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METROPOLITANIZATION AND LAND-USE PAROCHIALISM—TOWARD A JUDICIAL ATTITUDE

*Michael H. Feiler**

I. INTRODUCTION

IN 1926 the United States Supreme Court dangled before the courts of this country a "carrot on a string" that the courts have been attempting to snare ever since. The occasion was the celebrated case of *Village of Euclid v. Ambler Realty Company*,¹ in which the Court held that the division of Euclid, Ohio, into a number of use districts was a valid exercise of the police power. More significantly for present purposes, the Court also decided that a municipality located in the path of regional industrial development may nonetheless determine its own destiny by providing for the health, safety, and welfare of its own citizens. The "carrot" was the caveat that

[i]t 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.²

Since the *Euclid* decision, however, courts seem to be no closer to apprehending exactly *which* situations require subservience of municipal interests to larger public interests. This failure on the part of the courts is especially important in that since *Euclid* dealt with a constitutional limitation on the police power, the caveat and the questions it poses are significant in formulating judicial controls of local zoning actions. In fact, when viewed as a constitutional limitation on local zoning powers, the question of "greater interest" becomes a nagging spirit that may justifiably lead one to the conclusion that there is something inherently wrong with present judicial attitudes toward local zoning.

The purpose of this Article is to explore those situations in which courts have given meaning to the *Euclid* caveat in operation, and, from those instances, to attempt to evolve a judicial approach to the problems posed by the conflict between purely local interests on the one hand and more comprehensive regional interests on the other. Four basic premises are herein indulged: (1) that strictly

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1. 272 U.S. 365 (1926).

2. 272 U.S. at 390.

local zoning is unsatisfactory; (2) that new and innovative legislation will not be readily forthcoming; (3) that the burden of mediating these conflict situations will continue to fall upon the judiciary; and (4) that present judicial expressions threaten more harm than good by treating this crucial matter in an ad hoc fashion without producing any meaningful metropolitan or regional land-use theories.

With the development of a rational judicial approach to metropolitan zoning problems, it is hoped that local governing bodies may become more planning conscious and that the courts, in an essentially uncomfortable judicial role, may mediate land-use disputes with greater aplomb, predictability, and substantive justice.

II. THE PROBLEM

A. *The Problem of Self-Serving Zoning*

The problem of land-use distributions is essentially a social problem—it affects where and how people live, how much wealth they control, which kinds of employment opportunities are available to them, and a myriad of social and economic interrelationships. Land-use decisions concern both social and economic values, and these concerns often compete with each other. This competition, however, is not a free one. Social values tend to find their expression in isolation while economic interests are well represented by the real-estate industry, lending institutions, and neighborhood groups concerned with property values. Jacob Ukeles has stated:

It is the values, wishes and beliefs of these powerful groups that have the most influence on the allocations, organization and use of urban space. Great fiscal resources and decision-making power subject, of course, to internal competition, enable them to satisfy their own needs and values. But while these groups carry out social roles, and do respond to social values, they are primarily economic and political institutions acting in response to essentially economic needs in a power situation.³

Modern urban conditions and problems have highlighted the social aspects of land controls. The dangers in allowing each community to attempt to solve its own problems without regard to the general wants and needs of the region in which the community is situated have become apparent. In this regard, the President's National Commission on Urban Problems found that

[t]oday, a basic problem results because of the delegation of the zoning power from the states to local governments of any size. This

3. J. UKELES, *THE CONSEQUENCES OF MUNICIPAL ZONING* 14 (1964).

often results in a type of Balkanization, which is intolerable in large urban areas where local government boundaries rarely reflect the true economic and social watersheds. The present indiscriminate distribution of zoning authority leads to incompatible uses along municipal borders, duplication of public facilities, attempted exclusion of regional facilities.

....

One of the country's foremost legal experts on zoning notes that zoning is caught between two objectives: protection of the family home, which requires positive government action, and protection of the free market, which requires government refusal to take action. He questions the narrow court view of zoning as fitting into real estate law when, through subtle forms of discrimination, for instance, zoning affects people and the nature of society, not just land. In short, although the basic justification for zoning is to protect the over-all public good, this often appears to be the last consideration as zoning is now practiced.⁴

The Commission's conclusions succinctly frame the issue presented for analysis—whether because of judicial action or inaction zoning does not often operate contrary to the public welfare rather than in furtherance of it. While it is accepted doctrine that all property is held subject to the needs of the common weal, the concept of promoting the public health, safety, welfare, or morals has offered little guidance to harried judges who are called upon to decide where the public interest lies. Courts have generally responded (perhaps understandably) to this task by deferring to the judgment of local legislators when a challenged ordinance presents at least a debatable question of reasonableness⁵ and have thus refused to become embroiled in the substantive decision-making processes. Indeed, each zoning ordinance is said to come to the courts clothed with a presumption of validity that the challenger has the burden of overcoming.⁶

In terms of urban land distribution problems, the police power

4. NATL. COMM. ON URBAN PROBLEMS, REPORT: BUILDING THE AMERICAN CITY 19 (1969).

5. See, e.g., *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 431, 86 N.W.2d 166, 169 (1957): "It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts."

See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

6. See, e.g., *State v. Stark*, 100 Mont. 365, 52 P.2d 890 (1935); *Bellings v. Township of Denville*, 96 N.J. Super. 351, 356, 233 A.2d 73, 76 (Super. Ct. 1967) (requires an "affirmative showing that it [the ordinance] is arbitrary or unreasonable"). In *Vickers v. Township Comm.*, 37 N.J. 232, 242, 181 A.2d 129, 134 (1962), the New Jersey supreme court stated: "[T]he plaintiff to prevail must show beyond debate that the Township in adopting the challenged amendment transgressed the standards of [the New Jersey Zoning Enabling act]."

approach has proven ineffective in inspiring metropolitan planning or cooperation—either voluntary or mandatory. Rather, it has left each municipality free to decide for itself what shall be its character and its relation to neighboring communities. The result has been the tendency to view land control as an essentially negative mechanism that seeks to prohibit certain specified uses rather than to aid or encourage certain more beneficial ones. In comparison to the views prevailing in Europe, the American view has been characterized as a “maximum amount of private volition kept within bounds by a largely negative public law.”⁷ The restraints on this body of negative law rest with the judiciary through the operation of the somewhat amorphous terms, “public health, safety, and welfare.” Such vague notions do provide a mechanism for reconciling competing interests on an ad hoc basis, but unfortunately offer little guidance in directing how conflicts *should* be resolved.

To begin to formulate a solution to the problems of urban zoning controls, it is first necessary to identify the kinds of problems that are involved. As has been pointed out by Justice Hall of the New Jersey supreme court:

Regional or, for that matter, local institutions generally recognized as serving the public welfare are too important to be prevented from locating on available, appropriate sites, subject to reasonable qualifications and safeguards, by the imposition of exclusionary or unnecessarily onerous municipal legislation enacted for the sake of preserving the established or proposed character of a community or some portion of it . . . or to further some other equally indefensible parochial interest. And, of course, if one municipality can so act, all can, with the result that needed and desirable institutions end up with no suitable place to locate. In my view, *such action is not legitimately encompassed by the zoning power and the courts have the power to and should say so*. The substantive question seems to me to fall clearly within the . . . language from *Village of Euclid v. Ambler Realty Co.* . . .⁸

As Justice Hall intimates, the *Euclid* opinion does presage a judicial role in assessing which uses of land are sufficiently related to the public well-being to be permissible and in determining when their local exclusion is not in furtherance of the public welfare. It is clear, moreover, that if the judiciary is to have a role in this area, there must be a theory or doctrine upon which it can act; simply

7. Cribbet, *Some Reflections on the Law of the Land—A View from Scandinavia*, 62 Nw. U. L. REV. 277 (1967).

8. *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 223, 220 A.2d 97, 103 (1966) (Justice Hall, concurring) (emphasis added).

employing an ad hoc analysis of which uses seem important under the circumstances will not suffice. The question how courts should proceed is a vital one.

There can be little doubt that the social and economic implications of local zoning extend beyond municipal boundaries, especially in a metropolitan community. The acute dilemma posed by local autonomy is hinted at by the findings of the President's National Commission on Urban Problems⁹ and is dramatically portrayed by Professor Roger Cunningham:

In 1960 some 125 million Americans—73 per cent of the total population—lived in "urban" areas, and 113 million of them—63 per cent of the total population—lived in 212 Standard Metropolitan Statistical Areas. These 212 Standard Metropolitan Statistical Areas contained 255 "central cities," 310 counties, and the staggering total of 4,142 municipalities. . . . It is obvious that under such conditions zoning on a municipal basis cannot achieve anything more than a haphazard and uncoordinated pattern of urban land uses within the metropolitan areas.¹⁰

Whether one perceives such urban problems as being the result of uneconomic land-use patterns or inefficient government, it is clear that the effects have far-reaching implications. The effects are experienced not only in adjoining communities and the metropolitan area, but throughout the state and nation as well. Zoning has a definite influence upon the nature of urban society, as well as upon how people live, and the educational, medical, housing, recreational, and service facilities available to them. The effect of zoning on the condition of our urban life is generally negative—while zoning does not directly dictate the location of hospitals, schools, or the like, zoning restrictions do have a profound indirect effect upon their location. Because such uses—as well as industrial, commercial, and residential uses—are indirectly affected by zoning, the people whose lives depend on the existence and location of such facilities are also profoundly affected by it.¹¹

There are three categories in which the effects of parochial land-use controls are most acutely felt: (1) problems that all municipalities share, such as air pollution, adequate clean water supply, and the

9. See text accompanying note 4 *supra*.

10. Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 405-06 (1965).

11. See generally S. WILLHELM, *URBAN ZONING AND LAND USE THEORY* (1962) (the basic ecological phenomena that locate people within an urban matrix are Materialistic (symbiotic dependence on other uses) and Voluntaristic (cultural motivation attracting the need uses to the location)); J. UKELES, *supra* note 3, at 44.

like; (2) problems created by the need for facilities that cannot be supplied within the community, such as recreational facilities, garbage disposal facilities, utilities, educational facilities, and the like; and (3) problems for which the principal community satisfies its own needs but for which other communities must look to the facilities of the principal community, such as quiet residential neighborhoods, undeveloped land suitable for institutional or industrial development, and less expensive land on which to construct low-profit operations such as low-income housing.¹² It seems natural enough that regional problems are caused primarily by the protective devices employed by municipalities finding themselves in the third category. It follows too that the judicial role in regionalism, if there is to be one, must likewise be concerned with the problem evidenced in this category. Many land-use activities in this category do not find expression in the market place—the myriad of activities which, from a private standpoint, may be inefficient and uneconomical, but which nevertheless have a substantial social impact that may cause the economic interest to yield.¹³ In attempting to exclude such particularized uses as hospitals or schools, it may be possible for a community to show a greater value for the land as zoned, for instance, for residential use, but that response merely frames the question for a regional approach rather than answers it. Economic loss is essentially immaterial to the question whether a prohibition bears a relation to the public health, safety, or welfare and is therefore valid under the police powers.

Two distinct needs for land-use controls are thus evident: the need for a more cohesive metropolitan or regional framework; and the need for the introduction into the judicial decision-making process of those values that do in fact serve the general welfare as that term is defined in the context of modern urban society. It would obviously serve little purpose merely to elevate existing parochial values to a higher level. The criticism of the typical zoning

12. For a more extended discussion of these categories, see Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U. L.Q. 1.

13. A thorough discussion of the legal and theoretical bases of the urban planning functions is found in Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958). Professor Dunham states:

... it is this impact [upon the noneconomic public welfare] which defines the relation of the city planner to the operating departments of government and to the private landowner. Because of this external impact (beneficial or detrimental) it is possible that a less efficient or more costly location of a land use may, in terms of net community benefit, be more advantageous to general welfare than the most efficient and economical site

Id. at 655-56.

process as made by Ukeles is particularly appropriate in this context:

[B]oth environmental and spatial goals [of zoning] are curiously lacking in general concern for the particularly *urban qualities* of environment and space. None of the environmental goals reflect any direct concern for the quality of communication and social and economic interaction that is pivotal in urban life. Similarly, none of the goals suggests any direct concern for the role of space in such interactions. The goals and supporting structure of maps and regulations may intend such concern, but the goals do not explicitly express it. *Thus, zoning goals, whether progressive, protective or negative, are essentially aimed at a level of social amenity and economic benefit without recognizing basic attributes of urban social and economic reality.*¹⁴

While the control of land uses has passed from the individual to the community, the community has persisted in using its powers to accomplish essentially private ends such as neighborhood protection, the enhancement of property values, and the preservation of social amenities. Consequently, these community interests as reflected in zoning decisions often have been at odds with the interests of the people of a larger region or the state in general.

B. *The Alternatives*

Even assuming the seriousness of the impact of land parochialism, some reformers argue that the matter will better be solved by non-judicial action. The commentators suggest many alternatives, ranging from legislative metropolitanization of zoning¹⁵ to a metropolitan or regional government with zoning powers.¹⁶ Some have also suggested that land-use controls affecting other municipalities be placed in the hands of a state agency¹⁷ or at least that local zoning be required to follow a regional plan containing essentials for area-wide development.¹⁸ Other proposed legislative solutions include the increased use of flexible (non-Euclidean) zoning devices,¹⁹ the use of

14. J. UKELES, *supra* note 3, at 27 (emphasis added).

15. See Cunningham, *Zoning Law in Michigan and New Jersey: A Comparative Study*, 63 MICH. L. REV. 1171 (1965); Sturgis, *Metropolitan Boston—A Fresh Approach*, 3 PORTIA L.J. 131, 174 (1968).

16. See Cunningham, *supra* note 10.

17. *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 225, 220 A.2d 97, 104 (1966) (Justice Francis, dissenting); Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957).

18. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955); Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Note, *Comprehensive Plan Requirement in Zoning*, 12 SYRACUSE L. REV. 342 (1961).

19. Strine, *The Use of Conditions in Land-Use Control*, 67 DICKINSON L. REV. 109

extraterritorial zoning powers in the central cities,²⁰ or the use of "performance standards" rather than "use" as the zoning guideline.²¹

In spite of these many suggestions, it is obvious that problems of regionalism in land-use controls will continue to be a judicial problem for some time to come. Although many legislative solutions have been proposed, it is far from certain that they will be implemented by state legislatures. Moreover, it is not clear whether courts can escape dealing with questions of regionalism under much of the proposed legislation or whether the questions will simply be presented to them in another form. It would seem to be a not-too-conservative guess to say that the problems of regionalism and parochialism will be handled by the judiciary, for the foreseeable future at least, and that the courts will of necessity muddle unwillingly through the legislative void.²²

On the other hand, it is fair to say that at least certain aspects of regional land-use problems truly are judicial problems and are properly resolved by the courts. One commentator has expressed this view:

There can be no doubt that the courts possess a weapon of considerable force in judicially reviewing zoning ordinances, and that the imposition of a duty to accept into local planning and zoning philosophies decisions which have been communally made elsewhere, either by municipalities or by some form of regional planning commission, may well come in the end from the courts and not from the legislature.²³

It is important to realize that the work the courts do in the zoning area will have a lasting impact upon our urban environments. Even when the courts must act in an interim capacity for lack of effective legislation, that course of judicial operation may lead to the development of an area in such a way that it cannot be readily corrected by subsequent legislative solutions. If housing is

(1963); Comment, *Zoning—The Floating Zone: A Potential Instrument of Versatile Zoning*, 16 CATHOLIC U. L. REV. 85 (1966); Note, *The Administration of Zoning Flexibility Devices: An Explanation for Recent Judicial Frustration*, 49 MINN. L. REV. 973 (1965); Note, *Non-Euclidean "Zoning": Its Theoretical Validity and Practical Desirability in Undeveloped Areas*, 30 U. CIN. L. REV. 297 (1961).

20. See Becker, *supra* note 12.

21. See Cunningham, *supra* note 10.

22. *Id.* See also Dodds & Elenowitz, *Planning Legislation: 1966-1967*, 34 J. AM. INST. PLANNERS 312 (1968); Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600 (1965).

23. B. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 31 (1961). See also the concurring opinion of Justice Hall in *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 218, 220 A.2d 97, 101 (1966).

forced to locate in one place rather than another, or if a school is forced into another community, or if only large homes are to be built within a community, the long-range effects will be lasting monuments to judicial decisions made in the near future. Thus, even if judicial decisions constitute only a "holding action," that action must be well inspired if for no other reason than to avoid irreparable harm to a community or a region.

Unfortunately, however, judicial action in the area of regional land-use controls has proven unreliable, and recent decisions appear shallow and in need of a doctrine. The rubric of regionalism that is currently in vogue is hardly a solution. It is an interesting commentary that judicial regionalism has produced at best one decision in which local controls were invalidated on the basis of the needs of the larger region in which the community was located.²⁴ In hopes of synthesizing a much-needed reasoned approach to regional zoning, this Article will explore both the means by which the judiciary can act, and the ways in which courts have acted in certain land-use areas of special concern, and by drawing on this experience will indicate a suggested path for the future.

III. THE REGIONAL EXPERIENCE—METROPOLITANIZATION GONE AWRY

It is important at the outset to distinguish between the two types of zoning situations in which courts may be moved by regional considerations. The first involves an ordinance that is claimed to be invalid because of its effect vis-à-vis particular property. In this situation, the owner claims loss of value of his land, which, he alleges, constitutes a taking without compensation. The claim is that the reduction in value is suffered with no benefit to the public, or, if a public benefit is shown, that the operation of the ordinance upon the owner is too onerous and burdensome.

The second, and more important, situation is that in which an ordinance is claimed to be invalid because its terms bear no reasonable relation to the public health, safety, welfare, or morals. The property owner making this challenge need not show any financial loss. The right at stake here is the right to the unfettered use of one's property, subject only to limited interference for the common good.

A sort of regionalism has grown up in each of these situations: the

24. *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965), discussed in text accompanying notes 71-79 *infra*.

first, concerning the effect upon properties located adjacent to a zoned parcel but across a municipal boundary; the second, concerning an internal situation within the zoning community the effect of which is measured by external criteria.

A. *The Contiguous Uses*

It is a familiar rule that a parcel of property may be rendered unusable by a zoning ordinance if the ordinance precludes any reasonable use of the property in light of a pre-existing adjacent use.²⁵ The police power, however, does not allow a municipality to render land wholly unusable through zoning unless that result is necessary for the public well-being.²⁶ Although the recent case of *Consolidated Rock Products Company v. City of Los Angeles*²⁷ may herald a modification of this traditional rule,²⁸ it is still clear that an excessive diminution of value will not be allowed when a reasonable zoning alternative is available with no adverse consequence to the public welfare.²⁹ The injection of regionalism into this problem area has caused the rule of excessive diminution to be applied to situations as they exist in fact—even though the truly relevant factors exist across municipal lines.³⁰ When the nature and character of adjoining property is material to the validity of the ordinance in question, it is immaterial that the adjoining property is located outside the municipality.³¹

25. A thoughtful discussion is presented in *Spanich v. City of Livonia*, 355 Mich. 252, 94 N.W.2d 62 (1959).

26. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Goreib v. Fox*, 274 U.S. 603 (1927).

27. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). The case is critically reviewed in Note, *Constitutional Law: Zoning: Deprivation of All Economic Use Without Compensation*, 50 CALIF. L. REV. 896 (1962).

28. If *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (*see* text accompanying note 26 *supra*), is read to limit the taking of all value through the operation of a zoning ordinance, then, indeed, *Consolidated Rock Products*, which held that a taking of practically all value was permissible even though reasonable minds could differ on the question of necessity, would appear to presage a modification. *Nectow*, however, should be read somewhat more narrowly to prohibit onerous depreciation of value only in those situations in which the ostensible benefit to the public well-being is minimal or of no consequence.

29. The operation and limits of the police power in this regard are thoroughly explored in Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

30. *Schwartz v. Congregation Powolei Zeduck*, 8 Ill. App. 2d 438, 131 N.E.2d 785 (1956); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. Sup. Ct. 1963); *Chusud Realty Corp. v. Village of Kensington*, 22 App. Div. 2d 895, 255 N.Y.S.2d 411 (1964).

31. *LaSalle Natl. Bank v. City of Chicago*, 4 Ill.2d 253, 122 N.E.2d 519 (1954); *Hannifin Corp. v. City of Berwyn*, 1 Ill.2d 28, 115 N.E.2d 315 (1953). *See also* *Whittingham v. Village of Woodridge*, 111 Ill. App. 147, 249 N.E.2d 332 (1969).

A now-famous statement of this doctrine of marginal regionalism is that of the New Jersey supreme court in *Borough of Cresskill v. Borough of Dumont*.³² The defendant borough rezoned a parcel of land from residential to commercial. The property bordered on three other municipalities including the plaintiff borough, which challenged the rezoning on the ground that the commercial classification was inconsistent and unharmonious with the adjoining uses of the neighboring municipalities. Although the decision contains sweeping language about regional considerations, much of this dicta appears to be unnecessary. In holding that extramunicipal uses are relevant to the validity of a zoning ordinance, the court stated that zoning does not end at municipal boundaries and that

[s]uch a view might prevail where there are large undeveloped areas at the borders of two contiguous towns, but it cannot be tolerated where, as here, the area is built up and one cannot tell when one is passing from one borough to another. Knickerbocker Road and Massachusetts Avenue are not Chinese walls separating Dumont from the adjoining boroughs.³³

Although the logic of these statements is unrepachable, their precedential import is weakened by the ultimate holding in the case. The parcel in question in *Dumont* was spot zoned for commercial use. Thus the question was whether such spot-zoning was legal under state law. A New Jersey statute required that zoning be in accordance with a comprehensive scheme,³⁴ and that fact, the court held, precluded such spot zones. The other major point in the case—that the neighboring municipality has standing to challenge the rezoning—is likewise merely unnecessary dictum since the Supreme Court of New Jersey was able to reach all of the substantive issues by virtue of the fact that some of the plaintiffs resided within the defendant borough. Thus, the court never did reach the interesting standing questions.

In *Forbes v. Hubbard*,³⁵ the plaintiff challenged the classification of his land for residential use as being unreasonable under the circumstances because commercial properties existed across the road in an adjoining municipality. The court held that “conditions as they exist” determine the reasonableness of the ordinance as it is applied to a particular parcel, and that it is immaterial that those

32. 15 N.J. 238, 104 A.2d 441 (1954).

33. 15 N.J. at 247, 104 A.2d at 445.

34. N.J. STAT. ANN. § 40:55-32 (1967).

35. 348 Ill. 166, 180 N.E. 767 (1932).

conditions are extraterritorial.³⁶ In *Forbes*, as in the decision in *Dowsey v. Village of Kensington*,³⁷ extraterritorial factors were considered in assessing the question of public benefit accruing from a restriction on a single property owner who was situated on the border of the municipality and who was faced with contiguous land uses in an adjoining municipality that rendered his parcel undesirable as zoned. But to read these cases as a broad limitation on local zoning powers would be to say that local government may not draw sharp lines between residential, industrial, and commercial districts. If carried to its logical extreme, such a proposition would mean the end of zoning as it is currently practiced, unless buffer zones or tapering uses could be provided.³⁸ However, a meaningful principle may be gleaned from these cases—that, in assessing the effect of a zoning enactment upon a particular parcel, the effects may be considered as they exist *in fact*. The judiciary need not “modestly avert its gaze once it has arrived at municipal boundaries.”³⁹

While these border situations definitely represent a type of regionalism, the results are hardly surprising. If a property owner can show that his land has been rendered unusable by an ordinance, of what significance is it that this result derives from a source external to the community? From a doctrinal standpoint, these cases seem no different from those in which the relevant factors derive wholly from within the zoning municipality. One need not reach the conclusion that the border cases herald the adoption of a judicial doctrine of regionalism; indeed, such a conclusion may be unwarranted. These cases do not demonstrate local interests giving way to a greater good, but rather the fact that no matter what the interest involved, the zoning authorities may not destroy all of a man's use of his property without at least a substantial showing of public benefit.⁴⁰

36. 348 Ill. at 176-77, 180 N.E. at 771. The court stated that “in applying the test whether such ordinance is based on the public good, the considerations are not the comparative powers of neighboring villages, but conditions as they exist.” 348 Ill. at 177, 180 N.E.2d at 771.

37. 257 N.Y. 221, 177 N.E. 427, 245 N.Y.S. 819 (1931).

38. See, e.g., *Sisters of Bon Secours Hosp. v. City of Grosse Pointe*, 8 Mich. App. 342, 154 N.W.2d 644 (1967).

39. B. POOLEY, *supra* note 23, at 35.

40. Sax, *supra* note 29, at 36.

In a well-known article, Professor Charles Haar states that, along with extraterritorial zoning powers and nonresident standing, allowing a municipality to zone based on conditions in an adjoining municipality is a significant expansion of regionalism. Haar, *supra* note 17, at 527. It is suggested by this writer that that is too big a name for too minor an achievement.

The more important contribution of the "border cases," and that which will play a greater future role in the development of meaningful metropolitan land-use controls, is the liberalization of standing requirements. In *Koppel v. City of Fairway*,⁴¹ nonresidents protested a rezoning of border property in the defendant city. In holding that the nonresidents should have been allowed to file protests against the rezoning, the court stated:

It is true that even though two of the plaintiffs are located in an area just beyond the boundaries of the defendant city of Fairway they have, as abutting owners to the city, benefitted [*sic*] from the past zoning ordinance and are now directly and harmfully affected by the rezoning ordinance. As property owners they are entitled to the enjoyment of their property.⁴²

In keeping with this matter-of-fact approach to the border situations, the court in *Roosevelt v. Beau Monde Company*⁴³ granted a group of nonresidents the right to intervene in an action to set aside the rezoning of a border parcel. Unfortunately, this ad hoc approach that characterizes the border cases offers little assistance to the courts in defining internal uses that affect neighboring communities in terms of policy impact.

B. *External Considerations Bearing on Internal Decisions*

It may safely be stated that with perhaps the one exception noted earlier,⁴⁴ the doctrine of regionalism has been employed by courts to sustain exclusionary local ordinances rather than to require a municipality to accept a share of external burdens. Considering that the Supreme Court in *Euclid* foresaw at least some limitations on local zoning powers vis-à-vis regional or metropolitan interests, modern regionalism would appear to go even further than *Euclid* in permitting purely local interests to control those

41. 189 Kan. 710, 371 P.2d 113 (1962).

42. 189 Kan. at 714, 371 P.2d at 116.

43. 152 Colo. 567, 384 P.2d 96 (1963). Indeed, *Roosevelt* portends interesting developments of the standing issue in such cases. In *Roosevelt* the resident petitioners were not allowed to intervene on the ground that their interests were already represented by the city attorney. Obviously, no such claim could be made on behalf of the nonresidents. Unless the neighboring municipality decides to undertake legal action, it would appear that any right to intervene that may exist belongs to the disgruntled property owners in their individual capacities.

Similarly, in *Hamelin v. Zoning Bd.*, 19 Conn. Supp. 445, 117 A.2d 86 (C.P. New Haven County 1955), a Connecticut court found that a statutory requirement that the zoning commission consider extramunicipal factors gives nonresidents standing to seek judicial review of the commission's decision. See also *Whittingham v. Village of Woodridge*, 111 Ill. App. 147, 249 N.E.2d 332 (1969).

44. See text accompanying note 24 *supra*.

of the region. It is a mistake to regard the *Euclid* decision as a product of "rural America," not purporting to cope with the same quality of problems as now confront modern metropolitan America.⁴⁵ Alfred Bettman, a zoning pioneer and author of the amicus curiae brief in the *Euclid* case,⁴⁶ subsequently wrote:

This passage in the opinion [the caveat quoted earlier⁴⁷] is noteworthy in that it presents the conflict not as one between the individual and the community, but rather as between different communities, different social groups, or social interests, which is, when profoundly comprehended, true of all police power constitutional issues.⁴⁸

Even under the broadest reading of the statement in *Euclid* that "people acting through their democratic institutions are entitled to adjust traditional property rights to improve their community environment,"⁴⁹ one must recognize the logic of Bettman and of the *Euclid* opinion itself that this democratic process may be subject to larger policy limitations—that is, one can at least contemplate situations in which local interests should yield to broader metropolitan or regional ones. But regionalism in the courts seems to have yielded instead a rule permitting exclusionary practices probably not imagined by the Court in *Euclid*. It is interesting, moreover, that local interests have thereby been substantially increased rather than curtailed or required to yield to a greater public good as a matter of substantive due process.

Probably the leading case of those purporting to employ regional considerations is *Duffcon Concrete Products, Incorporated v. Borough of Cresskill*,⁵⁰ in which the court sustained an ordinance that served totally to exclude industrial uses from the defendant borough. In an oft-quoted phrase, the New Jersey supreme court held that the most appropriate use of property depends not only upon the conditions within the municipality, "but also on the nature of the entire

45. This notion is a popular misconception. A careful reading of the *Euclid* decision will reveal that the problems of the Cleveland metropolitan area are different from those existing in modern metropolitan communities in quantity of activity only, rather than in quality of problems encountered. See, e.g., Note, *supra* note 22.

46. Brief for Natl. Conference on City Planning, Ohio State Conference on City Planning, Natl. Housing Assn., and Mass. Fedn. of Town Planning Bds. as Amicus Curiae, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

47. See text accompanying note 2 *supra*.

48. Bettman, *The Decision of the Supreme Court of the United States in the Euclid Village Zoning Case*, in CITY AND REGIONAL PLANNING PAPERS 51, 55 (A. Comey ed. 1946).

49. Mixon, *Jane Jacobs and the Law—Zoning for Diversity Examined*, 62 NW. U. L. REV. 314, 346 (1967).

50. 1 N.J. 509, 64 A.2d 347 (1949).

region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously.”⁵¹

The *Duffcon* case dealt with a municipality attempting to exclude certain undesirable uses rather than a municipality being asked to carry its share of regional burdens. It is not surprising, therefore, that subsequent cases have used the reasoning of *Duffcon* to justify the most invidious forms of social and economic protectionism. Insofar as *Euclid* sustains the right of a local entity to determine its own destiny, *Duffcon* is consistent with it and, indeed, serves greatly to expand that local prerogative. But if *Euclid* is read to imply a regional limitation on local powers, then *Duffcon* tends to read out that limitation. The holding of *Duffcon* simply seems to be that a municipality may exclude any use that is, is thought to be, or that may become undesirable—so long as there is other land available for that use within the geographic region.

Predictably, *Duffcon* was cited as authority in *Lionshead Lake, Incorporated v. Wayne Township*,⁵² in which the court sustained a minimum-square-foot living-area requirement. This minimum-living-area requirement was directly related to the requirement that only houses costing a stated minimum price could be built anywhere within the twenty-five-square-mile township. Chief Justice Vanderbilt, the author of the *Duffcon* opinion, wrote again for the majority in *Lionshead*, stating, “[i]t requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums.”⁵³

Duffcon and *Lionshead* represent the gamut of how judicial regionalism has been applied by courts—from the useful consideration of relevant external factors in making substantive internal decisions in *Duffcon*, to the erection of a social and economic barrier around the zoning municipality in *Lionshead*. It is evident that judicial cognizance of external considerations in zoning cases has not resulted in meaningful regional cooperation or planning because the natural inclination of each contiguous community—being concerned with its own protection—is to zone its own land to avoid becoming a refuse heap of undesirable uses. Each community could therefore look to vacant land in the other to justify virtually any zoning decision. As Professor Haar wrote regarding the *Lionshead* case:

51. 1 N.J. at 513, 64 A.2d at 350.

52. 10 N.J. 165, 89 A.2d 693 (1952).

53. 10 N.J. at 173, 89 A.2d at 697.

The New Jersey court substituted shibboleths for reasoning, and used liberal shibboleths to attain an illiberal result—a decision which can only still further distort the problems arising from the complex relationship of city and country.⁵⁴

To be sure, as Professor Haar points out, this so-called regionalism is, in effect, a license for exclusion; but it is difficult to see the “liberal shibboleth” involved. In response to Harr’s analysis, Nolan and Horack⁵⁵ defended the *Lionshead* decision as being a regional decision in the spirit of *Duffcon* and *Borough of Cresskill v. Borough of Dumont*⁵⁶ in that the zoning municipality was looking outside its own boundaries for guidance in its internal decisions. They further stated that the court could not help but sustain such a practice:

Had it [the court], as Professor Haar would wish, used a reciprocal idea of “localism” to declare the ordinance unconstitutional it would have overstepped the bounds of the judicial function. *The use of regionalism to uphold legislative action is one thing, to strike it down, quite another.*⁵⁷

The logical extension of the Nolan and Horack argument, and that of the New Jersey court, is that the more metropolitanized an area becomes, the greater becomes the ability of any municipality within the area to exclude certain uses. The reason for this conclusion is evident: the more communities that may be considered in the internal decision-making process of the zoning community, the greater likelihood there is that it can find some suitable land for the use outside its municipal boundaries. Obviously as society becomes more and more complex and urban areas become more intertwined with social and economic realities, the alternative-location argument begins to take its toll on people instead of merely on buildings. At that point, rather than placing an emphasis on what kind of a house will be built within the community, the “regional” zoners will be determining who may live, work, or play in the particular community. Moreover, there remains the problem of determining

54. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1063 (1953).

55. Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

56. 15 N.J. 238, 104 A.2d 441 (1954). See text accompanying notes 32-34 *supra*. This case was also authored by Chief Justice Vanderbilt.

57. Nolan & Horack, *supra* note 55, at 984-85 (emphasis added). Professor Haar’s rebuttal to the Nolan and Horack article is found in Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954), discussed in text accompanying note 81 *infra*.

which land uses are of such great benefit to the public that eliminating potential locations therefor proves inimical to the general public welfare. This question is merely begged by the statement in the Nolan and Horack article that New Jersey saw fit to vest the zoning power in local government.⁵⁸ That argument is valid for an analysis of the validity of governmental delegations and scope of such powers,⁵⁹ but it is irrelevant to the question whether property rights are being invaded for the public's health, safety, or general welfare. There is some exercise of power that is constitutionally impermissible, whether it be accomplished by the state or its local laboratories. The role of the courts in this sphere is greater than merely to bow to the local planning judgment—it is to ascertain those instances in which private rights have been reduced without commensurate public benefit. As a constitutional matter, the courts must bend to larger needs.

Unfortunately the so-called regional cases do not respond to this question. Although a limited type of regionalism has been employed in certain cases, as is discussed below,⁶⁰ the principles have not emerged as judicial doctrine. The problem lies in the consideration of external factors—whether the zoning municipality *may* consider such factors, whether it *should* consider such factors, or whether it *must* do so. So far, the articulated regional doctrine has been limited to the first and possibly the second category, but has not included the “must” category. In *Kunzler v. Hoffman*,⁶¹ the New Jersey supreme court brought the principle of true regionalism to the brink of fruition. The municipality in that case granted a variance to a hospital, and residents opposed the grant. Under New Jersey statutes a variance is authorized whenever “special reasons” exist and it can be granted without detriment to the surrounding community.⁶² The court held that “special reasons” include those circumstances in which a variance is granted for the purpose of promoting the public welfare. In finding that the zoning board

58. Nolan & Horack, *supra* note 55, at 985.

59. See, e.g., *Detroit Edison Co. v. City of Wixom*, 382 Mich. 373, 172 N.W.2d 382 (1969); *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954); *Consolidated Edison Co. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct., Spec. Term 1955); *Nelson v. City of Seattle*, 64 Wash. 2d 862, 395 P.2d 82 (1964). See generally C. RATHKOFF, *THE LAW OF ZONING AND PLANNING* (3d ed. 1969).

60. Typically a regional approach has been used in diverse cases dealing with schools, hospitals, utilities, churches, and other such special uses. See notes 102-04 *infra* and accompanying text; Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

61. 48 N.J. 277, 225 A.2d 321 (1966).

62. N.J. STAT. ANN. § 40:55-39(d) (1967), as amended, (Supp. 1969).

properly looked outside its boundaries to find a regional need for hospitals, the court held:

A municipality may look beyond its own borders for zoning purposes and recognize legitimate regional needs [citing *Duffcon*]. It may provide cooperatively for the needs of neighboring communities as well as its own. . . . Although municipalities in their consideration of use variances have not yet been compelled to recognize values that transcend municipal lines, they certainly should be encouraged to consider regional needs and be supported by the courts when they do so for sound reasons.⁶³

In light of the fact that the *Kunzler* decision was based on the finding that "another such hospital for the treatment of mentally disturbed persons furthers the public welfare,"⁶⁴ it is difficult to see how, for instance, the *Lionshead* rationale could be used to exclude such a beneficial use from the community. The court in *Kunzler* did not, however, reach the question whether the municipality must consider such external factors because, in that case, the municipality evidently did so of its own volition. It should also be noted that in *Kunzler*, regional considerations were again employed to sustain local action.

Typically, the *Kunzler* case notwithstanding, in the courts regionalism has been virtually synonymous with exclusionary practices⁶⁵ and laissez faire.⁶⁶ Whether the doctrine was originally intended to have this effect is open to conjecture, although it must be presumed that Justice Vanderbilt was consistent in speaking for the New Jersey court in *Duffcon* and *Lionshead*. Creating an exclusionary doctrine does not appear to have been the intent of the *Euclid* court nor of the Massachusetts court in *Simon v. Town of Needham*,⁶⁷ in which the court held the *Euclid* caveat to be controlling in Massachusetts, although inapplicable to the particular case. On the other hand, exclusionary practices do seem to have been a major consideration of the court in the much-cited case of *Valley View Village v. Proffett*.⁶⁸

63. 48 N.J. at 287, 225 A.2d at 326.

64. 48 N.J. at 286, 225 A.2d at 326.

65. See, e.g., *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963) (rezoning for shopping center denied because of other land within region); *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749 (1958) (exclusion of apartment houses sustained on principle of *Duffcon*); *Guaclides v. Borough of Englewood Cliffs*, 11 N.J. Super. 405, 78 A.2d 435 (Super. Ct. 1951).

66. Cribbet suggests that the progression from individually oriented property rights to publicly oriented rights presents the progression, insofar as zoning is concerned, from laissez faire to savoir-faire. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245, 277 (1965).

67. 311 Mass. 560, 42 N.E.2d 516 (1942).

68. 221 F.2d 412 (6th Cir. 1955).

It is obvious that Valley View, Ohio, on the periphery of a large metropolitan center, is not such a self contained community, but only an adventitious fragment of the economic and social whole. . . . The council of such a village should not be required to shut its eyes to the pattern of community life beyond the borders of the village itself.⁶⁹

It has only been in more recent decisions that the courts have verbalized the corollary to the regional exclusion cases—that regional needs must be satisfied somewhere within the region and that undesirable uses might have to be located within a municipality that does not desire their presence.⁷⁰

The case that most nearly represents true regionalism in the sense of imposing upon metropolitan communities a duty or obligation to accept certain undesired uses is *National Land & Investment Company v. Easttown Township Board of Adjustment*.⁷¹ In that case, the city of Easttown, a rural suburb of Philadelphia, zoned minimum lot sizes of four acres—ostensibly on the theory that city services such as water, sewage, and highway capacities necessitated a low-density community. The court found, as a matter of fact, that such services were not then overburdened and refused to contemplate future stress in the event of an increase in population. In stating the judicial limitation on zoning powers—that they be used to promote public health, safety, or welfare—the court spoke in truly regional terms of the obligation of a community to absorb some of the regional burdens that surround it:

The township's brief raises (but unfortunately does not attempt to answer) the interesting issue of the township's responsibility to those who do not yet live in the township but who are part, or may become part, of the population expansion of the suburbs. Four acre zoning represents Easttown's position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send

69. 221 F.2d at 418.

70. The following quote from *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 220 A.2d 97 (1966), is representative of such expressions:

Hence the question will be whether a sound exercise of discretion [on application for a variance to allow a church school] requires that the school be permitted. In dealing with that question, the local authorities *should consider the State policy favoring such exempt functions and the fact that regional needs must be met somewhere.*

47 N.J. at 217, 220 A.2d at 100 (emphasis added).

71. 419 Pa. 504, 215 A.2d 597 (1965).

our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not.⁷²

Amid this public-service language of the opinion, however, two nagging problems persist that tend somewhat to depreciate its value. The first is the fact that the city's argument concerning the straining municipal facilities was makeweight since there were no *present* pressures on city systems or services. This argument is similar to that found in many cases that do not extend zoning powers to dealing with future conditions within the municipality.⁷³ One must wonder how the case would have been decided under a system, such as that in New Jersey, in which local legislators may plan ahead and contemplate future conditions in drafting ordinances.⁷⁴ Since, as the court found in *National Land & Investment*, there was no real present threat of straining municipal services, the decision may be justified on the ground that the Pennsylvania courts will not approve a zoning ordinance unless its relation to the public welfare is based upon conditions as they exist at the time the ordinance is passed. If this interpretation of the case is correct, the language relating to acceptance of the burden of metropolitan living is welcome, but superfluous.

Second, there is the factual determination in the opinion that the real motivation of Easttown in passing the ordinance in question was to reduce tax burdens—that in effect the city was attempting to erect economic barriers at its borders. Again the decision might well be rationalized on the ground that economic segregation is an improper basis for exercising zoning powers when there is no other public-welfare motive to support the action. Numerous other cases involving economic segregation have ultimately permitted an ordinance to stand on a showing of motivation related to the public welfare.⁷⁵ One must again wonder whether the decision would have been the same if there had been a more easily recognizable relationship between the ordinance and the welfare of the local inhabitants.⁷⁶

These problems greatly weaken the *National Land & Investment*

72. 419 Pa. at 532, 215 A.2d at 612.

73. See, e.g., *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962); *Gust v. Township of Canton*, 342 Mich. 436, 70 N.W.2d 772 (1955).

74. Compare the cases cited in note 73 *supra* with *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962), and *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). For a comparison of the New Jersey and Michigan views see *Cunningham*, *supra* note 15.

75. *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942); *County Commrs. v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

76. See *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942).

case insofar as its *ratio decidendi* may be viewed as espousing a meaningful rule requiring municipal sharing of metropolitan burdens and at least some negative cooperation in resolving common land-use problems. Subsequently, the Pennsylvania court had the opportunity to clarify and follow the *National Land & Investment* rationale in a case in which the ordinance in question excluded certain mineral-taking activities from within the zoning community.⁷⁷ The court apparently chose neither to clarify nor follow that rationale.

National Land & Investment, and its predecessor, *Bilbar Construction Company v. Board of Adjustment of Easttown Township*,⁷⁸ while offering satisfying results, offer little in the sense of legal rationale. One must wonder whether the court would arrive at the same result and be moved by the same considerations in a more rural setting or whether the region did indeed require the land in satisfaction of overriding regional housing objectives.⁷⁹

C. Critique and Criteria

If one perceives the regional approach as placing the municipality in the same relation vis-à-vis the region that the individual property owner is in vis-à-vis the municipality, it is clear that the regionalism doctrine as now applied has missed the mark by a wide margin. The present practice of permitting (but not requiring) reference to external needs and development has led to a greatly expanded local prerogative. This power is most typically used to exclude those uses

77. In *Exton Quarries, Inc. v. West Whitehead Township*, 425 Pa. 43, 228 A.2d 169 (1967), the court struck down an ordinance that prohibited quarrying anywhere within the borders of defendant township. While *National Land & Investment* might well have furnished authority for imposing a duty to accept the burden of producing resources necessary for the people of the state, the opinion in *Exton* took another tack—according special consideration to the fact that valuable natural resources were involved. The decision is similar to that in *City of North Muskegon v. Miller*, 249 Mich. 52, 227 N.W. 743 (1929), which, although striking down such a prohibition, can hardly be considered a "regional" case. See notes 154-55 *infra* and accompanying text. Compare the *Miller* case with *Township of Burlington v. Dunn*, 318 Mass. 216, 61 N.E.2d 243 (1945). See also Note, *Constitutional Law—Governmental Regulation of Surface Mining Activities*, 46 N.C. L. REV. 103 (1967).

78. 393 Pa. 62, 76, 141 A.2d 851, 858 (1958) ("[M]inimum lot areas may not be ordained so large as to be exclusionary in effect and, thereby, serve a private rather than public interest.").

79. One commentator, in discussing the *National Land & Investment* case, has suggested that

[o]ne looks with doubt upon the decisions of local bodies, apt to be parochial or representative of vested interests, when these decisions affect outside interests adversely. The issue remains whether this doubt can be translated into a foundation for legal action.

Note, *Regional Impact of Zoning*, 114 U. PA. L. REV. 1251, 1253 (1966). This critique is well founded, especially if one brings himself to look beyond the apparent natural justice of the *National Land & Investment* decision. Such criticism is invited by the Pennsylvania court by its statement, following the grandiose language of regionalism

deemed undesirable by pointing to other communities with space available for them. Ultimately, one community will end up having to allow the use, once all of the other communities have excluded it. While no case yet records retaliation by the repository community, the conclusion is inescapable that the doctrine is bound to foster such reaction. Professor Haar, in rebuttal to the Nolan and Horack discussion⁸⁰ of the *Wayne Township* case, stated:

Perhaps the most harmful tendency of such restrictive ordinances would be to stimulate protective movements on the part of neighboring communities, each anxious to avoid excessive immigration and the danger of absorbing those to whom neighboring towns refuse to grant building permits. . . . The court's claim that Wayne Township "lies in the path of the next onward wave of suburban development" is an indication of its restrictive view of what constitutes the best regional industrial and population distribution. . . . A valuable concept such as regionalism which has much to contribute to the solution of community problems ought not to be abused to justify a local determination to exclude a regional burden.⁸¹

As a judicial doctrine regionalism has not worked well—more often it has accomplished local rather than regional results. The problem lies in our continued adherence to the idea that the municipal community is the relevant public whose interests are at stake in zoning controls.⁸² Regionalism in a meaningful sense cannot be achieved until we are ready, and judicially equipped, to ascertain whether a particular desired use is in fact in the public's best interests. From a constitutional viewpoint, benefit to the regional public should be a requisite finding in order for a court to uphold a municipality's

already referred to (*see* text accompanying note 72 *supra*), that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities can not be held valid." 419 Pa. at 532, 215 A.2d at 612.

80. Nolan & Horack, *supra* note 55, at 984-85. *See* text accompanying notes 55-57 *supra*.

81. Haar, *supra* note 57, at 992-93. Indeed, the possibilities of retaliation are obvious. Logic demands the conclusion that what one can do, all can do. *See, e.g., Consolidated Edison Co. v. Village of Briarcliff Manor*, 208 Misc. 295, 301, 144 N.Y.S.2d 379, 385 (Sup. Ct., Spec. Term 1955):

If this Village could ban the proposed [high-tension electric] line entirely from its limits, so could every other municipality in the County. One municipality, especially where it uses particular public utility services, may not, so to speak, dump the undesirable facilities necessary to furnish such services upon the lap of an adjoining municipality.

82. This is an inescapable conclusion from the reasoning of the *Euclid* case. *See Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 158, 198 A. 225, 233 (Sup. Ct. 1938): the measure of validity of a zoning ordinance is its effect upon the "public at large," meaning, "the entire community as a social, economic, and political unit." *See* Note, *supra* note 22, and cases cited therein.

interference with private-property ownership rights. While private rights are often at odds with community purposes and are at times considered to be a hindrance to orderly development of the community,⁸³ such rights do provide a starting point for an assessment of the public interest. A private-property owner should be able to advance in court the inquiry whether his property rights are being interfered with for a legitimate purpose—one reasonably related to the promotion of the public health, safety, welfare, or morals. This proposition is stated simply:

. . . governmental power to interfere with general rights of land-owners by zoning regulations restricting the character of use of property is limited to restrictions which bear some substantial relation to the public health, safety, morals, and general welfare. . . . Under the guise of the police power legislatures may not impose unnecessary and unreasonable restrictions on the use of private property in pursuit of useful activities.⁸⁴

Yet, its application as an operative principle has been made difficult, if not impossible, because the courts generally have failed to identify the proper regional criteria to be considered in determining the public interest.

In light of the above discussion, four major criticisms of regionalism as it is practiced today may be stated.

1. *Regionalism Is Not Really Regional*

With the possible exception of the *National Land & Investment* case, no court has applied the regional approach except to sustain an action of interest to the zoning community. Courts still proceed on the assumption that zoning is a municipal function designed to care for local needs and to promote local interests. On the other hand, it has been suggested that unilateral action by a community in attempting to solve its own problems is the very antithesis of regionalism.⁸⁵ To be sure, none could fairly make the claim that the doctrine has created any greater sense of awareness of the municipality as part of the larger community in which it is located or any sense of duty or obligation toward that larger body. Instead, municipalities still act in their own interests, and they are willing to look toward regional

83. A learned discussion of the relation of private rights to property is found in Powell, *The Relationship Between Property Rights and Civil Rights*, 15 *HASTINGS L.J.* 135 (1963). See also Cribbet, *supra* note 66.

84. *E. BASSETT, ZONING 77* (1936) (citing *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928)).

85. Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 *WASH. U. L.Q.* 1, 13.

conditions only to the extent that what they see there may justify their decisions.

Thus, so-called regionalism may as aptly be called "localism" in terms of its over-all effect on the relation of local to regional or metropolitan interests. In general, so far as the battle lines have been drawn between proponents of local interests and those of regional needs, the former seem to have prevailed—at least when they have made a showing that the ordinance bears some relation to a recognized police power objective. The extent to which extramunicipal reference may or may not be limited may depend solely upon the cohesiveness of the area in which the municipality is located; the more communities that are included within the legitimate contemplation of the zoning officials, the greater the likelihood of successful exclusion. Thus, as metropolitanization increases, the power to exclude increases as well. There is little room for doubt that regionalism as practiced today is not regional at all, but merely a ploy for the extension of local powers to their ultimate end—complete Balkanization of uses, of economies, and, of course, of people.⁸⁶

2. *Regionalism Is Too Broad a Concept To Help Decide Cases*

It is futile to think of regionalism as a zoning doctrine capable of aiding the meaningful decision of cases. As a concept, its breadth is exceeded only by the indiscriminateness of its application. When used as a catchword, regionalism tends to draw upon a larger body-public and geographic area than the particular use in question may merit. When the use under consideration is of strictly local import, it is meaningless to invoke regionalism to ascertain whether it may be excluded from the community or forced to locate one place or another. For example, as to a controversy over a neighborhood grocery store or corner filling station, it would be easy to employ the catchword to find land available for such uses in other communities—all of which would be wholly immaterial to the local problem. One can perceive a certain irony in this logic—regionalism has become such a considerable force for exclusion that a court may have to resort to an analysis of local interests in order to limit the municipality's exclusionary powers.

86. J. UKELES, *THE CONSEQUENCES OF MUNICIPAL ZONING* 44 (1964), notes that [s]ince zoning is directly aimed at the use of urban space, it is likely to have significant effects on the economic and social aspects of the urban environment. Zoning functions in the economic system apportioning costs and benefits and adjusting or supplanting market mechanisms. It acts as a social element, expressing certain values and negating others, and affecting the structure and form of urban social communities.

The breadth of the term "regionalism" would appear to include all the territory within a definable geographic area,⁸⁷ apparently without regard to whether the use is even a concern of those to whom it is shifted. Geographic area is necessarily as arbitrary a concept as that of municipal boundaries since people live with little concern for either and base social and economic decisions on neither. To find land available for a hospital or a factory in some neighboring community is nonsensical unless, in fact, that community has a need for it. The examples of the local grocery or filling station are, no doubt, the illogic carried to its conclusion, but regionalism as a concept offers little more in the way of a reasoned solution. It may safely be said, at the very least, that regionalism permits municipalities to ignore socio-ecological considerations. It also no doubt tends to encourage local exclusionaries to include rural undeveloped land within the definition of the geographic region.

3. *Regionalism Is an Ad Hoc Determination*

The concept of regionalism has apparently been applied to certain classes of land uses that transcend municipal lines more than other classes of uses. In one case it is a factory and in others a shopping center, multiple dwellings, a hospital, or mobile homes. Yet it is not in every case involving such classes that one finds expression of extra-municipal considerations. Instead of being drawn into and made a part of the reasonableness criteria for the valid exercise of the police powers, regional considerations seem to have evolved into a system of special considerations that may or may not find application in the particular case depending upon the circumstances. If a parcel of property is zoned for residential use, for example, and the owner wishes to use it for a grocery store, it is not clear whether the regionalism principle would be applied. It would hardly seem responsive to the alleged invalidity of the ordinance to say that there are many lots available for groceries in some other community. Between the grocery store and uses such as a large hospital, there are innumerable uses that may affect people of the community and of the region in various ways. It is within this gradation of uses that the present regional approach lacks any degree of certainty and universality.

Even within the use classifications in which one might expect the doctrine to find a fairly consistent application, regionalism is applied purely on an ad hoc basis. One obvious question that has already been alluded to is what constitutes a region for purposes of applica-

87. See, e.g., *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

tion of the doctrine. Tied closely to this question is the problem of maintaining some relationship between the time of enactment of the zoning ordinance and the time of adjudication—that is, at what point does the alternative extramunicipal site have to be available for the undesired use? Does the municipality have to locate alternative land available for the use before it may enact its ordinance, or is the availability of such land an attorney's invention at the time of litigation? No matter what the answers to these questions may be,⁸⁸ it is enough for present purposes that the concept of regionalism raises questions that cut deeply into the ability of the zoning municipality to predict with any accuracy how its ordinances will be treated by the courts.

Under the present ad hoc application of regionalism, private rights, municipal interests, and regional needs are adjusted on a case-by-case basis with no governing principles emerging from the conflicts. Rather, these important interests are juggled on the happenstance of finding available land somewhere else or, worse, on finding a potentially undesirable situation within the region from which the municipality wishes to protect itself. This lack of a consistent pattern renders the concept of regionalism impotent in that it leaves courts without any doctrinaire basis for decision.⁸⁹ Institutions generally considered "essential" have been no less immune from this uncertainty and confusion in their attempts to locate within urban areas.⁹⁰

Not the least of the faults of ad hoc regionalism is the effect the

88. An answer is suggested in Note, *supra* note 60, at 731:

The critical question, however, not ruled on by the court [in *Wiltwyck School for Boys, Inc. v. Perry*, 14 App. Div. 2d 198, 219 N.Y.S.2d 161 (1961)] involves the time at which the rule of "alternate unrestricted sites" should be applied: the date of purchase or the date of trial. It would seem both sensible and necessary to utilize the rule as being implicitly operative at the time of purchase, not at the time of trial. If the date of purchase is the applicable time, *Wiltwyck* made a reasonable choice when it declined to purchase land in two other communities which had already passed exclusionary zoning ordinances and completed the transaction in Yorktown where it was a permitted use when title passed. If the date of trial were the applicable time, then *Wiltwyck*, in making its purchase, would have to find a site which was not restricted and would not become so. And the court, in passing on the validity of a zoning ordinance enacted after the purchase, would have to decide whether there were alternate sites which were presently unrestricted and which would remain so. A rule which necessitates predicting the responses of each of many communities to *Wiltwyck's* to purchase places an impossible burden both on the purchaser and on the court. It seems much more sensible to make the time of title passage the cut off point determining whether there were alternate available unrestricted sites.

One obvious question would arise when the user did not take title to the land but instead utilized a lease-back or land contract arrangement.

89. See Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600 (1965). See also note 79 *supra* and accompanying text.

90. Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 524 (1957); Note, *The Immunity of Schools from Zoning*, 14 SYRACUSE L. REV. 644 (1963).

process has on the judiciary itself.⁹¹ The case-by-case use of a potentially valuable vehicle for courts to limit local actions tends to impair the ability of the courts to apply the doctrine logically to new problems. The courts harbor a natural reluctance to make new law in the cases before them. Moreover, courts must share some concern for the expectations of litigants and the rules that they purported to rely on when they took their respective actions. These piecemeal efforts are not conducive to a planned society,⁹² nor do they lend credence to a constructive judicial role in resolving regional land-use controversies.

4. *Regionalism Is Self-Defeating*

If one begins an appraisal of judicial regionalism hoping to find metropolitanization—meaning a sharing in law what is shared in fact—he will find that the doctrine has exactly the opposite effect of that intended. Zoning as an institution tends to reinforce the status quo by codifying social and economic groupings within the metropolitan area.⁹³ Those living in large homes do not desire the presence of smaller homes; those in single-family dwellings do not desire multiple dwellings; those in residential districts do not want the presence of industrial or institutional uses; and no one seems to want mobile homes nearby. Local zoning boards must at least recognize a community need for some of these uses. By employing a regionalism theory, however, municipalities may take advantage of a corollary doctrine that a community does not have to provide a cross section of uses within its borders⁹⁴ and that, as a consequence, it may exclude unwanted uses when there is other land available for those uses within the geographic area.

Thus, it does not take much imagination to envisage the fear of leaking zoning plans to other municipalities for fear of retaliatory measures before adjudication. This atmosphere, it would seem, is the very antithesis of what regionalism should attempt to create. Obviously, zoning as an exclusionary practice cannot continue for too long before every municipality within a metropolitan area will enact protective ordinances in order to avoid becoming the repository of every other community's undesired uses. Instead of fostering coop-

91. For a general jurisprudential viewpoint, see L. FULLER, *THE MORALITY OF LAW* 51 (1964).

92. See Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227, 1257 (1966).

93. See J. UKELES, *supra* note 86, at 52.

94. See, e.g., *Valley View Village v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749 (1958).

eration and a sense of shared concern for common problems regionalism tends to have exactly the opposite effect in practice.

With each municipality attempting to implement its own solutions to its own problems in light of its own interests, the result is inevitably a Balkanization of communities within the metropolitan area, with its attendant effects upon the sociological and ecological qualities of urban life. It is not surprising that cases such as *Duffcon*⁹⁵ and *Proffett*⁹⁶ have become slogans for exclusionary tactics and have been applied to reach results contrary to results that one would suppose a genuine concept of regionalism would reach. Although on its face growing metropolitanization would lead one to theorize a greater public interest in land controls, municipalities have nonetheless remained individually oriented and regionalism has served to allow them to continue to be.⁹⁷

There is a certain amount of realism or pessimism necessary in this area. It would appear a fact of metropolitan life that communities compete for harmonious and economically advantageous uses. Competition likewise exists to avoid those uses that are considered undesirable or unharmonious. Under present notions of regionalism, however, competition in metropolitan areas has tended to increase, rather than diminish.⁹⁸

D. Synopsis

The four criticisms of regionalism set out above naturally suggest criteria for a desirable judicial approach toward a more meaningful doctrine of metropolitan land-use controls. The word "goals" should perhaps be used, rather than "criteria," since, after all, the questions are where the judiciary should be going in this area and what means are available for carrying it in the appropriate direction.

The first and most obvious need is for a doctrinaire approach to urban land-use problems that is capable of consistent application from case to case. This is not to say that each case will be decided the same, but only that an approach must offer at least a modicum of predictability and universality. If we are to be committed to metropolitan land development, then we must likewise be committed to an approach that recognizes this interest in every case. In each

95. See text accompanying notes 50-51 *supra*.

96. See text accompanying notes 68-69 *supra*.

97. See references cited in note 82 *supra*; Comment, *Government Control of Land: Protecting the I-Know-It-When-I-See-It Interest*, 62 NW. U. L. REV. 428, 441 (1967) (zoning is the embodiment of individual interests in land, which is at odds with the interests of the metropolitan community in land).

98. See Note, *supra* note 89.

case the inquiry must proceed from analyzing the relation of the use in question to the metropolitan community in which the zoning municipality is located. We must avoid the hit-or-miss regionalism currently finding judicial expression and dedicate the judicial functions to exploring zoning limitations from a consistent metropolitan or regional viewpoint. While cases may, on their facts, concern strictly local interests, regional interests, or something in between, we must achieve at least some measure of consistency in the basic approach to each case.

Second, there is the ever-present danger that courts will be placed in the position of being forced to make substantive planning decisions. Nothing could be more detrimental to the hopes for a well-planned metropolis or to the efficacy of the judicial process.⁹⁹ An approach that courts can apply to gauge the validity of local land-use decisions should have the quality of encouraging planning before the initial decisions are made.¹⁰⁰ We must recognize the influence of judicial decisions upon the manner in which land is ultimately developed and their effect upon the local decision-making processes. The judiciary does tend to discourage some potential decisions from contemplation while indirectly favoring other decisions.¹⁰¹ Moreover, there is always the great potential for courts to give vitality to essential policies of urban life that are before them for consideration but that are missing from the zoning enactments.¹⁰²

It is important for courts to comprehend their role in the land-use processes and to realize what effects a judicial pronouncement will have upon these processes at work. The courts must perceive the consequences of a decision in assessing its correctness—whether

99. See Haar, *supra* note 90, at 530.

100. The proposition is even stronger in the negative—that when individuals or municipalities cannot look to completion of their plans with any degree of certainty, there has certainly resulted a dissuasion from an initial planning process. Thus, Cribbet, *supra* note 66, at 277, suggests that what is needed is an administrative body to whom the respective parties can turn to find out which of their plans will be permissible. The theory is similar to that of the English Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51., but Cribbet would not place that amount of control in the administrative body as the English place in the Minister of Housing and Local Government. See L. BLUNDELL & G. DORBY, *TOWN AND COUNTRY PLANNING* 25 (1963).

101. See Kaiser & Weiss, *Local Public Policy and the Residential Development Process*, 32 *LAW & CONTEMP. PROB.* 232, 248 (1967). See generally S. WILLHELM, *URBAN ZONING AND LAND USE THEORY* (1962). Professor Dunham suggests that this is the overriding characteristic of our planning theory—that we can only hope to induce the kind of development we desire by eliminating the alternatives available to the developer. However, as Professor Dunham also points out, the courts have not countenanced land restrictions that effectively relegate the land to a single publicly desired use. Dunham, *A Legal and Economic Basis for City Planning*, 58 *COLUM. L. REV.* 650, 663 (1958).

102. See J. UKELES, *supra* note 86, at 63-64.

the decision will foster local parochialism or whether it will promote truly metropolitan interests. This sense of judicial introspection must, of course, find its expression through a recognized legal doctrine such as the relation of the exercise of the police power to the public health, safety, or welfare. At present there are some glitterings of such introspective attitudes in special-use categories that present inescapable intermunicipal consequences,¹⁰³ but these piecemeal applications barely reflect a judicial awareness of the more general urban land-use problems. The courts must attain an acute awareness (as they have not in past regionalism cases) of whether a doctrine will further local planning, encourage planning consultation, create a sense of intermunicipal cooperation, or merely serve to create an armed metropolitan camp with each local decision bringing retaliation from neighboring communities.

Finally, the judiciary must develop a filtration process by which the validity of the enactment is measured against only those interests that are truly affected by it. Just as some problems may be wholly local in nature,¹⁰⁴ others may cross municipal lines without necessarily involving the entire region. It is submitted that there is a spectrum of uses with a commensurate spectrum of definable publics. Those problems that are regional should not be subject to wholly local direction, but by the same token, it is useless and confusing to invoke the welfare of the public of a region to gauge wholly local decisions. Determining which decisions affect which public must be a prime consideration for any meaningful judicial doctrine that hopes to achieve an analytical review of land-use decisions. While for consistency such a doctrine should approach each problem by analyzing its impact upon the real public concerned, the measure of that

103. See note 60 *supra* and accompanying text.

104. Although the thesis shall be more fully developed below (see text accompanying notes 128-43 *infra*), it is perhaps useful at this point to distinguish between uses that are wholly local—that is, those that do not concern anyone outside of the municipality—and those circumstances in which, although the use itself has significant external impact, the regulation in question pertains only to local aspects of the use. Such a distinction was directly in issue in *School Dist. v. Zoning Bd. of Adjustment*, 417 Pa. 277, 283, 207 A.2d 864, 868 (1965):

We regard state-wide interest, and thus the area protected from local interference by statute, to be centered in, for example, the number of hours that children must attend school and the types and emphasis of courses that shall be presented to them. We see no inherent state-wide interest in the fact that certain school buildings, because of local problems of congestion, should be so situated that space is available for off-street parking, or even that, because of overcrowded conditions, each building should be of only a certain height, or that it should have a back yard of a certain depth.

Compare *Allendale Congregation of Jehovah's Witnesses v. Grossman*, 30 N.J. 273, 152 A.2d 569 (1959) with *Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954).

impact, in assessing the validity of an ordinance, must of course vary with the circumstances of the use itself.

Using these criteria one may begin to develop a judicial approach that will operate within the described parameters. The solution must first proceed with the question "Who is the public?" in order that the effect upon the public health, safety, welfare, or morals may properly be ascertained.

III. THE ANTIPRESUMPTION: A POLICY APPRAISAL PROCEDURE

Throughout the annals of modern zoning litigation there have always been certain classes of uses that have so obviously transcended local boundaries or have so obviously promoted the public well-being that they have received special attention from the courts.¹⁰⁵ Uses such as schools, hospitals, eleemosynary institutions, public utilities, the taking of minerals, and churches have generally required a showing on the part of the zoning municipality that the exclusion of such uses is reasonably necessary for the public health, safety, or welfare.¹⁰⁶ Although a sense of true regionalism does exist concerning these specific use situations, there is nevertheless still present in these cases a marked lack of continuity. Thus, we need to move toward a notion of preferred policies rather than preferred institutions.¹⁰⁷ One would hope that within the various decisions pertaining to the superior interests surrounding the so-called preferred institutions there is buried the seed of a universal judicial attitude that may find appli-

105. See note 60 *supra*; Haar, *supra* note 90, at 524.

106. See Note, *supra* note 60, at 724-26:

. . . courts have frequently recognized the necessity of protecting institutions which serve a larger public interest from the operation of local zoning ordinances. In so doing, they customarily utilize three techniques . . . First, a court may feel impelled by reason of public policy to expand by construction one of the categories of permitted uses to include an apparently excluded party. Secondly, it may extend the governmental immunity possessed by a public institution to private institutions carrying out similar functions on grounds that no reasonable basis for differential treatment can be found. And third, it may invalidate an ordinance because a certain use is so essential to the public welfare that an ordinance which excludes it can bear no reasonable relation to the public welfare. The first two techniques have been used by courts in a variety of familiar statutory contexts and presents few novel issues. The third technique—which rests explicitly on considerations of state public policy—represents, perhaps, the most accurate description of why courts respond to the claims of an excluded use. As such, it is significant both in itself and also as a rationale for the application of the other two techniques.

Likewise, for present purposes it is the third category that represents the judicial limitation of local zoning powers. Analysis of this category offers the greatest likelihood of exposing those considerations (explicit or implicit) that courts can and do act upon to protect a property owner, institutional or otherwise, from arbitrary interference. In the attempt to evolve a generally applicable judicial attitude, these distinctions are highly relevant in separating the general theory from the specific case, and the statutory from the constitutional issues.

107. See *id.* at 727.

cation in every zoning case. Such a distillation process does indeed yield an approach that is often unarticulated or, when articulated, is done so only in relation to the specific institution involved.

The special-use cases proceed on the assumption that the battle lines are drawn between the prerogatives of the individual landowner and the police powers of the state; that while every owner of land has a duty to step aside in the public's interests, there is a corollary right not to be pushed aside except when the public's interest is actually at stake. Obviously, then, there is an initial inquiry regarding who this "public" is whose interests may compel restrictions upon an individual's right to use his property as he desires. Once the body public is identified, the interests of that public may be more clearly delineated and the effort to ascertain whether those interests are sufficient to justify a land-use restriction may become more fruitful. It is suggested that once the public's interests are adequately identified, the same rationale that is applied, implicitly or explicitly, in the special-use cases, may give rise to an approach applicable to every zoning case. Such an approach will be truly regional in the sense of being a judicial limitation upon the local zoning powers of communities existing within a metropolitan matrix. Moreover, it is hoped that such a solution will be relevant in the noninstitutional cases as well, such as those involving housing and population density controls.

A. *The Shifting Public: "Who v. Whom?"*

Metropolitanization and a regional emphasis on land-use controls should shift the direction of the judicial inquiry from asking whether other land is available for a given use to whether a particular use restriction is in the interests of the public health, safety, or welfare. The change proceeds naturally enough from the passage of the *Euclid* case quoted at the outset of this Article¹⁰⁸ indicating that there might be interests that so far outweigh those of the zoning municipality that the municipality would not be allowed to stand in the way. This statement by the Supreme Court heralds an approach that is truly regional in principle—it recognizes that certain uses may be of such significance to the well-being of the "area public" that more parochial interests would simply not be in the public's interests.¹⁰⁹ From a more analytical viewpoint, there must be a shift

108. See text accompanying note 2 *supra*.

109. In Note, *supra* note 79, at 1254, a basic line of police power analysis is suggested:

... one can argue that to be valid as a police regulation, the ordinance must

in emphasis from viewing the conflict as the individual versus the municipality to viewing it as the municipality versus the region, with the individual's rights hinging on the outcome.

For example, one may hypothesize an institution owning land that it desires to use for hospital purposes. That use, however, is prohibited by an ordinance under which the land is zoned for residential purposes. An owner relying on the regional argument must maintain that the relevant public health, safety, and welfare is that of the regional public, and that unless the municipality can show substantial reason for the restriction, it should be considered arbitrary. In effect, such an argument envisages a matching of the local-interest factors against the detriment to the larger public from allowing the municipality to prohibit the use.¹¹⁰ What is suggested, of course, is that in such cases there is a balancing function carried out by the courts (articulated or not) in which local interests are weighed against the interests of the metropolitan community, the region, or the state itself.¹¹¹

It should be obvious that not every use involves the same interests on the part of the same public. Because of this factor, regionalism

bear a reasonable relation to the "general welfare" of the state. Since the relevant "general welfare" which limits exercise of the state police power is the general welfare of the state, and since the state delegation of its police power must be at least as limited as the power itself, then the local exercise of the police power must be similarly limited. Thus a local exercise of the police power must bear a reasonable relation to the general welfare of the state. It is not only permissible but necessary for a court to go beyond the words of the enabling act and consider the elements forming this broader general welfare. In this expanded sense, general welfare would certainly encompass regional demand for high density land and how it is affected by local ordinances.

Although this paragraph phrases with precision the police power confrontation at the local level, the conclusion reached that regional demands include high-density zoning is somewhat mysterious. It would appear that this analysis is often based on short-range metropolitan needs rather than on any longer-range planning evidence of what a region should be like. While it is obviously ill-considered to deny available land to those who might be able to utilize it, who is to say that having low-density, high-economic-level communities is not also in the greater interests of the entire community? This Article does not purport to answer this question. The question involves a theory of the city that probably has not yet been propounded.

The quoted paragraph is also illustrative of the proposition that enabling acts, as interpreted by the courts, may actually be attempting to delegate to the municipalities more power than exists in the state. To the extent that this is so, much of present zoning is subject to the taint of unconstitutionality. *See* B. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 98 (1961).

110. *See, e.g., Sisters of Bon Secours Hosp. v. City of Grosse Pointe*, 8 Mich. App. 342, 154 N.W.2d 644 (1967).

111. Federal policies may also be relevant. Typically, however, when federal policy is involved the question is whether the federal government has pre-empted the field rather than whether the local regulation is reasonable in light of national policy. *See, e.g., Tim v. City of Long Branch*, 135 N.J.L. 549, 53 A.2d 164 (Ct. Err. & App. 1947); *Thanet Corp. v. Board of Adjustment*, 104 N.J. Super. 180, 249 A.2d 31 (L. Div. 1969).

tends to become an unfortunate label when it is taken to refer to a public at large rather than to a theory of constitutional dimensions. There is in each case a group of persons who are affected by the use restriction and a group of others who, although within geographic proximity, may nevertheless be wholly disinterested in it. For example, assume that suburb *A*, suburb *B*, and central city *C* are all mutually contiguous, and that *A* passes an ordinance requiring minimum lot sizes of five acres. If suburb *B* is already a fairly stable and economically endowed community, it will no doubt more than welcome *A*'s enactment. A group of potential migrants from *C*, however, might be seriously aggrieved by the enactment, seeing it as eliminating their most likely access to suburbia. *B*'s attitude might be different if it were less developed and generally favored more liberal zoning laws since then it would be obliged to take on the rather unprofitable low- or lower-middle-income housing function that *A* avoided. Assuming, on the other hand, that *B* is an established residential community and that *A* rezones its border areas for industrial use, at least some citizens of *B* will be adversely affected by the enactment while the citizens of *C* will probably be indifferent to it.

While no social, ecological, or economic accuracy is claimed for the above illustrations, it should be obvious that to treat each case as a regional case is to lose sight of the real interests at stake. Before the court can proceed to effect any intelligent balancing of local and larger interests vis-à-vis a particular enactment, it is necessary for it to attempt to identify whose interests are competing with those of the zoning municipality. This step is certainly essential in terms of the procedure to be suggested herein,¹¹² as well as for purposes of standing and intervention in any litigation.¹¹³

Thus, in order to ascertain whether there are recognized external interests that may outweigh local interests, it is necessary to know whose interests they are. Because no two uses in any two cases will have identical consequences, the only intellectually honest way to proceed is through a device that is called, for want of a better name, a "shifting public," which is, in essence, a reasoned judicial calculation of who is in fact affected by a particular ordinance. The public in a given case may vary from the entire state to a neighborhood within the zoning municipality, and, of course, may be any of a

112. See text accompanying notes 168-79 *infra*.

113. Comment, *Standing To Appeal Zoning Determinations: The "Aggrieved Person" Requirements*, 64 MICH. L. REV. 1070 (1966). See also text accompanying notes 41-43 *supra*.

number of variations in between. Through this qualitative analysis of the external impact of a zoning ordinance, we may begin to search out relevant policies that may influence a court's assessment of the reasonableness of a particular ordinance. Thus, identifying the shifting public should be a first step in any metropolitan analysis.

B. *The Areas of Confrontation*

When courts approach the problem of a municipality attempting to exclude a so-called preferred institution, a strange chemistry seems to take place. The process is a shifting of the burden from the owner-challenger to the municipality to show the reasonableness of the ordinance. Although it is generally accepted that courts will not interfere with the legislative process when there is a debatable question concerning reasonableness,¹¹⁴ this premise appears to undergo a transformation when local interests come into conflict with those of the external public.¹¹⁵ In reacting to these conflicts, when preferred institutions are involved, courts have been moved by various considerations of policy vis-à-vis the particular use in question. Courts have eradicated the presumption of validity, shifted the burden of going forward onto the municipality, or even shifted the burden of proof of reasonableness to the zoning municipality. By analyzing these confrontations, it is possible to synthesize a principle that should be applicable to every case. Therefore, it will be more useful to depart from the traditional approach of determining judicial attitude toward particular institutions and to look instead to the underlying policies that many uses share.

1. *State Constitutional Provisions*¹¹⁶

In *Mooney v. Village of Orchard Lake*,¹¹⁷ the defendant municipality enacted a zoning ordinance that had the practical effect of excluding schools and churches from the entire community. In assessing the reasonableness of this enactment, the Michigan court referred to the Michigan Constitution, which provided that "religion, morality and knowledge being necessary to good government

114. See note 5 *supra*.

115. See Crawford, *Zoning for Large Industrial Properties*, 52 A.B.A.J. 646 (1966).

116. The constitutional provisions here under consideration are those purporting to set forth basic state policies (such as in the preamble) without attempting to set out division of power between state and local governments. Such statements do not prevent local action in the area nor do they create a wholly local or statewide realm of action. In each case considered there is a legitimate basis for local action subject only to the requirement that the action be reasonably related to public health, safety, morals, and welfare.

117. 333 Mich. 389, 53 N.W.2d 308 (1952).

and the happiness of mankind, schools and the means of education shall forever be encouraged."¹¹⁸ The court proceeded to strike down the ordinance as arbitrary and unreasonable, shifting to the municipality the burden of proving the relationship between the enactment and the public health, safety, and welfare. It was obvious that the challenger made a *prima facie* case of unconstitutionality by showing that the organic law of the state favored schools and churches and that, *ipso facto*, the exclusion of such uses was not in the public's welfare. The court stated:

Hardly compatible is this with a presumption that exclusion of school and church from an entire municipality is conducive to public health, safety, morals or the general welfare, a presumption which we decline to indulge. A thesis so inconsistent with the spirit and genius of our free institutions and system of government and the traditions of the American people will not be accepted by way of presumption, nor at all in the absence of competent evidence establishing a real and substantial relationship between the attempted exclusion and public health, safety, morals or the general welfare, and hence, the reasonableness and validity of the restriction upon use of private property as a legitimate exercise of the state's police powers.¹¹⁹

Three striking features of the *Mooney* decision are immediately apparent: first is the strong language of basic democratic principles at work, perhaps indicating the strength of the court's reaction to the question as one of first impression;¹²⁰ second is the fact that the ordinance was held to be violative of due process and not in contravention of some other particular provision of the state constitution; and third is the manner in which the court struck down the ordinance—on a failure of proof on the part of the municipality that its local policies were stronger than the "organic" policies of the State of Michigan.

It would be impossible to square the *Mooney* case with the generally accepted notion that courts do not sit as super zoning boards¹²¹ unless the theory of the case is that by reference to constitutional

118. MICH. CONST. art. 11, § 1 (1908).

119. 333 Mich. at 394, 53 N.W.2d at 310.

120. Such reaction is not unique to the Michigan court. In *Ex parte Medinger*, 377 Pa. 217, 226, 104 A.2d 118, 123 (1954), a Pennsylvania court struck down an ordinance requiring a minimum-square-foot house size, stating, "[t]his ordinance flies in the face of our birthright of Liberty and our American Way of Life, and is interdicted by the Constitution."

121. See note 5 *supra*. See also *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962).

policy the challenger has made out a prima facie case of invalidity that must be countered by the municipality in order to have its ordinance sustained as reasonable. Indeed, as the *Mooney* court stated, an ordinance that on its face flouts the organic policies of the state will not be entitled to a presumption of validity and may well result in a shift of the burden of proof, as well as the burden of going forward with the evidence, onto the municipality. Interestingly, the *Mooney* rationale does not erect a blanket prohibition against exclusion of schools and churches, but rather puts the onus on the municipality to show the justification for such an exclusion. Such a procedure not only preserves a great deal of local initiative, but also tends to foster planning in the sense that municipalities must be able to justify their zoning decisions if they are challenged at a later time. One may speculate that if the *Mooney* rationale were extended to each zoning case in which such a prima facie case could be made out, a new era of municipal planning might ensue.¹²²

With speculation aside, however, *Mooney* does suggest a means of dealing with intermunicipal needs even though the decision did not do so per se. Of doctrinal importance is the Michigan court's recognition that although the public involved was the local (municipal) public, the state's organic policies were still relevant at least to shift the burden of going forward to the municipality.

Generally, courts have been reluctant to take the approach that state constitutional policies prohibit localities from dealing with various use situations.¹²³ Such an inflexible premise has only found expression when courts have dealt with the first amendment impli-

122. What is cursorily suggested here is that while local legislators are avowedly dedicated to the protection of their constituents' interests, they are nonetheless entitled to a presumption of honesty and integrity in carrying out that function. On being faced with a statutory or constitutional policy of the state which, on advice of counsel, would seem to pose an impediment to the proposed enactment, legislators must at least consider more fully the planning basis for their action. Whether the threat of running afoul of state policies forces recourse to professional planners or consultation of the regional master plan, if one exists, or merely forces deeper thought, certainly it will have, in this regard, served a useful and needed function. See Strong, *Planning and Zoning: The Pennsylvania Prospect*, 35 PA. B.A.Q. 218 (1964).

123. See *Detroit Edison Co. v. City of Wixom*, 382 Mich. 673, 172 N.W.2d 382 (1968) (utilities); *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 220 A.2d 97 (1966) (schools); *Allendale Congregation of Jehovah's Witnesses v. Grossman*, 30 N.J. 273, 152 A.2d 569 (1959) (churches); *School Dist. v. Zoning Board of Adjustment*, 417 Pa. 277, 207 A.2d 864 (1965) (schools). See generally Note, *Constitutional Law—Governmental Regulation of Surface Mining Activities*, 46 N.C. L. REV. 103 (1967); Note, *Application of Local Zoning Ordinances to State-Controlled Public Utilities and Licensees: A Study in Preemption*, 1965 WASH. U. L.Q. 195; Note, *The Immunity of Schools from Zoning*, 14 SYRACUSE L. REV. 644 (1963).

cations of excluding churches from a community.¹²⁴ And even when the exclusion of a church has been held unconstitutional, courts have nonetheless recognized the power of municipalities to regulate churches. In *Board of Zoning Appeals of Decatur v. Jehovah's Witnesses*,¹²⁵ a rather traditionalist court was faced with two zoning ordinances that threatened to interfere with the construction of a church in a residential district. The first required a minimum setback from the street and the second required a certain number of offstreet parking spaces. Proceeding from a classical first amendment analysis,¹²⁶ the court sustained the setback requirement as being easy for the church to comply with and therefore not interfering with the right to worship. The offstreet-parking requirement, on the other hand, could not have been complied with by the church. In striking down this latter provision, the court found that any benefits it might have for the public health or safety were easily outweighed by the right to worship.

While churches have received special treatment in zoning cases by virtue of the first amendment, a generally applicable rule may still be gleaned from those situations in which the reasonableness of the ordinance has been tested not against the constitutional right to worship, but against the constitutional *policies* in favor of religious education and moral development of the people of the state. Such an organic policy permeates every reach of the state and its subdivisions. Thus, even though a court may determine that the relevant public is strictly local, the relevant state policy is nonetheless applicable. As in the *Mooney* and *Decatur* cases, the challenger should be able to establish the prima facie unreasonableness of the ordinance by reference to the applicable constitutional policies and at least enjoy immunity from zoning restrictions to the extent that the municipality cannot show a countervailing necessity that outweighs the impingement on the state policy.¹²⁷

124. See *Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 172 N.E.2d 39 (1961) (unconstitutional to exclude churches from residential areas); *Board of Zoning Appeals v. Decatur Co. of Jehovah's Witnesses*, 233 Ind. 83, 117 N.E.2d 115 (1954). In *City of Sherman v. Simms*, 143 Tex. 115, 183 S.W.2d 415 (1944), the court held that the exclusion of churches was not reasonably related to the public welfare, being too fraught with the possibility of a first amendment violation. See generally Note, *Churches and Zoning*, 70 HARV. L. REV. 1428 (1957).

125. 233 Ind. 83, 117 N.E.2d 115 (1954).

126. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

127. See Note, *supra* note 124, at 1431: "Many of the cases invalidating the exclusion of churches seem to place the burden on the zoning authorities to justify the exclusion. This is contrary to the usual rule that affords zoning ordinances and decisions a presumption of constitutionality."

2. Policies Founded in Statutory Provisions¹²⁸

In identifying state statutory provisions relating to preferred land uses, it is immediately necessary to distinguish policies founded in statutes that regulate and license certain land-use activities from those founded in statutes that encourage such uses as being in the public interest.¹²⁹ Under the former type of provision, virtually any use may find some legitimation in a statute, especially the more dangerous or exceptional uses that traditionally require state license for operation; but mere legitimation must not be considered encouragement or a statement of policy. It is, of course, difficult to make such a distinction in the abstract and, by the same token, a single statute may contain elements of both categories. The important point for purposes of the present analysis is that a legitimation—*e.g.*, licensing—provision is not a statement of state policy bearing on the reasonableness of a local enactment unless there is within the statute a statement—express or implied—that the use in question furthers the public well-being. Probably the most accurate guide will be the preamble to the statutory provision. In order to demonstrate *prima facie* unreasonableness of a local zoning restriction on such a use, the challenger must first show that the public interest involved is encompassed by the legitimating statute and, second, that the statute purports to establish a policy relevant to the public involved.

128. It is again necessary to distinguish statutory policies from statutory pre-emption. See note 116 *supra*. For purposes of this discussion it is assumed that local government has the authority to legislate in the area in question subject only to the constitutional limitation of reasonable relation to the public welfare. State statutes, however, although not supreme in the sense of pre-empting the field under regulation may, nonetheless, offer considerable guidance in discerning the reasonableness of a particular ordinance. The cases here under consideration are those in which the courts have explicitly or implicitly referred to such statutory policies in order to assess the reasonableness of the local enactment. The distinction is made in *Detroit Edison Co. v. City of Wixom*, 382 Mich. 673, 172 N.W.2d 382 (1968), in which the Detroit Edison Company challenged a height restriction imposed by the defendant city that would have had the effect of limiting the height of its main transmission towers. The transmission line was being constructed pursuant to a grant of necessity by the Michigan Public Utilities Commission, which had authorized the construction of eighty-foot-high towers across Wixom. The court held that the legislature had not vested exclusive power over the matter in the commission and that Wixom was free, within the limits of reasonableness, to legislate in the field. In reversing the court of appeals on the question of the reasonableness of the height ordinance, the court indicated that the statutory language establishing the jurisdiction and functions of the commission are to be considered in assessing the reasonableness of the ordinance. A similar statement can be found by the New York court in *Consolidated Edison Co. v. Village of Briarcliff Manor*, 208 Misc. 295, 300, 144 N.Y.S.2d 379, 384 (Sup. Ct., Spec. Term 1955). See Note, 1965 WASH. U. L.Q. 195, *supra* note 123.

129. See note 106 *supra*.

In *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*,¹³⁰ a local zoning ordinance prohibited the erection of schools in a residential district on the ground that the tax-exempt status of schools constituted a drain on municipal tax revenues. Upon remanding the case for determination whether a variance should be granted, the New Jersey court stated:

Hence the question will be whether a sound exercise of discretion [on application for a variance] requires that the school be permitted. In dealing with that question, the local authorities should consider *the State policy favoring such exempt functions* and the fact that regional needs must be met somewhere.¹³¹

Justice Hall, concurring, would have required that in order to prevent a tax-exempt institution from locating at a particular place, the municipality be required to demonstrate the harmful effects that would follow—that is, he felt that it is not within the zoning power to exclude such important and beneficial uses without some valid justification.¹³² Although the court did not reach the question of the presumption of validity, it would seem a fair assumption that the court would have, after a *prima facie* showing of a statutory policy favoring tax-exempt institutions, shifted the burden onto the municipality to show the relation of its enactment to the public welfare and to show that this relation would continue in the future. It remains to be seen, however, which objectives will be deemed sufficient for the municipality to carry its burden.

If this is a fair reading of the *Ho-Ho-Kus* case, one must ponder the future of such decisions as *Duffcon* (excluding industrial uses from the community),¹³³ *Lionshead* (minimum-house-size requirements),¹³⁴ and *Vickers* (excluding mobile homes)¹³⁵ in light of the

130. 47 N.J. 211, 220 A.2d 97 (1966).

131. 47 N.J. at 217, 220 A.2d at 100 (emphasis added).

132. 47 N.J. at 218, 220 A.2d at 101. Justice Hall stated that regional or, for that matter, local institutions generally recognized as serving the public welfare [i.e., by their tax-exempt status] are *too important* to be prevented from locating on available, appropriate sites, subject to reasonable qualifications and safeguards

47 N.J. at 223, 220 A.2d at 103 (emphasis added). It would appear that the same objection is appropriate to Justice Hall's view as was made to the *National Land & Investment* decision (see note 79 *supra* and accompanying text)—that is, that the result seems correct but the legal logic seems to escape definition. To ask which institutions are so "important" harkens back to the question posed by the *Euclid* case (see text accompanying notes 1-2 *supra*). Even assuming an "important" use, which local measures are justified in restricting the location and operation of that use?

133. See text accompanying notes 50-51 *supra*.

134. See text accompanying notes 52-53 *supra*.

135. *Vickers v. Township Comm.*, 37 N.J. 232, 181 A.2d 129 (1962).

possibility that future state legislation may indicate a public policy in favor of any of these excluded uses. For instance, if New Jersey should enact a statute declaring that it is the policy of the state to encourage low-income housing for ghetto residents, by the *Ho-Ho-Kus* rationale the municipality would at least have to show legitimate public-welfare reasons for interfering with this policy. Of course, in such a case, it would first be necessary to isolate at least in general terms the public involved in the particular local decision in order that the relevant state policies could be ascertained.¹³⁶ If one could show, first, that the ordinance would affect those within the core city presently living in undesirable housing, and second, that relevant state policies favor new low-income housing and a redistribution of the population out of the ghetto, the presumption of invalidity should arise to be rebutted by the municipality.

The most obvious difficulty in this area of policy considerations is in distinguishing statutory authority from statutory policy. Regarding the former, the local enactment may be invalidated under a supremacy argument if the court finds that the power to make the zoning decision has been withheld from the municipality in the zoning enabling act as a matter of legislative intention. Regarding the latter, the local authorities have the authority to make zoning decisions subject to the police power limitations—and statutory policy will indicate wherein lies the public welfare that circumscribes the police power. The issues presented here arise from a coexistence of statute and ordinance rather than from a conflict between them.¹³⁷

136. For instance, what might be intolerable policy-wise in a crowded suburb of Newark may simply have no policy implications at all in a less settled area of the state. See *Fischer v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952). Of course, as Justice Hall indicated in the *Ho-Ho-Kus* case, some policy considerations may not depend on the external impact of an ordinance when the stated policy touches the lives of the residents of the municipality itself. 47 N.J. at 218, 220 A.2d at 101 (Justice Hall, concurring). There are limitations on how much the majority may demand of the minority even within the identical constituency.

137. It is admittedly often difficult to make the distinction on a case-by-case basis, and courts often talk in terms of both issues simultaneously. See note 128 *supra*. An excellent example is the opinion of the Pennsylvania supreme court in *School Dist. v. Zoning Bd. of Adjustment*, 417 Pa. 277, 207 A.2d 864 (1965). See note 104 *supra*.

The difficulty in distinguishing the pre-emptive situation from a statutory-policy consideration is also seen in *Town of Bloomfield v. New Jersey Highway Authority*, 18 N.J. 237, 113 A.2d 658 (1955). In that case the court found that a local enactment excluding state highway service areas from the municipality was invalid as not being in furtherance of the public welfare. Although there was a statutory grant to the highway department to construct highways through New Jersey and it could well be argued that service areas are a necessary incident of such highways, the court chose instead to read the statute as creating a policy in favor of such uses as promoting the public welfare:

The need for new highway construction has been expressly recognized by the Federal Government and the various states—the belief is widespread that the

Perhaps the most eloquent proponent for using statutory policies to define the general welfare was Justice Edwards in his minority opinion in *Certain-Teed Products Corporation v. Paris Township*.¹³⁸ In that case, plaintiff corporation discovered gypsum in Paris Township, Michigan, and sought from the township the rezoning of the area from residential to industrial so that it could construct a mining and manufacturing facility. The Michigan court was no doubt impressed with the external impact of the local decision: "Here we have no mere zoning case. Its impact without doubt will be felt for years to come in great areas of Michigan where zoning is as yet unknown."¹³⁹ While the majority was content to shift the burden of proof of public benefit to the municipality because of its concern for valuable mineral rights,¹⁴⁰ the minority, speaking through Justice Edwards, determined that the public affected by the ban on mining and manufacturing was the general public and that, for it, the relevant state statutes favored the development of such industries:

On the basis of evidence presented to us in this record, we believe that this potentially important mining and industrial operation can be conducted in Paris Township consistent with the zoning and development plan of the community. It is apparent that this is an industry which, if it is to exist anywhere, must exist here. We believe the public policy of the State is calculated to encourage both manufacturing and mining [statutory citations omitted]. In the administration of our zoning laws, while we seek to protect our homes, we must likewise take into account the public interest in the encouragement of full employment and vigorous industry.¹⁴¹

Thus, on balance, local interests were insufficient to outweigh state policies since those policies could not be compromised. As discussed below,¹⁴² courts have often taken judicial notice of such economic considerations as preserving valuable mineral rights, but in *Certain-Teed* the challenger was able to shift the burden by

need is very urgent and that we cannot afford to wait. . . . But these rights [of individual property owners], valuable as they are, must, in the public interest, give way to the greater good for the greater number

18 N.J. at 248, 113 A.2d at 664.

Thus, dominant policy considerations rather than preclusion of local regulation indicated that the public's interests lay in building highway service areas and that local ordinances attempting to exclude such uses would be constitutionally invalid rather than statutorily pre-empted.

138. 351 Mich. 434, 88 N.W.2d 705 (1958).

139. 351 Mich. at 467, 88 N.W.2d at 722.

140. See, e.g., *City of North Muskegon v. Miller*, 249 Mich. 52, 227 N.W. 743 (1929).

141. 351 Mich. at 464-65, 88 N.W.2d at 720-21.

142. See notes 144-59 *infra* and accompanying text.

reference to state statutory policies relevant to the general public that would have been affected by the prohibition. Obviously, a point of impasse is reached when states seek to encourage industrial development and local subdivisions seek to prohibit such uses under their delegated zoning powers. When a claimant can assert that because of external factors a local enactment is in derogation of a relevant statutory policy, the burden of going forward with proof of public benefit should shift to the zoning body. It is important to distinguish at this point between the effects upon the *public* concerned and the effects upon the *use* concerned. In order to make out a presumption-shifting prima facie case, a claimant should be required to show that the policy relevant to the public concerned will be thwarted vis-à-vis that public, not merely that a desirable use will be hindered. For instance, in *Southern Railway Company v. City of Richmond*,¹⁴³ the plaintiff railroad sought to expand its yard, which was located in a residential area. In challenging the reasonableness of the restrictive zoning ordinance, the railroad referred to its statutory duty to provide service to the public and asserted that the ordinance prohibiting its expansion would interfere with state policies favoring good public transportation. The court sustained the ordinance, holding that the railroad failed to show that the relevant public would be adversely affected. The fact that the railroad would be so affected was immaterial without a showing that the ordinance would impair its ability to provide public service. Under the interpretation of the Virginia court, the statute requiring railroads to serve the public was meant to benefit the public and not the railroads except to the extent that the two are coincident.

3. *Judicial Notice of Uses Favoring the Public Welfare*

Courts frequently react to a particular use by finding that it is so valuable or necessary for the well-being of the area that it will take judicial notice of the beneficial effects and require a zoning municipality to justify its decision to exclude or restrict the use. Again, these decisions identify the relevant public and balance the welfare of *that* public against the local interests at stake.¹⁴⁴

143. 205 Va. 699, 139 S.E.2d 82 (1964).

144. Again, it is important to distinguish those situations that involve the welfare of the municipal residents themselves and those in which the courts are moved by the external public affected by the use. Only this second category can be considered truly regional. For instance, in *Certain-Teed Products* (see text accompanying notes 138-41 *supra*), the exclusion of the use would have had a statewide impact and thus the public welfare at stake was that of the state as a whole. Similarly, in the present category of decisions the courts evidence an awareness of who will be affected by the local ordinance in assessing its relation to the public welfare. If a hospital serves two com-

The most common instances in which a judicial-notice approach has been applied to zoning cases have involved hospitals and sanitariums, which are of obvious importance to the public health and well-being. A municipality attempting to exclude hospitals must invariably overcome the initial judicial attitude that hospitals directly promote what zoning only indirectly promotes—the public welfare. In *Sisters of Bon Secours Hospital v. City of Grosse Pointe*,¹⁴⁵ the Michigan court of appeals verbalized the judicial attitude:

. . . not only is there no relation to the public health, safety, morals or general welfare of this community served by the passage of the ordinance in question [imposing height, area and parking requirements upon plaintiff hospital that would render it a nonconforming use and deny it its vital expansion] but . . . in effect the enforcement of this ordinance might have a serious adverse effect upon the public health of the defendant city and its neighboring communities.¹⁴⁶

Similarly, in *American University v. Prentiss*,¹⁴⁷ a federal district court struck down an ordinance that would have prohibited the construction of a hospital in conjunction with the nursing school at American University's Washington, D.C., campus. While commenting on both hospital and educational needs of the area, Judge Holtzoff took judicial notice of the shortage of hospital beds within the District of Columbia and the fact that Congress was making grants-in-aid to encourage new hospital construction. In weighing the local interest in excluding the hospital from a residential area, the court found that noise would not be a serious problem, that the streets were ample to handle the traffic, and that property in the vicinity would not depreciate to the extent claimed by the protesting home-owners. Thus, the community was unable to justify its restriction and in the balance the public health won out.

In an indirect fashion a New Jersey court in *Kunzler v. Hoffman*¹⁴⁸ likewise took judicial notice of the importance of hospitals

munities within the state, it is absurd to assess the reasonableness of its exclusion based on the needs of the entire state, of the region, or even of the metropolitan area for that matter. The proper criterion should be the welfare of the public involved in the exclusion. This analysis avoids many unnecessary intellectual dilemmas in those situations in which, for instance, there is state saturation but a local need, or vice versa. Moreover, if a court is to look to the availability of alternative sites, how far shall it look? In *Sisters of Bon Secours Hosp. v. City of Grosse Pointe*, 8 Mich. App. 342, 154 N.W.2d 644 (1967), the Michigan court of appeals noted that the hospital served not only the Grosse Pointe area but a large area of the adjoining city of Detroit as well.

145. 8 Mich. App. 342, 154 N.W.2d 644 (1967).

146. 8 Mich. App. at 351, 154 N.W.2d at 648-49.

147. 113 F. Supp. 389 (D.D.C. 1953).

148. 48 N.J. 277, 225 A.2d 321 (1966).

and sanitariums to the public welfare. In deciding that the grant of a variance to a hospital for emotionally disturbed persons did indeed promote the public welfare, the court took notice of the need for such institutions within the state.¹⁴⁹ The language of the opinion suggests that the New Jersey exclusionary-regionalism doctrine may at least be tempered when such beneficial uses are involved.¹⁵⁰

In other situations, courts have taken judicial notice of the public-welfare aspect of the need for schools and churches,¹⁵¹ of the need for parochial schools,¹⁵² and of the value of an airport to a metropolitan community.¹⁵³

Historically, natural resources have posed a unique problem for the courts since when resources are not taken where they are found, they are lost to the state forever. Thus, prohibiting the taking of minerals presents a question of statewide importance. In *City of North Muskegon v. Miller*,¹⁵⁴ the court invalidated a zoning ordinance that prohibited the taking of oil or gas within the city of Muskegon, Michigan, holding that the opportunity to exploit valuable mineral interests should not be cut off "unless serious consequences will flow [from not doing so]."¹⁵⁵ The Pennsylvania supreme court reached a similar result in *Exton Quarries, Incorporated v. West Whitehead Township*,¹⁵⁶ when it struck down an

149. The court pointed out that [t]here are only two such hospitals currently in operation in this state. It cannot be questioned, particularly in view of this need, that providing another such hospital for the treatment of mentally disturbed persons furthers the public welfare.

48 N.J. at 286, 225 A.2d at 326. One might well ponder the effect of a similar attitude toward low-income housing upon an ordinance such as was sustained in the *Lionshead* case. See text accompanying notes 52-53 *supra*.

150. Compare the *Kunzler* case with *Mitchell v. Deisch*, 179 Ark. 788, 795, 18 S.W.2d 364, 367 (1929) ("... a sanitarium is not only considered a beneficent institution but a public necessity...").

151. In *Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 350, 172 N.E.2d 39, 43 (1961), the court stated: "We judicially know that churches and schools promote the common welfare and the general public interest."

152. *Andrews v. Board of Adjustment*, 30 N.J. 245, 251, 152 A.2d 580, 583 (1959) (stating, in sustaining the grant of a variance, that "the education of children directly furthers the 'general welfare' cannot be questioned"). See also *Roman Catholic Diocese v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 220 A.2d 97 (1966).

153. *Stengel v. Crandon*, 156 Fla. 592, 599, 23 So. 2d 835, 838 (1945): "[airplanes] represent the latest means of transportation, and certainly if we are to progress, the establishment of airports to accommodate them should be encouraged."

154. 249 Mich. 52, 227 N.W. 743 (1929).

155. 249 Mich. at 57, 227 N.W. at 744. It should be noted, however, that the court's great solicitude for minerals vis-à-vis zoning did not prevent it from sustaining a non-zoning regulation that had the effect of prohibiting drilling within the city. 249 Mich. at 60-63, 227 N.W. at 745-46.

156. 425 Pa. 43, 228 A.2d 169 (1967).

ordinance that prohibited quarrying anywhere within the township because of the special consideration given to natural-resource deposits. In both *City of North Muskegon* and *Exton Quarries* the contestant made a prima facie case by showing the loss of valuable natural-resource deposits to the people of the state. The economic interests of the state naturally depend upon the particular state involved and the extent to which its economy depends upon the particular resource.¹⁵⁷ In any event, making valuable mineral deposits unavailable without some commensurate benefit to the public is properly a subject of judicial notice since the exploitation of minerals is usually relevant to the prosperity and welfare of the entire state.¹⁵⁸

This discussion of judicial notice of state policies is intended to suggest an approach rather than to be an exhaustive treatment of the special uses involved. The decisions indicate that many uses are capable of evoking similar judicial responses, so that the response, not the specific use, may be used in developing doctrine in this area. Courts may, and often do, take judicial notice of the public's interest in a particular use, at least when that interest appears on the face of the controversy. The judicially noticed policies may pertain to the external impact of the ordinance or to the residents of the zoning municipality. When the invocation of judicial notice is appropriate, the effect is to shift the burden to the municipality to demonstrate the local conditions that it deems to outweigh the obvious benefits of the use to the public at large. As a constitutional limitation upon the zoning power, the courts may require a weaker or stronger showing of local justification depending upon the nature of the benefit arising from the anticipated use. Indeed, later decisions indicate that when the showing is sufficiently strong, there

157. In *Town of Burlington v. Dunn*, 318 Mass. 216, 61 N.E.2d 243 (1945), the Massachusetts court sustained an ordinance that prohibited the taking of topsoil within the town. Resources, the court stated, are to be treated just like any other use of land. However, in *Midland Elec. Coal Corp. v. Knox County*, 1 Ill. 2d 200, 115 N.E.2d 275 (1953), the court invalidated an ordinance that would have prohibited the taking of coal. In distinguishing the *Burlington* case, the Illinois court found that "coal is not so plentiful as topsoil." 1 Ill. 2d at 218, 115 N.E.2d at 285. In order to destroy the more valuable mineral rights, a higher justification is required—meaning, no doubt, a stronger showing on the part of the municipality of the relation of the ordinance to the public welfare. In those states in which mineral extraction is more significant to the economy of the whole state, that required justification increases proportionately. See Wengert, *Resource Development and the Public Interest: A Challenge for Research*, 1 NAT. RES. J. 207 (1961); Note, 46 N.C. L. REV. 103, *supra* note 123.

158. See, e.g., *Cleveland Builders Supply Co. v. City of Garfield Heights*, 102 Ohio App. 69, 136 N.E.2d 105 (1956).

is virtually no limit on the use conditions that a municipality may impose on the individual property owner.¹⁵⁹

C. Operation of the Antipresumption

By referring to the state policies—constitutional, statutory, or judicially noticed—relevant to the public whose interests are at stake, the courts have a ready analytical tool with which to evaluate the reasonableness of a particular zoning ordinance. As indicated earlier,¹⁶⁰ it is an analytical position in which courts appear to feel relatively comfortable, and it is capable of fostering planning as well as providing a coherent basis for decisions.¹⁶¹

The practice of policy reference serves to isolate the issues in the dispute by requiring the municipality to bring forth its reasons for the enactment when the ordinance, on its face, seems to be contrary to the true public welfare. Typically, under a presumption of validity, the municipality need not come forward with its reasons for taking the particular action,¹⁶² and the most invidious motiva-

159. *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

160. See text accompanying notes 114-15 *supra*.

161. Such a process was envisioned by Justice Hall in his dissent in *Vickers v. Township Comm.*, 37 N.J. 232, 260, 181 A.2d 129, 141 (1962):

While it has long been conventional for courts to test the validity of local legislation by the criterion of whether a fairly debatable question is presented, and if so to sustain it, it makes all the difference in the world how a court deals with that criterion. Proper judicial review to me can be nothing less than an objective, realistic consideration of the setting—the evils or conditions sought to be remedied, a full and comparative appraisal of the public interest involved and the private rights affected, both from the local and broader aspects, and a thorough weighing of all factors, with government entitled to win if the scales are at least balanced or even a little less so. Of course, such a process involves judgment and the measurement can never be made mathematically exact. But that is what judges are for—to evaluate and protect all interests, including those of individuals and minorities, regardless of personal likes or views of wisdom, and not merely to rubber-stamp governmental action in a kind of judicial *laissez-faire*.

However, as has already been indicated (see text accompanying notes 50-51 *supra*), the New Jersey court has, at times, followed the logic espoused by Justice Hall in making just such an evaluation. It would seem that whenever a would-be user can convince the court of the value of its particular use the court undertakes just such an evaluation. The judicial machinery is available for such a process; when it will be used remains clouded in mystery.

162. The typical judicial inquiry centers on whether there is some evidence on which the legislature could have reasonably based its decision, so that it is not palpably arbitrary or capricious. See cases cited in note 5 *supra*. Perhaps the most illustrative case is *Rogowski v. City of Detroit*, 374 Mich. 408, 132 N.W.2d 16 (1965). A challenge was made to the action of the city's common council in adopting a fluoridation ordinance. The court took judicial notice of the availability of some evidence sustaining the beneficial effects of fluoridation (even though there was also a contrary body of knowledge) and thus granted summary judgment for the defendant. Citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1904), the Michigan supreme court, in affirming, held: "It is no part of the function of a court or a jury to determine which one of two

tion may be present without being articulated. It would appear that a requirement of articulation will expose local parochialism when it is contrary to the public interest and force local legislators to consider carefully their reasons for enacting an ordinance when larger public interests may be at stake. It is interesting to speculate about the effect of such a requirement in cases such as *Lionshead Lake, Incorporated v. Wayne Township*.¹⁶³ The additional problem with cases such as *Lionshead* is that the relevant state policies relate to basic social needs—such as housing—that are not embodied in a recognized institutional form. Therefore, these cases are less likely to be analyzed like a case involving a hospital or a public utility since the respective interests are not so easily brought before the court. On the other hand, under the procedure suggested in this Article, the institutionalization of the use is immaterial since if the would-be user can cite relevant public policy, he immediately puts his use under a cloak of prima facie protection. By showing a relevant public whose interests may be adversely affected, the contestant forces the municipality to make its showing of local benefit. The proposition, although not the theory behind it, is ably stated by Judge Keating in *Fulling v. Palumbo*:¹⁶⁴

. . . until it is demonstrated that some legitimate purpose will be served by restricting the use of petitioner's property, he has sufficient standing to challenge the ordinance. Once it is demonstrated that some legitimate public interest will be served by the restriction, then before the property owner can succeed in an attack upon the ordinance as applied, he must demonstrate that the hardship caused [constitutes a taking].¹⁶⁵

Similarly, a Florida court has used an antipresumption upon a

modes was likely to be the most effective for the protection of the public against disease." 374 Mich. at 420, 132 N.W.2d at 22. Thus in such a case, as is also true with zoning judgments, the legislature need only point to reasons upon which it could have based its decision, rather than explain on which factor it actually did so.

163. 10 N.J. 165, 89 A.2d 693 (1952). See text accompanying notes 52-53 *supra*.

164. 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967).

165. 21 N.Y.2d at 35, 233 N.E.2d at 274, 286 N.Y.S.2d at 253. In *Aucello v. Moylan*, 60 Misc. 2d 1094, 304 N.Y.S.2d 765 (Sup. Ct. 1969), a New York court went even further in interpreting *Fulling*:

. . . the showing by a property owner that he will suffer "significant economic injury" . . . or "severe financial loss" . . . by the application of an area standard ordinance is "sufficient to entitle him to relief" . . . , unless the municipality comes forward with proof that the standard is justified because "the public health, safety and welfare will be served by upholding the application of the standard" . . . and it is not until such a showing has been made that the property owner "must demonstrate that the hardship caused [by the application] amounts to a taking of his property"

60 Misc. 2d at 1098-99, 304 N.Y.S.2d at 769. But see *Gardner v. Downer*, 61 Misc. 2d 131, 305 N.Y.S.2d 252 (Sup. Ct., Spec. Term 1969).

showing that changed conditions in the neighborhood rendered an ordinance unreasonable.¹⁶⁶ Although one might argue that the triggering mechanism for the antipresumption should be some important state policy, the cases discussed above do indicate the relative ease with which the courts can require an affirmative showing by the zoning municipality under the proper circumstances.¹⁶⁷ There is no doubt room for experimentation with the basic premise but only to effect a meaningful balancing of local versus external (metropolitan) interests in those cases in which external interests are actually at stake.

The process outlined here does not mean that regional interests will prevail in every case nor that parochialism is dead and buried. What is intended is a universally applicable statement of principle by which courts may gauge those situations in which local or regional interests should prevail. As our metropolitan areas increase in size and complexity, relevant regional values should be injected into the zoning process as they become apparent, while those functions that localities may best perform and those that are immediately of great concern to the health, safety, or well-being of local citizens remain in local hands.

D. *The Balancing Process*

Once relevant external policies are before the court and the municipality has come forward with its justifications for the zoning ordinance, the court is in the familiar position of balancing external and internal considerations to determine which interests best promote the public health, safety, morals, or general welfare. "[T]he strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large, and in such instances the interests of the 'municipality would not be allowed to stand in the way.'"¹⁶⁸ Consequently, the owner of property will not have his rights limited except in the "public"

166. *Burrit v. Harris*, 172 S.2d 820 (Fla. 1965). In referring to the *Burrit* decision a Florida district court subsequently stated:

In its opinion the Supreme Court pointed out that the evidence failed to establish that the zoning restriction there in question bears substantially on the public health, morals, safety, or welfare of the community. By this holding the Supreme Court has created an innovation in the zoning law of Florida by casting on the zoning authority the burden of establishing by a preponderance of evidence that the zoning restrictions under attack "bear substantially on the public health, morals, safety or welfare of the community" if the ordinance is to be sustained. *Lawley v. Town of Golfview*, 174 S.2d 767, 770 (Fla. Dist. Ct. App. 1965).

167. See notes 164-66 *supra* and accompanying text.

168. *Simon v. Town of Needham*, 311 Mass. 560, 566, 42 N.E.2d 516, 519 (1942), quoting the statement from *Euclid* in text accompanying note 2 *supra*.

interest—and that public is not necessarily regional, metropolitan, or strictly local, but rather the public that is relevant to the consequences of the restriction in question.

1. *Policy Evaluation*

In determining the extent to which local requirements may outweigh metropolitan, regional, or state policies, the courts should consider whether those policies are inherently incapable of fruition by local action or whether local action may be wholly consistent with them. For instance, one may readily perceive a distinction between school building safety inspection¹⁶⁹—an essentially local interest—and the maintenance of highways¹⁷⁰ or public utilities¹⁷¹—regional or state interests. In attempting to draw some meaningful distinction in actual cases, four criteria are suggested for determining the “strength” of the relevant external policy in question.

First, is the policy one that is already being implemented at the state or regional level such that local intervention will only tend to interfere with its success?

Second, is the policy one dealing with a problem or use that is generally considered local in nature or is it one generally considered to be identified at a higher political level?

Third, has a solution to the problem to which the policy is relevant already been attempted unsuccessfully at the local level?

Fourth, is the policy in question one that by its very nature does not lend itself to local resolution because of physical, economic, or geographic limitations of the community?

In utilizing these criteria to assess the strength of the policy in question, it is important to remember that what is being considered is the weight to be given to one factor in a balancing process, not a limitation on local zoning powers. Obviously, a relevant policy that has a statewide impact should be given more weight in assessing the external public welfare than one that is in perfect harmony with local prerogative. Certainly one would expect, as has been the case in the special use situations referred to,¹⁷² that policies tending to have more external impact as suggested by the four criteria above should require a greater showing of local benefit to justify an encroachment on individual property rights.

169. *See* *School Dist. v. Zoning Bd. of Adjustment*, 417 Pa. 277, 207 A.2d 864 (1965).

170. *See* *Town of Bloomfield v. New Jersey Highway Authority*, 18 N.J. 237, 113 A.2d 658 (1955).

171. *Detroit Edison Co. v. City of Wixom*, 382 Mich. 673, 172 N.W.2d 382 (1968).

172. *See* text accompanying notes 105-07 *supra*.

2. *Local Values at Stake*

There is a generally recognized spectrum of local considerations that should weigh upon the balancing process.¹⁷³ Highest on the spectrum are considerations that affect local health or safety directly. Thus, local traffic problems, unsafe buildings, and similar problems strengthen any argument for sustaining local action. At the other end of the scale are factors such as social segregation, economic segregation, and aesthetics, which should have little persuasive value in sustaining the reasonableness of local action. It is interesting to contemplate a corollary of the *Euclid* caveat as it pertains to a municipality's reliance on economic values to justify excluding a socially beneficial use—that just as an individual must bear some economic hardship for the betterment of all, so too must the municipality, which is after all a collection of private persons. In response to a municipality's attempt to exclude a church and school, the Indiana supreme court stated:

In the *Euclid* Case . . . it was specifically shown that the restrictions destroyed part of the value of the owner's property, yet the showing was made that the restrictions . . . were for the general welfare, safety and health. It would seem that the contrary would also be true—that if a use is shown to be without question for the good of the public and general welfare, that no owner of private property adjacent or in the neighborhood, could complain because the value of his property might be thereby depreciated to some extent, since the purpose of the zoning laws is not to protect private, personal interests, but rather to protect and promote general public interest.¹⁷⁴

In the middle of the scale are values such as “preserving the character of the neighborhood.” Considerations such as light, air, traffic, fire prevention, amenities, and the like are no doubt legitimate considerations in the abstract, but their relative value may diminish greatly when confronted by broader external policies. The assessment of these values must proceed from an articulated basis of what is at stake in the particular case and a realistic view of

173. See, e.g., Comment, *Government Control of Land: Protecting the I-Know-It-When-I-See-It Interest*, 62 Nw. U. L. REV. 428, 436 (1967), wherein the author suggests such a spectrum of factors to be employed in assessing the reasonableness of a zoning regulation.

174. *Board of Zoning Appeals v. Schulte*, 241 Ind. 339, 349, 172 N.E.2d 39, 43 (1961). See also *Consolidated Edison Co. v. Village of Briarcliff Manor*, 208 Misc. 295, 144 N.Y.S.2d 379 (Sup. Ct., Spec. Term 1955). In defending a challenge to a zoning ordinance the municipality is often heard to assert this argument on behalf of its constituents. See *American University v. Prentiss*, 113 F. Supp. 389 (D.D.C. 1953). The logic of the *Schulte* case would seem to be of equal force regardless of who is making the argument, the individual property owners or the municipality itself.

the harm that probably will befall the community if its ordinance is struck down.¹⁷⁵

3. *Geographic Considerations*

Geographic considerations are probably among the most difficult factors to delineate with any exactness. It is, nonetheless, important to consider the geographic character of the area as it pertains to the relevant public. If a particular use is to serve a public consisting of a core city and a suburb, for instance, the geographic configuration of this particular area should be considered in assessing the reasonableness of the local action. As has been discussed above,¹⁷⁶ the availability of alternative sites within this relevant area tends to foster exclusionary practices, as well as the possibility of intermunicipal retaliation. Moreover, geographic factors tend to be an inexact guide for extrapolating relevant policy considerations; institutionalizing them in an alternative-availability doctrine would be pushing a theoretical tool to its practical illogic. But courts should be ready to consider the converse of the availability approach—that is, they should favor a beneficial use when there are no other available sites within the relevant area.

4. *Reference to the Regional Plan*

Finally, the courts should give due deference to a showing by the municipality that its ordinance is based upon, and is in furtherance of, the regional plan, if one exists. Obviously, municipal-

175. Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720, 733-34 (1962) suggests a distinction between unusual detriment to the community and ordinary detriment:

. . . *unusual detriment*—those undesirable effects which would result from the interaction of the use with unique environmental conditions in the neighborhood where it proposes to locate—and *customary detriment*—those undesirable effects which invariably attend the presence of churches, hospitals, schools and the like. Courts disregard the customary detriment which attends the presence of such institutions in the community on the grounds that this detriment is merely an inevitable social cost of the highly valued and indispensable services which they render. So long as some neighborhood or community must bear this detriment, no single community is entitled to rid itself of the burden by simply shifting it to another. However, if a showing of unusual detriment is made by the community, the exclusionary provision may be sustained.

Although this distinction seems very appealing in the abstract, it does beg the question in most cases. No two institutions or communities are the same and in each case, no doubt, a parade of horrors could be conjured up that would be peculiar to the particular community: traffic problems, financial structure, relation with other communities, topography, and the like. Offering a "yes or no" solution only portends the same problems currently facing the courts—that is, the invocations become handy labels for deciding cases the way a judge thinks they should be decided but without offering any lasting doctrinaire guidance. It would be more helpful to constructive thinking to isolate a spectrum of considerations rather than to provide so handy a category for justifying exclusion.

176. See notes 65, 80-82, & 86 *supra* and accompanying text.

ities should be encouraged to consult the plan on a voluntary basis, and to the extent permissible under the facts of a given case, they should be given credit for having done so.¹⁷⁷ Thus, the plan "is a point of view which should be introduced in a courtroom when a particular measure is being assayed."¹⁷⁸

If the plan is to be given weight in this process, however, the court should require the zoning municipality to rely on more than a single provision of the plan. The favored conduct is not *subsequent* reference to the plan to attempt to justify what has been done, but rather the municipality's looking to the plan as a sort of "impermanant constitution"¹⁷⁹ governing its growth and the growth of the region in which it is located. Therefore, the zoning body should be required to show a *pattern* of reference to the plan as a matter of internal procedure in order to have the factor weighed in the balancing process. Upon such a showing the court may at least be assured that the ordinance and the plan are not related merely by coincidence. One should at least expect some evidence that the regional plan entered into the deliberations of the local legislative body and that the affected owner was notified that the local legislature was zoning by reference to the plan. The courts must also take notice of the extent to which the plan has been updated, the sorts of functions it purports to perform, and the general acceptance of the plan among the communities in the region.

IV. CONCLUSION

As the introductory remarks to this Article indicated, what is portrayed here is an approach to regional land-use problems, rather than a definitive solution. The cases are of infinite variety, and vir-

177. Such reference would seem to connote an element of forethought and design. See Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). While the actual bearing on the particular case may be of greater or lesser import, the social utility gained by encouraging the action should certainly find its way into the judicial considerations.

In ALI MODEL LAND DEVELOPMENT CODE xxxvi (Tent. Draft No. 1, 1968), the American Law Institute suggests: "Thus one method of inducing local communities to plan will be to give more protection to an ordinance or administrative order of a community which has a plan."

178. Haar, *The Master Plan: An Impermanant Constitution*, 20 LAW & CONTEMP. PROB. 353, 376 (1955). Professor Haar points out that there is little real hope for any greater relation between planning and zoning:

[T]his seems the limited function to which the master plan can withdraw in order to perform most effectively in the grand effort to improve American cities: A reminder of the myriad of activities affecting land, their inter-relation, their long-run effects which the day-to-day administrator is too busy to consider.

Id. at 375-76.

179. See *id.*

tually unlimited combinations of factors must be considered. Therefore, what is suggested is an approach that hopefully will accomplish what present dogma has failed to accomplish—the development of a rational and coherent theory of police power limitations on local zoning. Whether by design or default, the problem of land-use mediation in metropolitan areas will continue for some indefinite time to be a matter of judicial concern. There is good reason to argue that this is exactly as it should be; that the judiciary is capable, in its role as constitutional overseer, of achieving a more flexible and rational solution than can be achieved by legislation. Through a balancing process such as is suggested, courts can resolve cases while paying particular regard to metropolitan and regional, as well as local, conditions.

The approach suggested in this Article, while not definitive by any means, does offer a rational mechanism for reaching the best decision in each case. It envisions a uniform statement of doctrine to guide local actions prospectively. Furthermore, decisions will be articulated, balancing local against relevant external interests. Through this articulation and balancing, the suggested approach offers to the judiciary the opportunity to formulate doctrine in those cases in which it is demonstrated that larger interests may be at stake. This is not to say that the local decision will never be upheld¹⁸⁰—rather, that we should know why it is when it is. We need to know, in the constitutional sense, when it is that “the municipality [will] not be allowed to stand in the way.”¹⁸¹

180. See B. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 100 (1961):

It is not suggested here that an absolute prohibition should attach to all ordinances which have the effect of segregating with reference to economic means. Some *social goal* of the whole metropolitan area must be shown to require such segregation, however; the preservation of local property interests is not sufficient. [Emphasis added.]

Likewise what is here suggested is the maximum amount of local prerogative consistent with metropolitan or regional or statewide interests.

181. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).