How Sweet It Is:
Regionalism in the Jurisprudence of Local Zoning Home Rule

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> ***The axis of the earth sticks out visibly through the center of each and every town or city.***[1/]
>
> -- Oliver Wendell Holmes

I. Introduction.

On the popular NBC "*Today Show*," weather personality Willard Scott periodically materializes on camera to continue his long-standing and endearing tradition of celebrating the birthdays for people across the country who achieve the incredible milestone of living beyond 100 years. If he ever becomes so inclined, Willard will need to wait another decade or so – as of this writing – before he can say "*how sweet it is*" to cheer the centennial anniversary of the first state zoning enactment or the comprehensive local ordinance that followed shortly on its enabling heels.

The regulation of private land use in the United States is still a relatively new phenomenon. The Assembly of New York enacted the first state-wide legislation to enable local zoning in 1917.[2/] But only nine years later, marked in 1926 with the

watershed decision in *Village of Euclid v. Ambler Realty Co.*,[3/] more than half the nation's urban population lived within a local zoning jurisdiction, exercised then by 425 municipalities drunken with the fresh new authority enabled under laws enacted in 19 states, all of which was egged-on vigorously by the U.S. Department of Commerce.[4/] With such a popular political sea change accomplished in such short order, it is an interesting folly to imagine how the bell might have been "un-rung," even then, if the Supreme Court had come down in *Euclid* differently.

Of course, with the *Euclid* decision, the Supreme Court pronounced as enduring law of the land that principles of due process afford enough latitude for states to delegate the police power in favor of their political subdivisions to enable the local regulation of private property aimed toward the sovereign interests in health, safety, and general welfare.[5/] Thus, American legislators, jurists, and administrators worked as a well-oiled machine to successfully hitch the bandwagon of land use regulation to the team of local home rule, and there seems to be no end in sight to the parade they started.

This paper is the second in a series that aspires to explore the palpable tension between the entrenched American values that favor local "home town" rule and the pragmatic need to incorporate inter-jurisdictional and regional considerations in order to deliver effective community planning and zoning. In the first installment, *Erasing Local Lines in the Sand*,[6/] the spotlight was cast toward a handful of regional government entities in an effort to showcase how they function on a tightrope, straining to balance parochial desires against a broader territorial vision under the big tent of political observation and contention. This paper surveys the jurisprudence of local land use regulation in geographical areas where regional government regulators do not exist, a

body of common law evolving even now as courts are called upon to referee disputes among parties with interests situated beyond the relevant county or municipal boundary.

With the growth in regional planning initiatives prompted in large measure by Federal environmental regulations and transportation funding, there should be no serious quibble – at least none pronounced in empirical terms – with the notion that land use policies implemented in one jurisdiction carry the potential to have an abiding impact on the citizens of another. Land use policies influence tangible everyday experiences in housing, traffic, demand for mass transit, school enrollment, open space and parks, and emergency assistance; core qualities of life in every urban and suburban American community. But even as planning and zoning agencies chart policies, plans and ordinances to implement the public ambition of every county and municipal electorate, their neighbors in most contiguous and nearby jurisdictions have little say in the matter, even when those implementing acts have direct consequences as a result of a regional economic engine that is shared across municipal or county lines.

II. A Famous Caveat to Local Home Rule: Regionalism in *Euclid*.

Among several avenues of attack, the appellee-developer fighting against the local ordinance in *Euclid* invites the Supreme Court to consider the village zoning map within a much larger context circumscribed by the entire metropolitan region growing then by leaps and bounds around Cleveland. The Court recounts the argument as follows:[7/]

> **It is said that the village of Euclid is a mere suburb of the city of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village, and in the obvious course of things will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere, with the consequent loss of increased values to the owners of the lands within the village borders.**

But this invitation is rejected neatly in the main, swept away by a theory of deference to municipal home rule espoused *a fortiori*, though without statutory elaboration. Justice Sutherland writes:[8/]

> **But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public, if left alone, to another course where such injury will be obviated.**

Nevertheless, an important crumb does escape the broad stroke. Justice Sutherland foretells circumstances where home rule might not prevail, as the opinion follows on:[9/]

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

(Emphasis added.)

Thus, rooted deeply within the fertile soil of American land use law, this dicta expressed the Supreme Court's lucid reservations about the customary esteem bestowed upon local home rule in zoning. On its own terms, the *Euclid* decision contemplates a balancing of a broader "general" interest – a regional interest – against the specific interests advanced by a municipality in the regulation of land use. What is less clear, however, is exactly how the Court thought this balancing act should proceed.

In order to constitute a valid legislative exercise of the police powers conferred under the Constitution, the law is settled that a state, county or municipal agency is normally required only to muster some rational basis; the selected means must be

reasonably related to appropriate ends.[10/] Even if other means to accomplish the same result are readily apparent, courts are extremely reluctant to disturb local decisions, so long as the approach or solution adopted by the local jurisdiction can be characterized as "fairly debatable" or, conversely, so long as it is not "arbitrary, capricious or unreasonable."[11/] The *Euclid* decision follows in lock-step a comparable formulation of the so-called "rational basis test."[12/]

As recited above, however, Justice Sutherland's regionalist caveat leaves open the chance that local regulators of land use might flunk the rational basis test required to survive a constitutional course. Whatever else may be open to sensible question, the opinion clearly draws some distinction between municipal interests, on the one hand, and the "general public interest," on the other. Beyond that, however, the dicta contemplates only that a valid zoning regulation may sometimes require a deliberate balance between the two.

Based on this reading, one obvious pitfall that a local jurisdiction might suffer would follow enacting a regime of land use regulation that completely ignores what Sutherland calls the "general public interest." On a theoretical level, that mistake should be a fatal one because, after all, any absolute failure to weigh the general public interest seems like the epitome of taking action that is irrational, capricious or arbitrary at least. Still another miscue that should prove fatal under the analysis prescribed in *Euclid* is for the local jurisdiction to adopt zoning and land use regulations with an intention to frustrate the general public interest. Finally, a county or municipality that endeavors in good faith to weigh its own jurisdictional interests against the general public interest might just get it wrong.

The balance of this paper surveys a handful of cases that take up the caveat of regionalism expressed as an afterthought under *Euclid.* For the most part, this trail has been blazed by state, not Federal courts. The disputes involved sometimes pit neighbors against developers; churches, affordable housing advocates and developers against municipalities; and even municipalities against each other. What these cases all share, however, is the integral recognition that regional concerns can matter when courts are launched into an expedition to test the rational basis of land use regulations against the various constitutional principles with which those regulations are compelled to comply. Indeed, it is a challenge for the bench to make out a regional forest among so many local trees.

III. The Jurisprudence of Regionalism.

[a] The Early Years. After World War II with "V-J Day" on September 2, 1945, American servicemen and service women poured back over the Atlantic and Pacific to accept all the spoils of civilian life, and the suburban areas of most metropolitan centers began to swell. Major metropolitan areas in New Jersey and Pennsylvania were hardly immune to the advent of this sprawl, and their courts enjoyed the first opportunities to consider the regional impact of local land use decisions.

[1] The Duffcon Concrete Case (1949). Builders need concrete in order to build almost anything in most areas of the country. In 1946, Duffcon Concrete Products, Inc., set up a facility to manufacture pre-cast concrete panels in the northern New Jersey Borough of Cresskill, then a "small residential community in Bergen County, comprising about 1,300 acres [populated by] approximately 2,300 persons…"[13/] The Borough had adopted a zoning ordinance in 1941 and, while it allowed a limited number of light

industrial or manufacturing uses in areas assigned to the one commercial zoning district, effectively, the ordinance totally excluded any heavy industrial activities within the municipal boundaries. After operating the concrete business within the designated commercial zone for about six weeks without seeking Borough approval, Duffcon eventually applied for a variance and won a recommendation of approval by the local board of adjustments after revising the facility plans. The mayor and council of Cresskill rejected the board's recommendation, and Duffcon appealed.

In *Duffcon Concrete v. Borough of Cresskill*,[14/] the Supreme Court of New Jersey considered whether the enabling statute that expressly authorized the state's municipal jurisdictions to *regulate* industrial land uses should also extend to enable "regulation" by means of their total exclusion. The Court upholds the Borough's "stringent" zoning ordinance, basically finding that the statute does not affirmatively compel the Borough to accept every sort of industrial use within its boundary, and that much better locations for a concrete plant are available in other areas of the region. The Court writes:[15]

> **What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to be governed by such artificial lines. Changes in methods of transportation as well as in living conditions have served only to accentuate the unreality in dealing with zoning problems on the basis of the territorial limits of a municipality, improved highways and new transportation facilities have made possible the concentration of industry at places best suited to its developments to a degree not contemplated in the earlier stages of zoning.**
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> *** * * ***
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> **In the present cause the Court will take notice not only of the residential character of the Borough of Cresskill and the suitability of its location for such development, situated as it is on the western slope of the Palisades, but also of the availability and use of the extensive**

bottom lands of the Hackensack River Valley within the region for industrial purposes…

(Emphasis added).

Duffcon Concrete certainly could be taken to stand for the proposition that local home rule in New Jersey zoning also implies the authority to exclude certain uses as part of a rational regulatory scheme. At the same time, however, perhaps the more compelling point of this analysis lies in the fact that the Court uses a telescope rather than a microscope to evaluate the Borough's rational basis. In fact, the holding seems more limited when you consider that it does not rest on the theory or ethos of home rule; but rather, it is inextricably tied to a certain factual predicate that is only established by reference to the region at issue.

[2] Dumont: The Case of Battling Boroughs (1954).[16/] Even as the judicial ink was hardly dry on *Duffcon Concrete* opinion, in the waning days of 1952, the New Jersey Borough of Dumont was busy fashioning some major changes for the area within its borders designated as "Block 197." After three or four years of study and a favorable recommendation by the Borough's planning board, the governing body approved a zoning map amendment that would change the property from a residential zone to a business district. The only real problem with this plan was a strenuous objection voiced in unison by three other jurisdictions sharing municipal borders with Dumont; the Borough of Haworth, and the Boroughs of Cresskill and Demarest, municipalities situated – literally – just across the street from Dumont's Block 197.

After the municipal trio raised their objection to Dumont's plan for rezoning, and their song was promptly ignored by the governing body presiding, the three neighboring jurisdictions sought judicial relief in an effort to overturn the change in zoning. The trial

court struck-down the rezoning, holding that it did not promote the "general welfare" after taking the surrounding jurisdictions into account, and Dumont promptly registered its appeal of the lower court decision. In *Borough of Cresskill v. Borough of Dumont*,[17] the New Jersey Supreme Court is tossed again into the abyss of regional land use analysis without the benefit of meaningful state or Federal guidance.

No doubt relying on comfortable implications of its legal success in defeating the *Duffcon* concrete plant, Cresskill openly assaults the regional impact of bordering a business district. The Court takes in this argument as follows:[18]

> **The first complaint [made by the neighboring municipalities] in effect charges that the amendatory ordinance is not in accordance with the comprehensive zoning plans in effect in the boroughs of Cresskill, Demarest, Dumont and Haworth in that it fails to take into consideration the physical, economic, and social conditions prevailing throughout the entire area of those four municipalities and the use to which the land in that region can and may be put most advantageously, and that regard was given solely to the political boundaries of the Borough of Dumont in utter disregard of the contiguous residential areas of the plaintiff boroughs.**

In scoring its counterpoint, Dumont claims that the trial court erred by considering properties in the adjoining municipalities at all, urging to the contrary "that only property lying within the borough itself is to be taken into consideration by [Dumont] authorities in their zoning."[19]

Since it is so unusual for an American court to ascribe the word "fetish" to an arguable school of political or legal theory, the Court's emphatic rejection of the argument marshaled by Dumont can only be chalked up among the truly remarkable moments in our legal history. Writing for the Court after a survey of relevant state constitutional provisions and enabling statutes, Chief Justice Vanderbilt says:[20]

> **The appellant [Dumont] spells out from the language of these constitutional and statutory provisions that the responsibility of a municipality for zoning halts at the municipal boundary lines without regard to the effect of its zoning ordinances on adjoining and nearby land outside the municipality. Such 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 [delineating Dumont, Cresskill and Demarest] and Massachusetts Avenue [delineating Dumont and Haworth] are not Chinese walls separating Dumont from the adjoining boroughs. At the very least Dumont owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of Dumont. To do less would be to make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning. There is no merit to the defendant's [Dumont] contention.**

(Emphasis added).

Thus, in one quick stroke of the pen, Justice Vanderbilt has forever associated the term "fetish" with the parochial regulation of land use. (Indeed, this same "fetish passage" is repeated in a number of cases taken up later by appellate courts in New Jersey and across the nation.) Even so, and notwithstanding the Court's resounding rebuke of Dumont's attempt to confine the scope of relevant inquiry to the area within its boundaries, *Cresskill v. Dumont* ultimately turns on other grounds. Instead of holding that Dumont failed to account for regional impact, the Court dismantles the Borough's rezoning after finding it a case of illegal spot zoning, motivated to further private development interests and, therefore, holding that it does not comport with the requirement of a comprehensive land use plan.[21/] In this case, as in *Euclid*, all the fireworks of regionalism are spent in the daylight of dicta.

[c] The Valley View Case (1955).[22/] Acting pursuant to state enabling legislation codified in the Ohio General Code, the Valley View Village Council adopted in 1932 a zoning ordinance to regulate land use within the unincorporated area situated about eight miles southeast of Cleveland. The predominant feature of the zoning map is that it assigned the village's entire land mass to the "U-1" district, thereby restricting uses

throughout the village to single-family dwellings, churches, schools, along with "social, recreational and welfare uses," whatever that was intended to mean.

In 1950, Grace and Henry Proffett contracted to allow the mining of sand and gravel by the Schmidt Brothers for a five-year term on a property in the village consisting of 44 acres. The Schmidt Brothers extracted sand and gravel from the land owned by the Proffetts pursuant to an "oral permit" granted by the village that "expired" in 1952 and, later that year, the village officials shut the mining operation down. The Proffetts sued in Federal district court to enjoin the Village from enforcing a zoning ordinance they alleged to be void. After the lower court granted a permanent injunction, the Village appealed to the 6th Circuit, prompting a rare excursion by the Federal courts into the muck remaining behind in the wake of the *Euclid* decision.

The appeals court embarks upon a journey in doctrine that looks much like a negative of the photograph produced by the New Jersey court in *Duffcon Concrete*. The principal issue, in its view, was whether the authority enabling zoning on a district-by-district basis necessarily requires establishing more than one zoning district. In other words, the question taken up by the Circuit Court is not whether a particular use can be entirely excluded, but whether the enabling authority allows a municipal jurisdiction to exclude almost every use other than residential ones.

After reading relevant provisions in the state constitutional and enabling laws, and of course touching-base with the common law presumption of validity for legislative decisions, the Circuit Court concludes that nothing in them expressly obligates a municipal jurisdiction to establish more than one zone. And without citing any persuasive authority, the Circuit Court muses that regional considerations might prompt

valid municipal "one-use" zones under a rational basis analysis. The opinion carries on:[23/]

> **Traditional concepts of zoning envision a municipality as a self-contained community with its own residential, business and industrial areas. 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. We cannot conclude as a matter of law that an ordinance which places all of the area of such a village into a residential district is per se arbitrary and unreasonable, with no substantial relation to the public health, safety, morals or general welfare. It would appear contrary to the very purposes of municipal planning to require a village such as Valley View to designate some of its area for business or industrial purposes without regard to the public need for business or industrial uses. 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. We think that it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large.**

In the end, the Circuit Court in *Valley View* decides only that the Village zoning ordinance is not arbitrary or capricious on its face. So the appeals court remands the case, back to the Federal district court, to consider whether the ordinance violates the rule of reason required by due process "as applied" to the property owned by the Proffetts and mined by the Schmidt Brothers. Along the way, however, the court certainly wandered into the same regional calculus that tips the scales of doctrine toward the opposite result in *Euclid*.

[d] The Vickers Case (1962).[24/] In September of 1957, the New Jersey township of Gloucester adopted a new ordinance to regulate the location of trailer homes and parks. Before then, a 1947 ordinance barred trailer camps in the entire Township, but the subject of trailer homes was not specifically addressed – apparently missed – when the Township adopted a brand new, supposedly comprehensive zoning ordinance in July of 1957; that is, just two months before the new trailer regulations were promulgated in

September. With adoption in September of the special trailer regulations, the Township effectively prohibited trailers except in districts zoned for industrial use.

In November of 1957, Harold Vickers purchased a ten-acre parcel of land located in the Township's industrial district. In August of 1959, he applied for permit to operate a trailer camp on that property and, while the application was pending, he purchased another ten acres of property zoned for industrial uses located on the opposite side of the road fronting his initial purchase. When the Township denied his permit application in December of that year, Vickers sued almost immediately and the case went to trial in March of 1960.

Apparently, during the trial, Vickers realized that his plans for a trailer camp did not comply with state health standards, so he sought leave of the court to revise his plans and amend his permit application, and this was apparently allowed by the court without prejudice to his claim. Just two weeks after the trial, on April Fools' Day of 1960, Vickers submitted his revised application and plans to the Township Committee meeting and learned, at the same meeting, about a legislative proposal to change the zoning ordinance so as to absolutely prohibit trailer camps (again) from the municipal boundaries. The town passed the moratorium on trailer camps with lightning speed, and without approval of Vickers' revised permit application, so a second lawsuit was promptly filed in May and the trial followed in June of 1960.

The trial court sustained the Township's moratorium, and the intermediate state appeals court reversed; so after an eight-year vacation from the extra-territorial dimensions of local home rule in land use considered in the *Dumont* case, the New Jersey Supreme Court is asked to reexamine a local ordinance through the regional looking

glass. After ascribing a valid basis in the rational purpose of preserving the Township's rustic residential character, and recognizing that trailer camps present relatively more density and traffic congestion than would be expected with development of single-family homes, the New Jersey Supreme Court ultimately comes down in favor of the town's trailer moratorium.

But the Court's majority opinion does not go forward without a vigorous dissent, a dissent that forebodes the shape of things to come on that state bench. In a salient critique of the majority's ruling on Vickers' trailer park, Justice Hall wrote:[25/]

> **The majority decides that this particular municipality may constitutionally say, through exercise of the zoning power, that its residents may not live in trailers--or in mobile homes, to use a more descriptive term. I am convinced such a conclusion in this case is manifestly wrong… The import of the holding gives almost boundless freedom to developing municipalities to erect exclusionary walls on their boundaries, according to local whim or selfish desire, and to use the zoning power for aims beyond its legitimate purposes. Prohibition of mobile home parks, although an important issue in itself, becomes, in this larger aspect, somewhat a symbol.**
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> **The instant case, both in its physical setting and in the issues raised, is typical of land use controversies now current in so many New Jersey municipalities on the outer ring of the built up urban and suburban areas. These are municipalities with relatively few people and a lot of open space, but in the throes, or soon to be reached by the inevitable tide, of industrial and commercial decentralization and mass population migration from the already densely settled central cores. They are not small, homogeneous communities with permanent character already established, like the settled suburbs surrounding the cities in which planning and zoning may properly be geared around things as they are and as they will pretty much continue to be. On the contrary these areas are sprawling, heterogeneous governmental units, mostly townships, each really amounting to a region of considerable size in itself. There present rural, semi-rural or mixed nature is about to change substantially and they are soon to become melded into the whole metropolitan area. Their political boundaries are artificial and hence of relatively little significance beyond defining one unit of local government. Their existing conglomeration of land uses is sectionally distributed--large or small scale agriculture, residences in separated communities and on good sized plots or acreage in the open country, business establishments in the populated sectors and along through highways, and perhaps a spot or two of industry much sought after to aid municipal tax revenues. Many differing land uses, both present and future, are and can be made comfortably compatible by reason of the distances involved and the varying characteristics of geographical sections. Present municipal services are not more extensive than necessary to serve a population scattered over a large territory. Increased facilities, especially schools, required to accommodate a sudden population growth of large proportions must be provided almost solely at local expense, which in New Jersey means from additional taxation on real estate within the municipal boundaries. And it is elementary knowledge that small homes with children to be educated in local schools cannot pay their own way tax-wise.**

> **Such municipalities, above all others, vitally need and may legally exercise comprehensive planning and implementing zoning techniques to avoid present haphazard development which can only bring future grief. They are entitled to aim thereby for a sound and balanced area, with varying uses confined to specified districts and appropriately regulated. They may even limit the pace of growth to coincide with the availability of the necessary additional facilities and services so as to minimize growing pains… They do not have to permit an Oklahoma land rush or a western boom town. They need not allow every land use wherever someone wants to put it or the property is suitable and, in accordance with a comprehensive plan, may reasonably restrict districts to a particular future use even though another use would be equally suitable. <u>They would be well advised to plan with adjoining communities, especially for joint public services and facilities. Intercommunity planning is also best able to accommodate those categories of uses that ought not be excluded everywhere, but which may be more desirably located in one municipality rather than another. Unfortunately, our statutory provisions for voluntary regional planning boards… have been little used, if at all.</u>**
>
> **And this gets to the nub of what this, and similar cases, are really all about, i.e., the outer limit of the zoning power to be enjoyed by these municipalities most in need of comprehensive authority. What action is not legitimately encompassed by that power and what is the proper role of courts in reviewing its exercise?**

(Emphasis added and citations omitted).

In assailing a discrete zoning decision that he perceives as "exclusionary," Justice Hall blows a whistle on the regional impact of the course of action undertaken by the Township of Gloucester. In the mean time, he also complains openly that a doctrine of judicial deference to decisions made under a cloak of local home rule, arguing the bench is collectively turning a blind-eye to a mischief he sees so plainly in the daylight. In this compelling dissent, he certainly makes good enough sense to be taken up in the next cases.

[e] <u>The Ho-Ho-Kus Cases (1964-1966)</u>.[26/] In 1960, the New Jersey Borough of Ho-Ho-Kus comprised 1.76 square miles of mostly residential area inhabited by just less than 4,000 residents. Approximately one-half of the Borough's foot-print was assigned to the R-1 residential district, then the least dense and most rigorous of all four residential zones included within the municipal boundaries. Even so, in October of 1960, operation of a high school was included among the permitted uses in the R-1

district, and the Catholic Church based in Newark purchased a 20-acre parcel located within the R-1 zone precisely for that purpose. But the Borough amended its zoning ordinance to prohibit a high school in the R-1 zone, leaving the use as a permissible one in its other three residential zones.

The state trial court invalidated the zoning amendment twice; first, holding that the municipal authority to regulate the land use of private schools but not public ones was discriminatory and, later, that the amendment prohibiting high schools was unreasonable and arbitrary as applied to the particular parcel owned by the Church. The New Jersey Supreme Court rejected the lower court's reasoning on both counts. Contrary to the legal assumption made by the trial court, after wading through the relevant state statutes, the State Supreme Court decided that zoning regulations adopted by municipal jurisdictions in New Jersey did apply to public schools, but that the question of whether a public or private school was an appropriate use of a particular piece of land was the proper subject of an administrative request for a variance or special exception – not a challenge to invalidate the zoning itself.

Although the trial court found as a matter of fact that Ho-Ho-Kus did not enact the zoning amendment in an effort to conserve property taxes otherwise lost to ownership by a tax-exempt charity, Justice Hall contemplates the effect of tax exemption for a regional high school when the burden of foregone revenue is borne alone by one municipal jurisdiction. Writing in a separate opinion to reluctantly concur with the Court's treatment of the case, he observes:[27/]

> **This litigation actually involves the perplexing problem of the permissible extent of local land use control of regional, tax-exempt institutions--be they private schools of religious or secular sponsorship educating children from more than one municipality, or other beneficial non-governmental educational, religious, charitable, hospital and like institutions the**

services of which transcend local boundaries.

In treating this problem, the primary frame of reference is that under present law planning and zoning regulation in New Jersey must be confined within municipal lines and each municipality may legislate with substantially no regard for the over-all area of which it is a part. The second frame of reference, well illustrated in this case, is that such facilities necessarily increase in size and number with the density of population and require sizeable tracts of land. In such areas lands at all adequate for facilities of this kind are scarce and becoming more so. They generally do not belong in commercial or industrial areas and suitable sites are likely to be found only in sections already zoned for residential use. Moreover, the availability of appropriate land is even more restricted by the absence of the power of eminent domain. On the other hand, there can be no doubt that such institutions have a physical impact on a residential neighborhood which can be unduly dissonant unless buffers and other conditions are imposed. It is equally true that in almost every case they cost the municipal taxpayer some money because they usually create a need for additional governmental installations and services without any return in the form of taxes. Furthermore, local residents frequently share in the benefits of the institutions only to a limited extent and sometimes not at all.

I fear that so far we have come up with little of a constructive nature by way of answer to this basic question and that, as far as the parties in interest in this case are concerned, after five years of litigation we have succeeded only in marching them up hills and down again, with more of the same in prospect.

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My conviction is that, while a municipality cannot be required to permit tax-exempt institutions at any location without conditions or restrictions, it also may not exclude them from any zone by unqualified prohibition. Rather such institutions should have the right to locate on any appropriate site where the physical impact of their operations can be alleviated to a reasonable extent by the imposition of suitable conditions and restrictions. I have in mind, for example, a tract so situated and large enough to accommodate the projected functions and activities as well as motor vehicle traffic and parking in order that considerable insulation will thereby be created for the benefit of immediate neighbors, together with such additional buffers and restrictions as are needed. In addition, the exterior structural design should not be completely out of keeping with the district, as would be the case of a ten-story building in a high-class one-family area.

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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 (which seems to be the principal reason for Ho-Ho-Kus' antipathy to plaintiff's school) 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.

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> **Municipalities greatly prize the New Jersey system of substantial home rule. But it should encompass responsibilities as well as rights and they should not be heard to object that they must take some of the bitter with the sweet when the public good thereby advanced necessarily transcends municipal boundaries. That the particular institution which circumstance brings into the community may cost some additional tax moneys does not dictate a different approach. The next town may well have to undertake a similar burden next year. If none can exclude, all will be equally subject to the same possibility of bearing the burden.**

(Citations omitted.)

Once again, Justice Hall carries the torch of regionalism he ignited first in the *Vickers* case. In his view, the Court is unnecessarily constrained by the "fairly debatable" standard of review in the jurisprudence of land use cases when they involve questions of regional import. The legal touchstone for making this argument is the very same caveat of regionalism announced forty years before by Justice Sutherland in *Euclid*, which he cites and believes should control the "substantive question" in the instant case.

[b] The Caveat Continues (1971-2003). By the time the war in Viet Nam was winding down and the Nixon administration grew interested in a program of aggressive urban renewal to retard blight in center cities, development pressure in the suburbs was building. Armed with about 50 years of zoning experience since the *Euclid* decision, suburban municipal jurisdictions scrambled to prepare for the deluge of newcomers forecast with each new subdivision application. In many cases, the towns, boroughs, and hamlets tried mightily to draw up the bridge, adopting policies intended to "preserve the rural character" for the vocal residents already situated quite comfortably inside. In this environment, for about twenty years ending in 1991, the courts in New Jersey and a number of other states are presented with a whole slew of disputes that tax the tension between local development controls and regional needs for housing and commerce.

[a] The Indian Wells Case (1972).[28/] Mary Lou and Albert Scott owned a home on a 4,000 square-foot parcel just outside the California City of Indian Wells. In November of 1969, the Scotts received a letter from the City, notifying them about an upcoming planning commission hearing that would consider a conditional use permit to allow construction of a planned development in an area currently zoned for one-story single-family homes. Even though the development proposal concerned property abutting the Scott homestead, the City had mailed the notice by mistake, intending only to notify residents of the City. Nevertheless, after reviewing the site development plans and attending the hearing, the Scotts eventually learned that the development was slated to include 90 single-family homes, 675 condominiums, two golf courses, clubhouses, tennis courts, several two-story buildings, one six story building and a heliport.

After essentially being ignored when the development was approved both by the planning commission and the City Council, the Scotts and a class of homeowners similarly situated outside the city limits sought declaratory relief challenging approval of the permit. The City demurred, arguing the Scotts did not have standing under the administrative procedures available only to its residents, and the trial court granted dismissal with prejudice. In overturning the dismissal, the California Supreme Court recounts the Garden State's decision in *Dumont*, *supra*, as well as similar holdings by appellate courts in Kansas, Colorado, and Illinois. But the Court does not contain its advice to the narrow subject of standing, instead plowing forward as follows:[29]

> **In the early days of zoning, when there were large undeveloped areas at the borders of two contiguous towns... the municipality's responsibility in using its zoning power might extend only to the municipal boundary lines. In today's sprawling metropolitan complexes, however, municipal boundary lines rarely indicate where urban development ceases. We have come to recognize that local zoning may have even a regional impact. Certainly it is clear that the development of a parcel on the city's edge will substantially affect the value**

> **and usability of an adjacent parcel on the other side of the municipal line.**
>
> **To hold, under these circumstances, that defendant city may zone the land within its border without any concern for adjacent landowners would indeed make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning. Common sense and wise public policy . . . require an opportunity for property owners to be heard before ordinances which substantially affect their property rights are adopted . . .**

(Footnotes, citations and internal quotations omitted).

[b] The Ramapo Case (1972).[30/] The New York town of Ramapo adopted an adequate public facilities ("APF") ordinance in 1969. Cast in connection with its zoning ordinance, the purpose of the town ordinance was to curb subdivision development until adequate public infrastructure was available to support it. Using a point system applied to procure a special permit required for subdivision approval by the planning board, the effect of the APF ordinance was to "test" each proposed development for adequacy of sewer or septic systems; workable storm water management features; available public park, recreational and school facilities; the affect on town roadways; and access available to nearby fire fighters. A property owner and an association of local builders sued to overturn the APF ordinance, arguing it amounted to a moratorium and a taking of property.

Ultimately, after detailing the ordinance's relationship to the Town's 18-year capital improvement program for public facilities, the New York Court of Appeals does not consider the ordinance as effecting a moratorium or taking of permanence; but rather, a reasonable control mechanism intended to bring about the orderly timing of development within the jurisdiction. The principal legal question, in the Court's view, was whether or not the ordinance was authorized under the controlling state enabling statutes, in light of the fact that such authority was not delegated in express terms.

In concluding that the enabling laws were of sufficient breadth to authorize the ordinance as a matter of law, the Court of Appeals nevertheless complains of its frustration with the practical consequences of the purely local scope of analysis. With a powerful logic, the Court in *Ramapo* wrote:[31/]

> **Undoubtedly, current zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government--that the public interest of the State is exhausted once its political subdivisions have been delegated the authority to zone... While such jurisdictional allocations may well have been consistent with formerly prevailing conditions and assumptions, questions of broader public interest have commonly been ignored...**
>
> **Experience, over the last quarter century, however, with greater technological integration and drastic shifts in population distribution has pointed up serious defects and community autonomy in land use controls has come under increasing attack by legal commentators, and students of urban problems alike, because of its pronounced insularism and its correlative role in producing distortions in metropolitan growth patterns, and perhaps more importantly, in crippling efforts toward regional and State-wide problem solving, be it pollution, decent housing, or public transportation...**
>
> **Recognition of communal and regional interdependence, in turn, has resulted in proposals for schemes of regional and State-wide planning, in the hope that decisions would then correspond roughly to their level of impact... Yet, as salutary as such proposals may be, the power to zone under current law is vested in local municipalities, and we are constrained to resolve the issues accordingly. What does become more apparent in treating with the problem, however, is that though the issues are framed in terms of the developer's due process rights, those rights cannot, realistically speaking, be viewed separately and apart from the rights of others in search of a (more) comfortable place to live...**
>
> **Invariably, the primary responsibility for formulating and implementing zoning policy remains in the hands of local government, with provisions for review at county, State and regional levels...**
>
> *** * ***
>
> **Of course, these problems cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, State-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies. Nevertheless, that should not be the only context in which growth devices such as these, aimed at population assimilation, not exclusion, will be sustained; especially where, as here, we would have no alternative but to strike the provision down in the wistful hope that the efforts of the State Office of Planning Coordination and the American Law Institute will soon bear fruit.**
>
> **Hence, unless we are to ignore the plain meaning of the statutory delegation, this much is clear: phased growth is well within the ambit of existing enabling legislation. And, of course,**

> **it is no answer to point to emergent problems to buttress the conclusion that such innovative schemes are beyond the perimeters of statutory authorization. These considerations, admittedly real, to the extent which they are relevant, bear solely upon the continued viability of 'localism' in land use regulation; obviously, they can neither add nor detract from the initial grant of authority, obsolescent though it may be.**

(Footnotes, citations and internal quotations omitted).

[c] The Mount Laurel Case.[32/] In 1975, the New Jersey Supreme Court is invited to consider certain consequences – unintended, no doubt – attending the gist of its decision 20 years before in *Valley View*, discussed *supra*. In an attempt to avoid the fiscal stress from bearing too many demands on local services, the Township of Mount Laurel enacted a zoning ordinance that effectively prohibited the development of any apartments or townhomes, and a complimentary map to zone a whopping 4,100 acres for industry; that is, almost 30% of the all the acreage in the town and roughly half of all its undeveloped land. This ambitious zoning assignment was apparently chosen despite the fact that only 100 acres were actually occupied with industrial uses at the time, certainly making it look as if the Town had intentionally "over-zoned" for industrial uses beyond any reasonable forecast or expectation. As a result of the confluence of these zoning policies, along with a pervasive administrative disdain by the Town for multi-family dwellings, the net effect of the local regulation of land use was to prohibit development of residential housing other than on a rather large-lot, single-family basis.

A county chapter of the N.A.A.C.P. and other advocates for affordable housing sued Mount Laurel, seeking declaratory and injunctive relief from the zoning. The plaintiffs argued on the basis that Mount Laurel's zoning regulations effectively excluded poor and middle-income people who could not afford rent or purchase a home of the only sort allowed in the town which, they put forward, was improper in light of a dire need for

affordable housing in the greater Camden metropolitan area. While extending the Town the benefit of any doubt that its purpose in establishing the restrictive land use regime was not to discriminate on the basis of race, origin or any improper perception of incompatibility, the Supreme Court essentially holds that municipalities in New Jersey carry a special, affirmative obligation to provide its "fair share" of affordable housing to support the continued health of all the municipal neighbors within its region.

This time, writing for the majority in *Mount Laurel*, Justice Hall reminds us of his dissent in *Vickers*. Justice Hall wrote:[33/]

> **The record thoroughly substantiates the findings of the trial court that over the years Mount Laurel has acted affirmatively to control development and to attract a selective type of growth...**
>
> *** * ***
>
> **This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing. There has been no effective intermunicipal or area planning or land use regulation. All of this is amply demonstrated by the evidence in this case as to Camden, Burlington and Gloucester counties... One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms (and, in Mount Laurel's case, even some of its own lower paid municipal employees) to live in the community where they work.**

(Footnotes, citations and internal quotations omitted). He continues later in the opinion by exhorting the grave importance of affordable housing within municipal obligations to promote "general" welfare:[34/]

> **It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for**

> **an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.**
>
> **It is also entirely clear, as we pointed out earlier, that most developing municipalities, including Mount Laurel, have not met their affirmative or negative obligations, primarily for local fiscal reasons...**
>
> *** * ***
>
> **In sum, we are satisfied beyond any doubt that, by reason of the basic importance of appropriate housing and the longstanding pressing need for it, especially in the low and moderate cost category, and of the exclusionary zoning practices of so many municipalities, conditions have changed, and ... judicial attitudes must be altered from that espoused in that and other cases cited earlier, to require, as we have just said, a broader view of the general welfare and the presumptive obligation on the part of developing municipalities at least to afford the opportunity by land use regulations for appropriate housing for all.**

(Citations and internal quotations omitted).

[d] The Pascack Association Case.[35/] Justice Hall's noble legacy, devised in *Mount Laurel* as the doctrine of the affirmative municipal obligation to consider regional housing needs in zoning, survived intact for exactly two years before the Court in New Jersey started back-pedaling in his conspicuous absence. In 1977, grounded in recognition that the Town of Mount Laurel had plenty of undeveloped land at the time it was considered, the Court in *Pascack* beats a hasty retreat from the presumptive reach of the obligations it expressed earlier in *Mount Laurel* – effectively giving a "free pass" for municipalities that are near their full development potential. In a spirited dissent with which two justices concurred, Justice Pashman picked up precisely where Justice Hall had left off, writing:[36/]

> **Though the State Legislature may have vested the power in Washington Township and Demarest to determine the general welfare, it was constitutionally barred from granting those communities the right to ignore the welfare of citizens not living within their municipal boundaries. We underscored this principle in Mt. Laurel when we stated:**
>
> > **(I)t is fundamental and not to be forgotten that the zoning power is a police**

> **power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served...**
>
> *** * ***
>
> **The Court in Mt. Laurel limited its discussion to "developing communities." As a consequence, the Court's decision was taken by some to excuse communities which could be characterized as "developed" from the affirmative duty to provide for regional housing needs. I have repeatedly criticized this proposition as being inconsistent with the spirit of that decision and an impediment to any attempt at requiring affirmative action to counteract exclusionary zoning... Today, four members of the Court have indicated their desire to prolong the "developed-developing" distinction, thereby seriously impairing the ability of the Court to continue seeking broad solutions to the problem of exclusionary zoning. I would apply the dictates of Mt. Laurel to all municipalities, and therefore welcome the endorsement of this view by Mr. Justice Schreiber and Mr. Justice Sullivan.**

(Citations and internal quotations omitted).

[e] Zuckerman v. Hadley.[37/] In 1988, the Town of Hadley, Massachusetts, enacted a "rate of development" ordinance for the purpose of compelling developers to phase-in each new housing subdivision, essentially in equal rations of 10 percent of the total number of units proposed, spread over 10 years or more. The purpose ascribed at the time was to preserve the Town's agricultural land and character, and to phase development in to allow enough time for the Town to expand public services and facilities commensurate with a cap on local property taxes enshrined for years then in state law by popular referendum. At first blush, the Town's objectives seem of little difference in comparison to those advanced in New York some twenty years before by the Town of Ramapo, discussed *supra*, and indeed the Supreme Judicial Court in 1980 had already sustained a similar "rate of development ordinance" for another Massachusetts town.[38/]

Since 1986, Martha Zuckerman held an interest in a 66-acre parcel located in Hadley zoned for agricultural-residential uses. Her property was capable of supporting a development of about 40 single-family homes which, under the Town's rate of development ordinance, could only be accomplished at the rate of up to four homes in each of the ten years following. Ms. Zuckerman sued to challenge the subject ordinance, claiming in the alternative that it either was unconstitutional or a compensable taking. A lower court held that time limitations on the development of property must be temporary and related by reason to appropriate planning studies. Since Hadley's rate of development ordinance had by then achieved an age without substantive change somewhat greater than a number of popular recording artists, the lower court held in Ms. Zuckerman's favor.

In the appeals proceedings concluded in August of 2004, the Commonwealth's Supreme Judicial Court agreed with the trial court. In particular, the Court seemed rather troubled that the Town had commissioned a number of planning studies, expanded its school and public safety systems, hired more full-time officials and improved its water supply. But over the same period of time of such tangible growth, the Town had not adopted "many" of the recommendations delivered in those planning studies, and had not considered changes in the rate of development law.

In striking down the Town ordinance, the subjects of exclusionary land use policies and their probable regional impact are front-and-center in the Court's analysis. The opinion reasons:[39/]

> **Rate of development bylaws such as the one at issue here are restrictions not on how land ultimately may be used, but on when certain classes of property owners may use their land. Where classic zoning bylaws keep the pig out of the parlor, rate of development bylaws tell the farmer how many new pigs may be in the barnyard each year. In their intent and in**

> **their effect, rate of development bylaws reallocate population growth from one town to another, and impose on other communities the increased burdens that one community seeks to avoid. Through zoning bylaws, a town may allow itself breathing room to plan for the channeling of normal growth; it may not turn that breathing room into a choke hold against further growth… [A] zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed. Despite the perceived benefits that enforced isolation may bring to a town facing a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular town to deflect that wave onto its neighbors… As concisely stated by the Supreme Court of New Hampshire, prevent[ing] the entrance of newcomers in order to avoid burdens upon the public services and facilities ... is not a valid public purpose.**

(Footnotes, citations, and internal quotations omitted) (Emphasis added). In that vein, the Court in *Zuckerman* holds the rate of development ordinance unconstitutional because it is directed toward an improper municipal purpose.

The Court in *Zuckerman* also highlights a compelling counterpoint to the improper exclusionary motives of Hadley by recounting the valid regional goals that would sustain a local land use regulation of comparable effect. In another decision reached by the Supreme Judicial Court only three months before deciding *Zuckerman*, the Supreme Judicial Court upheld a town-wide building cap for the Town of Barnstable located on historic Cape Cod.[40/] The Barnstable cap works as an absolute limit on the number of new residences – delineated respectively as "affordable" and "market" permits – within the town computed on an annual basis. And while the rate of development ordinance was not adopted Hadley with the express intention of becoming perpetual, the building cap for Barnstable certainly was so intended. The key difference with the building cap as articulated by the *Zuckerman* Court is that the limitation in Barnstable was adopted with the general welfare of the Cape Cod region squarely in mind. Highlighting this important distinction, the Court writes:[41/]

> **In *Home Builders Ass'n of Cape Code, Inc. v. Cape Cod Comm'n…* (*Home Builders Ass'n*),**

> **we upheld the town of Barnstable's adoption of a zoning ordinance that included a permanent building cap. We did so recognizing that the cap was adopted to protect a sole source aquifer, the integrity of which was an issue of regional importance, and that the cap was adopted through the Cape Cod regional commission, a body specifically established by the State Legislature in recognition of the unique natural, coastal, scientific, historical, cultural, architectural, archaeological, recreational, and other values ... threatened ... by uncoordinated or inappropriate uses of the region's land and other resources… The purpose of the commission was to enable the implementation of a regional land-use policy plan for all of Cape Cod, to recommend for designation of specific areas of Cape Cod as districts of critical planning concern, and to review and regulate developments of regional impact. The unusual circumstance that the entire town lay atop the aquifer… and that the zoning ordinance permanently restricting development was adopted by a body established to address issues of region-wide concern, presented the unusual situation in which the permanent bylaw advanced the public welfare…**

(Citations and internal quotations omitted).

As an interesting aside, although the building cap is technically an ordinance adopted via the authority granted to a town council, that authority is exercised under a broader, regional aegis of state statutes that empower a "Cape Cod Commission" to regulate land use and development throughout the county in which the Town is located.[42/] Even as the Massachusetts legislature was busy several years ago with the business of abolishing six of its then 14 counties, it thoughtfully elected to leave intact the municipal and county jurisdictions that cover environmentally sensitive Cape Cod and, more importantly, to integrate those local governments within a special state enabling law that overlays municipal home rule in the region.

IV. Lessons and Food for Regional Thought.

The catalogue of cases highlighted in this paper is not intended to be exhaustive; there are dozens more that pay some tribute to regional thinking scattered about the nation's appellate courts. Most of them uphold the authority of the municipal jurisdiction to limit development, either because the court does not see the municipal practice as "too" arbitrary or, otherwise, because the planning and zoning officials have created a

record for their actions – at least in part – on some manner of empirical thought that transcends town or city limits.[43/] But sometimes the municipal authorities might stand behind some façade of regional thinking, only in an effort to hide what a court might suspect to be raw parochialism and little more. When the courts are able to peer behind those walls, to succeed in catching a glimpse of the same "exclusionary" motives about which Justice Hall complained so bitterly for so long – they typically dispatch the municipality back to the drawing board of comprehensive planning against which any valid zoning ordinance must be propped.[44]

Meanwhile, the parade of inter-jurisdictional land use disputes goes on. Last year, a major battle erupted in Florida between the fly-speck towns of Golden Beach and Sunny Isles Beach. When Sunny Isles approved plans for a developer to construct a 40-story building for condominium homes, the residents – and of course the township – voiced their vituperative objection, and the matter appears to be a decent prospect for another paper like this one in a year or two. According to a press account that offers some context to the problem:[45/]

> **The beach-town tussle is only the latest in a series of zoning battles across South Florida pitting residents of older, low-scale neighborhoods against high-rise condo development – and it's unlikely to be the last.**

These battles can become extremely emotional for residents and leaders of the municipal jurisdictions, prompting one city council to require its taxpayers to stomach legal fees of more than $1 million devoted to outside counsel, an amount one council member characterized at the time as "obscene."[46/]

A home-spun philosopher once said, "If you find yourself in the bottom of a pit, stop digging." In a system that, as a rule, foists the state's power to regulate land use into

a scattered collection of county and municipal jurisdictions, the big picture is very easy to lose indeed. Thinking that regional government land use entities would be too ambitious for most states to construct, Professor Haar suggested almost 50 years ago that the state legislatures should instead consider state-level agencies that would define – and yes, constrain – the exercise of local planning and zoning decisions.[47/] In short, he reasons that the states must accept the mantle of change and stop digging.

State legislators are hardly equipped to anticipate every possible basis for dispute among neighbors. On the other hand, some disputes are certainly more predictable than others and, if so, legislators should consider targeting their efforts to establish well-reasoned policies that yield predictable and optimal results in the quality of life for as many families as possible. Following this utilitarian premise, after examining the common law described in this paper – that our yeomen judges have stitched together sometimes from the whole cloth of constitutional law and other times from the scraps of threadbare enabling statutes – perhaps state and local legislators will engage a new dialogue under the banner of "smart growth." In any case, the benign neglect of regional health in enabling the regulation of land use, or a prevailing resignation to proceed with business as usual until Willard Scott announces the birthday of American zoning may very well deserve another banner; that is, the "opposite-of-smart" growth.

Notes

[1/] OLIVER WENDELL HOLMES, THE AUTOCRAT OF THE BREAKFAST-TABLE (pt. 6) (1858), *reprinted in*, DICTIONARY OF QUOTATIONS AND PROVERBS 122 § 17 (D.C. Browning compil., Octopus Books Ltd., Everyman's Ed. 1982) (1951).

[2/] *See* ANDERSON'S AMERICAN LAW OF ZONING 92-94 (Kenneth E. Young ed. 4th ed. 1996); RATHKOPF'S THE LAW OF PLANNING AND ZONING 33 (Edward H. Zeigler, Jr., ed. 4th ed. cum. supp. 200?) (historical discussions of zoning enabling acts in New York).

[3/] 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926).

[4/] Herbert Hoover, *Forward* to U.S. ADVISORY COMMITTEE ON ZONING, DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (Rev. Ed. 1926).

[5/] In *Euclid*, a real estate developer sought to enjoin enforcement of an Ohio zoning ordinance that prohibited any industrial use of a property purchased on speculation for that purpose. In the majority opinion, written over the dissent of three members of the Court, Justice Sutherland upholds the ordinance as a fairly debatable approach directed to solve problems within the proper scope of the police power, and therefore a valid exercise of legislative authority to improve the public health, safety, and welfare. 272 U.S. at 396-397.

[6/] *See* Adrian R. Gardner, ERASING LOCAL LINES IN THE SAND: BUSINESS MODELS FOR REGIONAL GOVERNMENTS, paper presented to the Int'l Municipal Lawyers Assn. (October 21, 2002).

[7/] 272 U.S. at 389, 47 S.Ct. at 119.

[8/] 272 U.S. at 389-390, 47 S.Ct. at 119. The opinion does not consider or address whether the zoning ordinance is within the scope of authority enabled by state statute.

[9/] *Id.*

[10/] *See e.g. Lawton v. Steele*, 152 U.S. 133 (1894).

[11/] 272 U.S. at 388, 47 S.Ct. at 118, *citing Radice v. New York*, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 (1924), ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

[12/] 272 U.S. at 395, 47 S. Ct. at 121 ("[Legislative reasons for modern zoning laws] are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can

be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety morals or general welfare.")

In a decision that turns on very different considerations to support a legal conclusion that is opposite of the one reached by the Supreme Court, the lower Federal court nevertheless also applied a rational basis analysis before rejecting the zoning ordinance in *Euclid*. District Judge Westenhaver reasoned:

> **In the last analysis, the result to be accomplished [by Euclid's zoning ordinance] is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service. Aside from contributing to these results and furthering such class tendencies, the ordinance has also an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful. The assertion that this ordinance may tend to prevent congestion, and thereby contribute to the health and safety, would be more substantial if provision had been or could be made for adequate east and west and north and south street highways. Whether these purposes and objects would justify the taking of plaintiff's property as and for a public use need not be considered. It is sufficient to say that, in our opinion, and as applied to plaintiff's property, it may not be done without compensation under the guise of exercising the police power.**

Ambler Realty Co. v. Village of Euclid, Ohio, 297 F. 307, at 316, 2 Ohio Law Abs. 451, 21 Ohio Law Rep. 607 (N.D. Ohio 1924).

13/ 1 N.J. at 511, 64 A.2d 348.

14/ 1 N.J. 509, 64 A.2d 347 (N.J. 1949).

15/ 1 N.J. at 513-514, 349-350.

16/ *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (N.J. 1954).

17/ *Id.*

18/ 15 N.J. at 240, 104 A.2d at 442.

19/ 15 N.J. at 245, 104 A.2d at 444.

20/ 15 N.J. at 247, 104 A.2d at 445-446.

21/ 15 N.J. at 249, 104 A.2d at 447.

22/ *Valley View Village v. Profett*, 221 F.2d 412 (6th Cir. 1955), *reversing and remanding*, 123 F.Supp. 339 (N.D. Ohio 1954).

23/ 221 F.2d at 418.

24/ *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962).

25/ 37 N.J. at 252-254, 181 A.2d at 140-141.

26/ *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*, 42 N.J. 556, 202 A.2d 161 (N.J. 1964); and, *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus*, 47 N.J. 211, 220 A.2d 97 (N.J. 1966).

27/ 47 N.J. at 218-224, 220 A.2d at 101-104.

28/ *Scott v. City of Indian Wells*, 6 Cal.3d 541, 492 P.2d 1137, 99 Cal.Rptr. 745 (Cal. 1972).

29/ 6 Cal.3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.

30/ *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, 63 A.L.R.3d 1157 (N.Y. 1972).

31/ 30 N.Y.2d at 374-376, 285 N.E.2d at 299-301 , 334 N.Y.S.2d at 148-150.

32/ *South Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (N.J. 1975).

33/ 67 N.J. at 170-172, 336 A.2d at 723.

34/ 67 N.J. at 179-180, 336 A.2d at 727-728.

35/ *Pascack Association Ltd. v. Township of Washington*, 74 N.J. 470, 379 A.2d 6 (N.J. 1977).

36/ 74 N.J. at 502-503, 379 A.2d at 22-23.

37/ *Zuckerman v. Town of Hadley*, 442 Mass. 511, 813 N.E.2d 843 (Mass. 2004).

38/ *See Sturges v. Town of Chilmark*, 380 Mass. 246, 402 N.E.2d 1346 (Mass. 1980) (town's rate of development ordinance was a limited restriction on development grounded adequately on a rational basis designed to further the general public interest).

39/ 442 Mass. at 518-519, 813 N.E.2d at 850.

40/ *Home Builders Association of Cape Code v. Cape Cod Commission*, 441 Mass. 724, 808 N.E.2d 315 (Mass. 2004).

41/ *See Zuckerman*, 442 Mass. at 518, 813 N.E.2d at 850, n. 17.

42/ For a more detailed treatment of the Cape Cod Commission and its enabling legislation, see Gardner, ERASING LOCAL LINES IN THE SAND, *supra*, at note 6.

43/ *See e.g. Steel Hill Development, Inc. v. Town of Sanborton*, 338 F.Supp. 301 (D.N.H. 1972), *aff'd* 469 F.2d 956 (1st Cir. 1972) (zoning amendments not "so arbitrary or unreasonable"); *Committee for Sensible Land Use v. Garfield Township*, 124 Mich.App. 559, 335 N.W.2d 216 (Mich.App. 1983) (record established that township considered regional environmental impact in rezoning decision). *See also Construction Industry Association of Sonoma County v. City of Petaluma*, 552 F.2d 897 (9th Cir. 1975), at 908, ("If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's role to intervene… [T]he federal court is not a super zoning board…").

44/ *See e.g. Beck v. Town of Raymond*, 118 N.H. 793, 394 A.2d 847 (N.H. 1978); *Britton v. Town of Chester*, 134 N.H. 434, 595 A.2d 492 (N.H. 1991); *Save A Valuable Environment v. City of Bothell*, 89 Wash.2d 862, 576 P.2d 401 (Wash. 1978).

45/ Miami-Dade County, Fla., Beachfront Towns Battle over Escalating Development, by Andres Viglucci, Knight Ridder/Tribune Business News (August 25, 2003).

46/ Cities Pay Big Fees to Fight Project Regardless, Developers Hope to Get Final OK on Center Park Forty, by Dan Mihalopoulos, St. Louis Post-Dispatch (January 1, 1997).

47/ Charles M. Haar, REGIONALISM AND REALISM IN LAND USE PLANNING, 105 U. Pa. L. Rev. 515 (1957).