Marquette Law Review

Volume 59
Issue 1 *1976 (Number 1)*

Article 7

Exclusionary Zoning - New Hope for the Economically Deprived?

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RECENT DECISIONS

Exclusionary Zoning Challenged—New Hope For The Economically Deprived?—In the recent case of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,[1] the Supreme Court of New Jersey imposed upon a developing suburban community in New Jersey a set of guidelines by which its zoning law was found invalid for failing to provide moderate and low income housing. The decision is of concern not only to other New Jersey communities, but also to the developing suburbs of other jurisdictions. For this reason, this article will examine the court's reasoning, ask some of the questions left unanswered, and indicate how the Wisconsin Supreme Court might resolve a similar case.

Mount Laurel is a sprawling township of approximately 22 square miles, or 14,000 acres, on the west central edge of Burlington County. About ten miles from both Camden, New Jersey, and Philadelphia, Pennsylvania, it is within relatively easy commuting distance of both these metropolitan communities.[2] Its close proximity to these and other cities has caused the population growth of Mount Laurel to increase in a way similar to that of many other suburban communities.[3] From a population of 2,817 in 1950, to 5,249 residents in 1960, the growth of the township reached 11,221 people in 1970.[4] This growth was comprised of people who were in the words of the court, " 'outsiders' from the nearby central cities and older suburbs or from more distant places drawn here by reason of employment in the region."[5]

Mount Laurel's local government responded to this growth in a way that was typical of similarly developing suburbs. One-third of the township's land was zoned industrial in an effort to attract the favorable tax rateable from that source.[6] Little

1. 67 N.J. 151, 336 A.2d 713 (1975) [hereinafter cited as Mt. Laurel, and cited to unofficial text.]

2. Mt. Laurel at 718.

3. Indeed, the court makes repeated references to Mount Laurel as a typical example of suburban expansion. For a comparison, *see* Williams, Jr. and Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYR. L. REV. 475 (1971).

4. Mr. Laurel at 718.

5. *Id.*

6. Favorable "tax rateables" bring in large revenues and require a minimum in

more than one percent of the land was zoned for retail and business activities. The remainder, almost seventy percent, was zoned for residential purposes.[7] The general ordinance for this last area provided for four residential zones, all of which permitted only single family detached dwellings in the usual pattern of one house per lot. Of these residential zones, none provided for a lot of less than 9,375 square feet, or a building line width of the lot of less than 75 feet, or a floor space area of less than 900 square feet.[8] The only deviations from this general pattern were a special zone created in 1968 to accommodate a cluster zone development,[9] a recent Planned Unit Development that provided a few multi-family units in the form of medium and high rise apartments and attached townhouses, and a severely limited Planned Adult Retirement Community. These exceptions did not noticeably alter the theme of the major residential subzones.[10]

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public services whereas less desirable rateables provide less revenue and require more in services.

7. The actual figures the court cites for these areas are as follows:
Industrial: 29.2% or 4,121 acres
Retail: 1.2% or 169 acres
Residential: 69.6% or about 10,000 acres
Id. at 718-19.

8. The exact figures for the residential sub-zones are as follows:
R-1 Min. lot area: 9,375 sq. ft.
Min. lot width: 75 ft. at building line.
Min. floor area: 1,100 sq. ft. for one-story house.
R-2 Min. lot area: 11,000 sq. ft.
Min. lot width: 75 ft. at building line.
Min. floor area: 900 sq. ft. for one-story house.
R-3 Min. lot area: 20,000 sq. ft.
Min. lot width: 100 ft. at building line.
Min. floor area: 1,100 sq. ft. for one-story house.
Id. at 719-20.

9. To define "cluster zone" the court quoted 2 WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER, §§ 47.01-47.05 (1974) as follows:

> . . . Under the usual cluster-zone provisions, both the size and the width of individual residential lots in a large (or medium-sized) development may be reduced, provided (usually) that the overall density of the entire tract remains constant—provided, that is, that an area equivalent to the total of the areas thus "saved" from each individual lot is pooled and retained as common space.

Id. at 720.

10. These deviations alter neither the types of housing allowed on these lands nor the types of persons for whom they are intended. The "cluster zone" still requires single family, detached houses on lots of at least 10,000 square feet, with building line widths of at least 80 feet, and an overall development density of 2.25 dwelling units per gross acre. The PUD developments—only four were started before the enabling legislation was repealed—are restricted by the number of bedrooms allowed each unit, the num-

The inescapable conclusion that may be drawn from this general plan of development was that the township sought only high tax rateables which required the least expenditures for municipal services—specifically, light industry and expensive houses occupied by small families.[11] The court noted that the existent dwellings were such that only those of middle or high income could afford to purchase a home in the township,[12] and that the possibility of renting an inexpensive home was severely limited.[13]

Not only had Mount Laurel acted affirmatively through its zoning ordinances to exclude those whom it felt undesireable, but the township also attempted to expel its own lower income residents. Generally, the official response to the resident poor, usually living in substandard housing, was to wait for the delapidated premises to be vacated and then forbid further occupancy.[14]

A single attempt by a non-governmental organization to provide subsidized, multi-family housing for these groups was effectively thwarted by the requirement that the project comply with all zoning, planning and building ordinances.[15]

Predominantly black and Hispanic, the plaintiffs fell into four groups: (1) present residents of the township residing in delapidated or substandard housing;[16] (2) former residents who were forced to move elsewhere because of the lack of housing

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ber of children permitted per multi-family unit, and the requirement that all units be supplied with such amenities as central air conditioning. Lastly, the PARC is reserved for those who are at least 52 years of age, have children above the age of 18, and will require no more than three permanent residents per unit. *Id.* at 720-22.

11. The court states:

> The conclusion is irresistible that Mount Laurel permits only such middle and upper income housing as it believes will have sufficient taxable value to come close to paying its own governmental way.

Id. at 730. Also, *see* Williams and Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827, 829.

12. The average cost of a house in the township in 1971 was approximately $32,000, and the court speculated that by the time of the decision, this figure would have been higher. *Id.* at 719.

13. As the court stated: "Attached townhouses, apartments (except on farms for agricultural workers) and mobile homes are not allowed anywhere in the township under the general ordinance." *Id.*

14. *Id.* at 722.

15. Because this project was to be built on land in a R-3 zone, single family, detached houses on 20,000 square foot lots were required. *Id.*

16. For a graphic description of the substandard housing of some of these present residents, see the lower court's opinion at 290 A.2d 465, 466-67 (1972).

within their means; (3) non-residents living in the central city substandard housing who desired decent housing within their means in the township and generally elsewhere; and (4) three organizations representing the housing and other interests of racial minorities.[17] The trial court found the township zoning ordinance totally invalid and ordered the municipality to determine the housing needs of low and moderate income families who desired residence in the present or in the future. Further, the township was directed to meet these needs with a new zoning scheme, with the court retaining jurisdiction for judicial consideration and approval of the plan and its implementation.[18]

After considering the particular circumstances presented by the Mount Laurel zoning scheme itself, and giving careful consideration to the social and economic ramifications of suburbanization generally, the New Jersey Supreme Court arrived at a conclusion similar to that of the lower court. In affirming the invalidity of the ordinances, the court concluded:

> As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like to meet the full panoply of these needs. . . . The amount of land removed from residential use by allocation to industrial and commercial purposes must be reasonably related to the present and future potential for such purposes. In other words, such municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.[19]

Unlike the trial court, the supreme court did not find it neces-

17. Although the standing of these groups was not at issue here, the court noted that the persons failling into the first three groups had the requisite standing. No opinion was expressed as to the standing of the organizations. Mt. Laurel at 717, n. 3. It is questionable, however, if all of these groups would have the requisite standing for the United States Supreme Court in light of the recent decision of Warth v. Seldin, ___ U.S. ___, 95 S.Ct. 2197 (1975).

18. 290 A.2d 473-74.

19. Mt. Laurel at 731-32.

sary to invalidate the entire zoning scheme. It did, however, affirm the lower court's decision to allow the municipality ninety days to bring the zoning ordinance within the newly set parameters.[20]

If Mount Laurel's zoning scheme is viewed solely as a vexatious example of exclusionary zoning, the policy position of the decision presents few difficulties. Zoning, however, has been and possibly should remain, an integral component of planned development. Therefore, it is necessary to give careful consideration to the factors by which this particular scheme was criticized. Many of the important legal, social and economic considerations supporting either side of this controversy must be remembered and, ultimately, preserved.[21]

Since feudal times, the Anglo-American concept of land ownership, in spite of common belief, has never been entirely free of restraint upon its use.[22] While city planning was common place in the earliest settlements, the real impetus for modern American city planning, and the use of zoning laws to that

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20. *Id.* at 734. Note that Justice Pashman, concurring with the result of the majority opinion, differed in that he would have had the court go further and faster in the implementation of the principles announced. Regarding the role of judicial supervision, he said:

> The mere fact that local land use control issues are involved does not preclude the court from making such determinations, nor, if a court finds that the municipality has failed to meet its obligation, from exercising the full panoply of equitable powers to remedy the situation.

Id. at 746 (concurring opinion).

21. For example, *see* Village of Belle Terre v. Borras, 416 U.S. 1, 9 (1974) wherein Justice Douglas remarks:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

22. *Compare*, for instance, Blackstone's comment:

> So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

1 BLACKSTONE, COMMENTARIES 139 (1782), *with* An Act touching Iron-Mills near unto the city of London and the River of Thames, 23 ELIZ., c. 5 (1581) which provided in part:

> That no person or persons from and after the feast-day of the nativity of Saint John the Baptist next coming, shall convert or employ, or cause to be converted or employed, to coal or other fewel for the making of iron or iron metal . . . any manner of wood or underwood now growing . . . within the compass and precinct of two and twenty miles from and around the city of London.

Both are quoted in BEUSCHER, LAND USE CONTROLS: CASES AND MATERIALS, 1-3 (1964).

end, first developed after the turn of the twentieth century.[23] The initial Supreme Court review of zoning was not until the case of *Amber Realty Co. v. Village of Euclid, Ohio*,[24] wherein the plaintiff challenged the validity of a local ordinance which prohibited him from using all of his land for industrial purposes. In spite of the plaintiff's contention that the use permitted by the zone designation was a deprivation of property in that it decreased the value of the land, the Court found the ordinance was securely based within the power of the state to promote the general welfare of the community.[25] The Court concluded it was the prerogative of the local legislature to determine the validity of debatable zoning classifications, and only under extreme circumstances would the courts intervene.

Euclid is important to *Mount Laurel* not only in that it served as a constitutional validation of numerous zoning ordinances,[26] but also because of the way the concept of police power was interpreted. In comparing the judicial attitude toward zoning during the years separating these decisions, several considerations are noteworthy. The first is what might be called the deciding force creating the zoning regulation. In *Euclid*, the Court determined that the local government was the proper point for determining the desirability of a particular zoning ordinance, a position which was recently reasserted.[27] In this the *Mount Laurel* court concurred. Restrained in the ex-

23. The distinction between the early uses of planning and the modern approach constitutes the objectives of each. In the former, it was the aesthetic considerations of street and public building placement. In the latter, it is attempts to encompass all of the functions necessary to the vitality of a city—transportation, housing, employment areas, etc. New York was the first major city to enact geographically comprehensive zoning laws. *See*, generally, R. ANDERSON, AMERICAN LAW OF ZONING, §§ 1.04-.08, 1.13 (1968).

24. 272 U.S. 365 (1926). Earlier cases had considered the validity of municipal ordinances that restricted the use of land on less than a wide scale plan, for example Hadacheck v. Sebastian, 239 U.S. 394 (1915) and Reinman v. Little Rock, 237 U.S. 171 (1915). However, *Euclid* has been recognized as the leading case in which a geographically comprehensive zoning ordinance is at issue.

25. 272 U.S. 365, 387.

26. ANDERSON, *supra* note 23 § 2.10.

27. In *Belle Terre v. Borras*, 416 U.S. 1 (1974), Justice Marshall, who dissented from a majority opinion which upheld a zoning ordinance in spite of various, and in his view controlling, constitutional arguments, nonetheless conceded:

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. 416 U.S. 1, 13.

tent to which the majority wished to impose judicial supervision over the township, the court deferred the initial determination of the means of compliance to Mount Laurel itself.[28]

Second, the important consideration of whose general welfare justified the exercise of the zoning power, emphasized in *Mount Laurel*, was anticipated in the *Euclid* decision. The use of zoning is commonly conceived of as a tool, (or to some, an end in and of itself) by which a community may carry out a pattern of development within its political boundaries.[29] Concomitant to this idea is the concept that the local municipal government is the most logical basis for the exercise of this power. To this end, enabling statutes are created to empower these local governments,[30] and tax structures are devised to support this arrangement.[31] Therefore, if only for this reason, local governments were forced into a type of fiscal parochialism for which zoning was used primarily as a means of protecting their own economic and political interests. In *Euclid*, however, the Court noted that although this was proper, parochialism had its limits. While stressing the conclusion that the municipality properly possessed the power to zone, and that the general interests of its own citizens would be its primary concern, the Court qualified this opinion:

> It is not meant by this, however, to exclude the possibility of

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28. Mt. Laurel at 734.

29. For a discussion of the relationship of zoning, theoretically the tool, to comprehensive planning, theoretically the goal, see R. BABCOCK, THE ZONING GAME, 120-25 (1969), wherein the author gives a good review of the ways in which the "zoning tail" has been used to wag the "planning dog."

30. For example, the statute enabling Mount Laurel to zone, N.J.S.A. 40:55-30 reads:

> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. Such ordinances shall be adopted by the governing body of such municipality, as herein provided, except in cities having a board of public works, and in such cities shall be adopted by such board.
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> The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes.

31. Mt. Laurel at 731.

> 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.[32]

In spite of this language, the concept that the local government could properly exercise the zoning power for the best interests of its own citizens remained firm in both law and practice.

In *Mount Laurel*, the court denounced this ingrown application of zoning power.[33] The theme of the decision is a "broader view of the general welfare and the presumptive obligation on the part of developing municipalities,"[34] to be responsive not only to the needs of the municipality itself, but also the regional needs as they are manifested in the area. The court begins its analysis by defining Mount Laurel as a portion of the Philadelphia-Camden urban region, and sums up its position by announcing an affirmative responsibility on the part of the local government to zone with regional needs in mind.[35]

In so doing, the court in *Mount Laurel* found it necessary to re-evaluate the purpose of and extent to which the police power may be utilized.[36] The court began by reciting the necessity that all police power enactments conform to the basic state constitutional requirements of substantive due process and equal protection,[37] and the affirmative requirement that zoning, like any other police power enactment, promote the public's health, safety and general welfare. Next, it noted that even in decisions which upheld the validity of strict zoning regulations, there had been the caveat that the judicial approach to the subject would and should change with social conditions. Last, the court asserted that the situation had changed and that a new approach was now needed.[38] No longer

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32. 272 U.S. at 391.

33. The court, in an emphatic moment, said:

> Almost every [municipality] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for various kinds of housing.

Mt. Laurel at 723.

34. *Id.* at 728.

35. *Id.* at 731-32. Although the court defines the region for consideration as extending beyond state lines, the court did not impose interstate zoning. *Id.* at 733.

36. *See* also ANDERSON, *supra* note 23, §§ 7.12-7.36.

37. The court insisted that the decision made in this was pursuant to the New Jersey constitution and statutes, and that it was unnecessary to consider the other federal constitutional arguments urged by the plaintiff. Mt. Laurel at 725.

38. To find this new attitude, the court looks to several legislative enactments

was zoning used as a tool by the municipality to shape its development, but rather it was used as a means to preserve a homogeneous single family residential community with just enough industry and commerce to meet its fiscal needs.[39] Thus, the court concluded that the state police power could not be used by a local government in such a way as to promote the welfare of the group within its political boundaries while completely ignoring the needs of those outside the community.[40]

The validity of a suburban community enacting a zoning scheme to promote its fiscal interests, and preserve its particular aesthetic appeal, seems now to be in serious question. As noted above, one of the strongest incentives for exclusionary zoning is the fiscal benefit that can be cultivated by it. But the *Mount Laurel* court did not find this argument at all compelling. Accepting the concept that zoning is a means of creating a better economic balance for the community when done reasonably and pursuant to a plan for the community's development, the court nonetheless concluded that this reason could not be used to totally exclude categories of housing.[41] Moreover, though ecological and environmental considerations had properly become more important to those planning a community's growth,[42] they too would not necessarily justify exclusionary

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concerned with the quantity and quality of housing in New Jersey, and to a sixteen county study done by the state which pointed out a growing need for multi-family housing in areas surrounding large cities. *Id.* at 727.

39. Indeed, so thorough was the zoning ordinance in its exclusionary effect that the court was prompted to note:

> One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms (and, in Mount Laurel's case, even some of its own lower paid municipal employees) to live in the community where they work.

Id. at 723.

40. *Id.* at 726.

41. *Id.* at 731.

42. Actually, the environmental argument has always been significant as a basis of zoning regulations, at least as between the use to which the land is put and the inhabitants of that area. The new thrust, however, is more concerned with the relationship between the use to which the land is put and the land itself.

The court used the term "environmental considerations" in a narrow sense to indicate the destructive effects of pollution upon the delicate balance between living things and land, water and air. But as a term of art used in its technical sense by planners, environmental considerations take in the full panoply of relationships between natural resources and all of the demands man and other creatures place upon them. In this way, the placement of lower income housing is as much an environmental consideration as the capacity and effectiveness of a municipality's sewage treatment plant. As one commentator noted: ". . . land use is a fundamental environmental

zoning of this type. Here, the township forwarded an environmental argument—lack of sewer or water utilities for much of the area—which was quickly disposed of by the court with the suggestion that these utilities be required of the builders and developers as improvements.[43] The court did not dismiss environmental considerations altogether but required only that the adverse affect on the environment be substantial.[44]

In putting the decision in its proper perspective, several factual circumstances of Mount Laurel itself become important. First, the court was primarily concerned with a zoning scheme which had become economically discriminating. The scheme had been adopted in 1964[45] when the township's population was less than half of the present population.[46] It may be only fair to say, then, that the zoning provisions found exclusionary in 1975 were enacted in 1964 in a reasonable attempt to maintain a rural-suburban environment. But it seems clear that this was not the sole purpose of the scheme as time went on. The trial court made reference to the minutes of various township committee meetings which indicated that the true purpose by the time of the decision was the social and economic discrimination of many of those supporting the scheme.[47] So uniform was the discriminatory effect of this zoning scheme in denying those of lower income access to the community that this result alone would seem to have greatly aided the court in reaching its decision.

Second, an important consideration in evaluating this decision is the fact that much of the township's land was not yet improved. Of the five major zones—industrial, commercial, R-

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issue—one that vitally affects transportation, housing, recreation, and even job opportunities." WILLIAM REILLY, THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH (1973) at 1.

43. The court, however, did not comment on the fact that by so doing, the cost of constructing a home would be increased accordingly. Apparently, the cost of these improvements is not insubstantial. *See* WILLIAMS and NORMAN, supra note 3 at 484.

44. Mt. Laurel at 731.

45. *Id.* at 718.

46. *See* text accompanying note 5.

47. 290 A.2d 468-69. The lower court, in summing up the particularly interesting testimony of one witness, recalled:

> He also conceded that he knew of no standard housing in defendant township available for residents on welfare; that people are living in substandard housing because the municipality will not condemn, in as much as our Relocation Law, N.J.S.A. 20:4-1 to 22, would require that these residents be otherwise located.

The witness in this instance was a municipal planner.

1, R-2 and R-3—the industrial and R-3 zones were still less than half developed.[48] This availability of land enabled the court to assume that under proper management low income housing could be built.[49] That land in the industrial zone was thereby withdrawn from the residential land market, allowing the township to control later residential development of the area. It is conceivable, and indeed probable, that had the zoning scheme continued the last remnants of the areas zoned for residential purposes would have been completely built up before the industrial area, allowing the municipality to then rezone portions of that area for single family residential purposes. Thus, the continued homogeneity of the township's residents could be insured in the future.

Lastly, it will be necessary for the zoning authorities of Mount Laurel, as well as many other suburban communities, to give consideration to the important questions left unanswered by the court. For example, what effect will the affirmative obligation now imposed upon developing suburbs have upon established communities? The majority chose to limit its inspection to those communities which, because of the availability of unimproved land, could more readily respond to the present and future housing needs of lower income groups.[50] In contrast, Justice Pashman, concurring, insisted that the obligation also be assumed by those communities "which have benefited from regional development, [and] have, by their land use controls, contributed to the regional housing shortages."[51] In light of the dynamics which cause most communities to change, to require that developed communities provide such needed housing at a moderate pace is not unreasonable. If the obligation and the need exist, it would be possible to legally enforce the obligation whenever reasonable opportunities arise. But drastic rezoning of such neighborhoods on a large scale will lead only to the social and economic instability zoning and planning were originally intended to avoid. The vested interests of the current residents of these areas are not to be ignored.[52] Moreover, if the referendum remains an accepted

48. The industrial zone had been improved on only 100 of its 4,121 acres. *Mt. Laurel* at 719-20.

49. Moreover, the only residentially zoned land available was also the most restrictive. *See* note 8, *supra*.

50. Mount Laurel at 717.

51. *Id.* at 748.

52. In addition to the position taken by the *Belle Terre* court (*see* note 21, *supra*),

mode of public expression on local zoning matters, the practical availability of drastic measures is doubtful.[53]

Also, what impact will this decision have upon the power of the local authorities to zone? Again, the majority opinion gives this question only cursory consideration, and merely suggests that proper planning and governmental cooperation may prevent community instability.[54] The result is an obligation upon local authorities to consider regional needs. Once more Justice Pashman differs, finding that cooperation between the localities which implement zoning and regional organizations which can effectively plan the type of careful development required by the decision is an obligation concomitant to meeting the regional needs of lower income groups.[55] Therefore not only must communities consider regional housing needs, but they must also affirmatively participate in regional planning efforts. To what extent either approach will undermine the traditional concept of zoning and planning as a local responsibility and perogative remains to be seen. Only the probability that such efforts will be hotly contested by many groups and possibly require major reallocations of this aspect of the police power appear certain at this time.[56]

Finally, what result might be expected from a similar case decided by the Wisconsin Supreme Court?[57] Of all the ques-

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new development in any suburban community generally imposes new fiscal burdens upon its residents. Municipal services, including roads, sewers, schools and teachers, are placed in greater demand by new residents who, if residents of apartments and other multi-family units, cost more in the way of these services than they contribute through taxes. *See* Note, *The Responsibility of Local Zoning Ordinances to Nonresident Indigents*, 23 STAN. L. REV. 774 (1971) at 776-77.

53. The referendum is a method by which a governing body "lets the people decide" proposed zoning changes involving large areas or controversial changes. For a review of those cases which have upheld and rejected the referendum used in this way, *see* Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881 (1970). For a short discussion of its use in Wisconsin, *see* R. CUTTER, ZONING LAW AND PRACTICE IN WISCONSIN (1967) at 33-35.

54. Mount Laurel at 733.

55. *Id.* at 744.

56. *See* Freilich and Ragsdale, Jr., *Timing and Sequential Controls—The Essential Basis to Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974), wherein the authors state at 1026: "The utilization of regional and state level units for the exercise of zoning and planning power will necessitate a new delegation or redelegation of the police power." Although Mount Laurel did not divest local communities of their power to zone, the obligation to consider regional needs will no doubt cause friction between the local community and planners, especially if the latter are not at the local level.

57. Since the *Mount Laurel* decision, two similar cases have been decided by other

tions raised by the *Mount Laurel* decision, this is probably the most speculative. Neither is there a Wisconsin decision addressed to the same factual and legal issues involved in *Mount Laurel*, nor is there a clear trend in Wisconsin zoning case law generally. Although the Wisconsin Supreme Court in *Town of Habart v. Collier*[58] invalidated a zoning ordinance which excluded all industry by imposing a single residential zone over the entire community, an attempt to correlate exclusionary zoning vis-a-vis industry with exclusionary zoning vis-a-vis

courts. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1975) the court was confronted with a situation involving the construction of lower income multifamily dwellings in an essentially single family, upper class neighborhood. The defenant had refused to rezone an area to allow the construction on the grounds that the zoning ordinance required that such rezoning be permitted only to allow a "buffer zone" between single family and non-residential areas. This argument was rejected, and the court concluded that the rejection of the desired rezoning had the effect of perpetrating residential segregation. The case is important because after defining the defendant as a portion of the Chicago metropolitan region, the court concluded that de facto residential segregation in the region imposed an obligation on the community to provide relief by allowing construction of a reasonable number of lower income housing units:

> Because the village has so totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a small contribution towards eliminating the pervasive problem of segregated housing.

(517 F.2d at 415). Thus, the concept of approaching the problem of exclusionary zoning in the suburb by evaluating the regional needs resulted in the imposition of zoning considerations which went beyond the political boundaries of the suburban community.

Subsequently, in *Township of Willistown v. Chesterdale Farms, Inc.*, ___ Pa. ___, 341 A.2d 466 (1975), the question was again decided in favor of the builder of lower income housing (Chesterdale). After a series of requests by Chesterdale to rezone a particular 80 acre area for such construction, the township enacted a new zoning ordinance which provided 80 acres to be developed for multi-family purposes. However, the 80 acres rezoned was not the same land desired by the builders. On appeal, the Pennsylvania Supreme Court agreed with Chesterdale that the new ordinance's allocation of 80 acres, out of the 11,589 acres in the township, constituted "tokenism." Citing an earlier case of *National Land & Ir. Co. v. Easttown Twp. Bd. of A.*, 419 Pa. 504, 215 A.2d 597 (1965), for the proposition that a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid fiscal burdens may not be held valid, and the *Mount Laurel* case for the proposition that a developing community has the obligation to provide lower income housing at least to the extent of the municipalities fair share of present and future regional needs, the court concluded that the

> . . . township zoning ordinance which provides for apartment construction in only 80 acres out of a total of 11,589 acres in the township continues to be "exclusionary" in that it does not provide for a fair share of the township acreage for apartment construction.

(341 A.2d at 468). Again, regional needs become a factor in suburban zoning.

58. 3 Wis. 2d 182, 87 N.W.2d 868 (1957).

lower income groups would be tenuous. Indeed, legal researchers are warned of such a comparison:

> We do not construe the majority opinion as holding that a zoning ordinance which zones an entire town or municipality in a single-district-use-district is *per se* unconstitutional and void. However we are fearful that it may be so construed in the future.[59]

This caveat is well taken, for although exclusionary zoning, whatever its form, is still exclusionary zoning, the *Collier* decision was based more upon equitable considerations and the application of a "reasonably adaptable" standard[60] than regional needs and a broad construction of the term general welfare.

But it is not meant by this to discourage attempts to make such a comparison. In *Collier*, the ordinance was found invalid primarily because it did not fulfill the objectives set forth in its preamble. The Wisconsin zoning enabling statutes also set forth objectives which such ordinances must strive to meet.[61] Because of the similarity of these statutes to those of New Jersey, it is possible that the Wisconsin Supreme Court could define the term "general welfare" in a regional context. Thus, if sufficient emphasis is placed upon the need for a regional

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59. *Id.* at 191.

60. The term "reasonably adapted" is used to denote the requirement that a zoning ordinance conform to the reasonable uses to which the particular area may be put. As the *Collier* court noted:

> The municipaltiy must recognize the natural reasons and differences suggested by necessity and circumstances existing in the area with which the ordinance deals.

Id. at 189.

61. The authority to plan and zone is given to the County unit by WIS. STAT. § 59.47 (1973), which states as its purpose:

> **59.97 Planning and zoning authority.** (1) PURPOSE. It is the purpose of this section to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to insure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds.

The power to zone is given the city by WIS. STAT. § 62.23 (1973), including the power to zone outside of city limits.

approach to these problems, if the court would adopt the broad view of general welfare, and if zoning laws were strictly held to the obligation to meet the objectives of the enabling statutes, a result similar to that of *Mount Laurel* could be reached.[62]

The *Mount Laurel* decision is legally and morally laudable. The original purpose of zoning, protection of the general welfare, has been reasserted while the descriminatory aspects of zoning have been rejected. Both the law and the city are constantly growing and changing things, and because of this are always in need of reconstruction and renewal to meet the needs of those for whom they are intended to serve. Although there are problems yet to be resolved, it is hoped that the new direction given to New Jersey zoning will inspire other jurisdictions to reevaluate the goals of their ordinances in such a way as to promote a heterogeneous environment which encourages the economic and social welfare of the people living in their growing metropolitan regions.

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62. Here, the emphasis has been upon the possible judicial response to exclusionary zoning practices and the need for regional planning. However, there is already state legislative recognition for regional, or non-local zoning and planning. For example, *see* WIS. STAT. § 66.945 (1973) which provides for the establishment of regional planning commissions, WIS. STAT. § 59.971 (1973) which requires restrictive zoning along shorelands of navigable waters and WIS. STAT. § 87.30 (1973) which requires restrictive zoning of flood plain areas. The latter two also allow the state to act if the localities do not.