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Modern Social Problems and Land Use Regulation - The New Jersey Experience

MODERN SOCIAL PROBLEMS AND LAND USE REGULATION–THE NEW JERSEY EXPERIENCE

Land use regulation in the United States today is essentially a local government function. In an effort to meet the challenges of rapid population growth and commercial expansion, local planners have relied heavily upon zoning as a means of implementing long range community policies. As a result, principles of zoning law have been contoured to meet the growing needs presented by changing circumstances of municipal development.

One unfortunate by-product of this expansion has been a widespread abuse of the zoning laws by those who have sought to protect their communities against urbanization and its attendant dangers. Specifically, zoning regulations have been used to exclude low income families and minority groups, forcing local zoning schemes to deal with two conflicting interests–the pressing need for adequate low-income housing and the desire to preserve pleasant, suburban living conditions and high real estate values. Resolution of the conflict has not been easy. Although the dangerous inequities inherent in exclusionary zoning are manifest, it is also clear that property owners ought to be provided some means of protecting their investment in clean, healthy surroundings, good schools, and other incidents of costly real estate.

In the struggle to strike a proper balance between these conflicting purposes, the development of zoning laws in New Jersey has been notable. For a variety of reasons, the New Jersey experience has been typical of what other states will be forced to confront in the very near future. Rapid commercial growth and continued patterns of population concentration in New Jersey has precipitated significant litigation concerning urban land use; that state's treatment of the problem has involved a complex interface between municipal and federal governments that is typical of developments already begun in many other states. Even today, after two decades of courtroom struggle, the outer limits of local zoning power in New Jersey have not been clearly defined.

Zoning Authorization: Constitutional and Statutory Bases

Although municipal zoning had been accepted in New York City by 1916,[1] the New Jersey courts persisted in holding zoning regulations

1. The New York City ordinance was held to be constitutional in Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920).

to be violative of both the state and United States Constitutions.[2] In *H. Krumgold & Sons, Inc. v. Mayor of Jersey City*,[3] for example, the Court of Errors and Appeals held a zoning ordinance which prohibited commercial construction in a residential district to be an unconstitutional restriction of private property rights. This view was, however, short-lived; in 1926, in *Village of Euclid v. Amber Realty Co.*,[4] the United States Supreme Court removed all doubt concerning the validity of governmental land use regulation under the United States Constitution. Faced with facts similar to those confronted in *Krumgold*, the Court observed that "the exclusion of buildings devoted to business . . . from residential districts . . . bears a reasonable relation to the health and safety of the community." [5] Enforcement of the zoning ordinance thus was held to be a constitutional exercise of the state's police power.

The federal constitutional impediment to zoning having been removed, the New Jersey Constitution was amended one year later to authorize enabling legislation that would permit municipalities to enact zoning ordinances.[6] The following year the New Jersey legislature substantially adopted[7] the model zoning enabling act promulgated by the Advisory Committee on Building Codes and Zoning appointed by Herbert Hoover.[8] The municipal zoning power later was amplified by the ratification of the New Jersey Constitution of 1947, which pro-

2. *See, e.g.*, Ignaciunas v. Risley, 98 N.J.L. 712, 121 A. 783 (Sup. Ct. 1923), *aff'd sub. nom.*, Ignaciunas v. Town of Nutley, 99 N.J.L. 389, 125 A. 121 (Ct. Err. & App. 1924).

3. 102 N.J.L. 170, 130 A. 635 (Ct. Err. & App. 1925).

4. 272 U.S. 365 (1926).

5. *Id.* at 391.

6. The legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to special districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the exercise of such authority shall be deemed to be within the police power of the state.

N. J. CONST. art. IV, § 6.

7. N. J. LAWS ch. 274, §§ 3-13 (1928) *codified at* N. J. REV. STAT. §§ 40:55-30 to -51 (1937).

8. *See* Cunningham, *Control of Land Use in New Jersey by Means of Zoning*, 14 RUTGERS L. REV. 37, 38 (1959). The New Jersey zoning enabling act contains the following grant of power to municipalities:

Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. Such ordinance shall be adopted by the governing body of

vided that all laws concerning municipal corporations were to be construed liberally in favor of local autonomy.[9] In light of the expanded power given to local governments, the New Jersey judiciary initially assumed only a limited role in the zoning process.[10] However, because of the realization by many commentators that zoning does not cure, but in fact creates, many state and local problems,[11] there has been an increased demand for legislative reform and for an expansion of the judiciary's role in protecting the rights of the poor and other minority groups.

THE ROLE OF THE JUDICIARY

Even after the 1927 constitutional amendment[12] overruled the early cases which had invalidated municipal zoning ordinances,[13] the New Jersey courts continued to be suspicious of the expanding power of local zoning. Typical of the cases during this period was *Brookdale Homes, Inc. v. Johnson*,[14] in which the Supreme Court of New Jersey invali-

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such municipality, as hereinafter provided, except in cities having a board of public works, and in such cities shall be adopted by said board.

The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes.

N. J. REV. STAT. § 40:55-30 (1937).

Logically, planning legislation should have preceded zoning legislation. However, in New Jersey the first planning act was not passed until 1930. N. J. LAWS ch. 235, §§ 1-21 (1930) *codified at* N. J. REV. STAT. §§ 40:55-1 to -21 (1937).

9. The provisions of this Constitution and any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

N. J. CONST. art. IV, § 7.

10. *See* notes 35-55 *infra* & accompanying text.

11. *See, e.g.*, Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URBAN L. 344 (1971); Note, *Segregation and the Suburbs: Low-Income Housing, Zoning, and the Fourteenth Amendment*, 56 IOWA L. REV. 1298 (1971); Note, *Snob Zoning: Must a Man's Home be a Castle?*, 69 MICH. L. REV. 339 (1970); Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge*, 81 YALE L.J. 61 (1971).

12. N. J. CONST. art. IV, § 6.

13. *See* note 2 *supra* & accompanying text.

14. 123 N.J.L. 602, 10 A.2d 477 (Sup. Ct. 1940).

dated a zoning ordinance which provided that no building in a particular residential zone could be erected with a roof ridge less than 26 feet above the building foundation. The court rejected the town's argument that minimum restrictions on the size of dwellings protected the character and property values of the community. Although the court enunciated a broad test which has been followed in subsequent cases—that the ordinance must bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense" [15]—its holding implicitly cautioned that a municipality must be prepared to demonstrate a valid purpose for enacting its zoning regulation.

The judicial attitude changed significantly after the promulgation of the new constitution in 1947 requiring a liberal construction of all laws concerning municipalities.[16] Under this constitutional mandate, local governments were to be given even more latitude in enacting zoning regulations to achieve the purposes set forth in the enabling act:

> Such regulations shall be . . . designed for one or more of the following purposes: to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land and buildings; avoid undue concentration of population. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.[17]

Judicial response to this enactment was positive. For example, in *Collins v. Board of Adjustment of Margate City*,[18] which involved a zoning ordinance barring the use of accessory buildings by all except domestic servants of the owner, the New Jersey Supreme Court affirmed the broad grant of zoning power:

> Reasonable use restrictions in the exercise of the police power pursuant to the Constitution do not constitute the taking of property for public use within the intendment of the constitutional

15. 10 A.2d at 478. This test was stated originally in Nectow v. City of Cambridge, 277 U.S. 183 (1928).

16. N. J. CONST. art. IV, § 7.

17. N. J. REV. STAT. § 40:55-32 (1937).

18. 8 N.J. 200, 69 A.2d 708 (1949).

> mandate for compensation in such cases. All property is held in subordination to the police power; and the correlative restrictions upon individual rights—either of person or of property—are incidents of the social order, deemed a negligible loss compared with the resultant advantages to the community as a whole, if not, indeed, fully recompensed by the common benefits.[19]

Once the power to enact zoning regulations was established firmly, the New Jersey judiciary turned its attention to the objectives of local zoning and how they were to be achieved. One of the primary purposes of land use regulation has been to prevent the urban blight and environmental destruction caused by uncontrolled land development. Thus, the celebrated language in *Euclid* has continued to justify what commentators[20] have described as exclusionary zoning:

> [W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupations of private lands in urban communities. . . . [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.[21]

The New Jersey courts have accepted the proposition, implicit in *Euclid*, that municipalities may establish barriers to prevent the problems of urbanization. Accordingly, they have acquiesced in multifarious zoning devices[22] which have foreclosed opportunities for human mobility

19. 69 A.2d at 710.

20. Much has been written recently on exclusionary zoning. *See generally* Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URBAN L. 344 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Williams, *Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80 (1970); Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246 (1970); Note, *Snob Zoning: Must a Man's Home be a Castle*, 69 MICH. L. REV. 339 (1970); Note, *New Jersey Judiciary's Response to Exclusionary Zoning*, 25 RUTGERS L. REV. 172 (1970).

21. 272 U.S. at 386-87.

22. *See, e.g.*, Hohl v. Township of Readington, 37 N.J. 271, 181 A.2d 150 (1962) (municipality may exclude trailers from business district); Napierkowski v. Township of Gloucester, 29 N.J. 481, 150 A.2d 481 (1959) (ordinance proscribing use of trailers on industrial lots is valid); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958) (municipality may change its zoning laws to prohibit erection of more apartments); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955) (exclusion

in the name of land use regulation. Indeed, in many instances, community exclusion of low-income groups clearly was the primary purpose giving rise to zoning regulation. Not surprisingly, judicial passivity in such matters has been criticized strongly.[23]

Prompted in part by this criticism, the lower New Jersey courts recently have responded by balancing the desire for a decent place to live with the ever pressing need for *just* a place to live. This change in judicial attitude, however, has not been shared by the Supreme Court of New Jersey, which, by contrast, has felt restrained by the constitutional limitations placed upon its power to review local government action.[24]

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of motels and hotels upheld); Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (sustaining a zoning ordinance which prohibited construction of residences in a rural area upon a plot of less than 5 acres); Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952) (upholding regulation fixing minimum floor space requirements); Loveladies Property Owners Ass'n. v. Barnegat City Service Co., 60 N.J. Super. 491, 159 A.2d 417 (App. Div. 1960) (sustaining ordinance requiring minimum lot size); Clary v. Borough of Eatontown, 41 N.J. Super. 47, 124 A.2d 54 (App. Div. 1956) (zoning ordinance may provide a 20,000 square feet minimum lot size requirement); Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951) (municipality may restrict entire community to single family dwellings); Chrinko v. South Brunswick Township Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963) (upholding cluster zoning ordinance).

23. In his discussion of Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952) (*see* notes 36-45 *infra* & accompanying text), Professor Haar was especially critical of the fact that the judiciary has thus far confined the doctrine of "regionalism" to validating a zoning ordinance which otherwise would have been held unconstitutional:

> Thus the only aspect of regionalism considered by the [*Lionshead*] court was the isolationist view of the township: that the city would be spilling over into its neighborhoods. This is localism, not an attempt at evaluating the interests of the broader community as a whole.

Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1053 (1953). *See also* Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 VAND. L. REV. 341 (1971).

24. In Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1, 8 (1951) the supreme court stated:

> The zoning statute delegates legislative power to local government. The judiciary of course cannot exercise that power directly, nor indirectly by measuring the policy determination by a judge's private view. The wisdom of legislative action is reviewable only at the polls. The judicial role is tightly circumscribed.

See also Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955); Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 94 A.2d 482 (1953); Cobble Close Farm v. Board of Adjustment, 10 N.J. 442, 92 A.2d 4 (1952); Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (1952). *But see* Vickers v. Township of Gloucester, 37 N.J. 232, 181 A.2d 129 (1962) (dissenting opinion); Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A.2d 693 (1952) (dissenting opinion).

PROCEDURAL DEVELOPMENTS

Standing

In addition to problems defining the appropriate scope of judicial review of such matters, other procedural developments also have had an important impact on the delicate issues of local antonomy in zoning endeavors. Resolving the question of who has standing to attack a zoning ordinance may predetermine the substantive issues raised in many controversies. It is generally accepted that a person owning property within the area affected by zoning has standing to contest its validity.[25] The substantive issue in such a case usually is whether the regulation amounts to an unconstitutional taking of property.[26] Until 1969, the more difficult procedural question was whether non-resident individuals and municipalities had standing to attack a zoning ordinance for failure to take into account regional considerations. In *Borough of Cresskill v. Borough of Dumont*,[27] the Borough of Cresskill brought suit against its neighbor, the Borough of Dumont, to set aside an amendment to the

25. *E.g.*, Piscitelli v. Township Comm., 103 N.J. Super. 589, 248 A.2d 274 (L. Div. 1968); *see also* Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1951) (taxpayers and citizens of community have a right to seek review of local legislative action without proof of unique financial detriment); Behlen & Bros., Inc. v. Mayor & Council of Town of Kearney, 31 N.J. Super. 30, 105 A.2d 894 (App. Div. 1954) (property owners have standing to challenge the validity of zoning ordinances relating to the non-conforming use of other property within the same zone).

In comparing the federal and New Jersey approaches to standing, it should be noted that the New Jersey Constitution does not restrict the exercise of judicial power to actual cases and controversies. N.J. CONST. art. VI, § 1. However, the New Jersey judiciary has imposed upon itself rules limiting judicial review which are similar to the federal case or controversy requirement:

> [W]e will not render advisory opinions or function in the abstract.... [N]or will we entertain proceedings by plaintiffs who are "mere intermeddlers" . . . or are mere interlopers or strangers to the dispute. Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of "just and expeditious determination of the ultimate merits."

Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y., 58 N.J. 98, 275 A.2d 433, 437-38 (1971).

26. Substantive questions also may involve the equal protection clause and rights protected by the Civil Rights Act, 42 U.S.C. §§ 1982, 1983 (1970). *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 248-50 (1971).

27. 15 N.J. 238, 104 A.2d 441 (1954).

Dumont zoning ordinance. Cresskill alleged that Dumont failed to consider the nature of the region in formulating land use plans. The court acknowledged that regional considerations could be an important factor in the promulgation of a zoning ordinance and held that: "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." [28] Although this language seems to imply a general grant of standing to non-residents, the court in *Borough of Roselle Park v. Township of Union*[29] cautioned that, when restricted to its facts, *Cresskill* does not support such a broad inference. In *Cresskill* the court had been able to avoid the delicate issue of standing, since one of the plaintiffs attacking the ordinance was a proper party. Nevertheless, a close reading of the case suggests that the court would have resolved the issue in favor of standing if the issue had been raised.[30]

The question was resolved in 1969, when the New Jersey legislature amended the zoning enabling act to assure standing to non-residents.[31] Although there are no reported cases interpreting this section, the reasoning in *Cresskill* suggests that the courts will give full effect to the clear intention of the legislature.

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28. 104 A.2d at 445-46.

29. 113 N.J. Super. 87, 272 A.2d 762 (L. Div. 1970).

30. The following New Jersey cases have cited *Cresskill* in support of the proposition that a community must consider the adverse effects of its zoning on its neighbors: Barone v. Township of Bridgewater, 45 N.J. 224, 212 A.2d 129 (1965); Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962) (dissenting opinion); Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657, 130 A.2d 372 (1957); Borough of Leonia v. Borough of Fort Lee, 56 N.J. Super. 135, 151 A.2d 540 (App. Div. 1959); Gartland v. Borough of Maywood, 45 N.J. Super. 1, 131 A.2d 529 (App. Div. 1957); Township of Scotch Plains v. Town of Westfield, 83 N.J. Super. 323, 199 A.2d 673 (L. Div. 1963); Palisades Properties, Inc. v. Brady, 79 N.J. Super. 327, 191 A.2d 501 (Ch. 1963). *Contra,* Kunzler v. Hoffman, 48 N.J. 277, 225 A.2d 321 (1966). *See generally* Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent,* 55 IOWA L. REV. 344 (1969); Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation,* 24 VAND. L. REV. 341 (1971); Note, *The "Aggrieved Person" Requirement in Zoning,* 8 WM. & MARY L. REV. 294 (1967).

31. The statute extends standing to "any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under the act to which this act is a supplement, or whose rights to use, acquire, or enjoy property... under any other law of this State or of the United States have been denied, violated or infringed by an action or failure to act...." N.J. REV. STAT. § 40:55-47.1 (Supp. 1970).

The Scope of Review

Perhaps the most controversial question in zoning law today is the extent to which the judiciary should examine the factual basis and purpose of local zoning ordinances. As noted earlier, the New Jersey judiciary has taken three positions on this issue—initially, local governments were allowed no discretion in promulgating zoning regulations;[32] after *Euclid*, limited discretion was permitted;[33] finally, in response to the 1947 constitutional change,[34] the current judicial attitude was adopted, permitting municipalities almost unlimited discretion within the limits established by the zoning enabling act.

Although earlier cases[35] presaged the change in attitude, the present position was first explained in *Lionshead Lake, Inc. v. Wayne Township*.[36] The township of Wayne, a large and relatively undeveloped municipality, had enacted a zoning ordinance which fixed a minimum living-floor space for several types of buildings. Only about 70 percent of the existing dwellings in the township met the minimum requirements of the ordinance, and the plaintiff presented expert testimony showing that only about 30 percent of the population could afford such homes. To meet the plaintiff's attack on the reasonableness of the ordinance, the township produced a public health expert who testified that the living-floor space in a dwelling has a direct relation to the mental and emotional health of its occupants. After stating these facts and noting the lower court's decision that the minimum floor space requirements of the ordinance were not reasonably related to the public health and thus were arbitrary and unreasonable, the court examined the larger issue of the scope of judicial review. Chief Justice Vanderbilt observed that the zoning powers of municipalities were extended by the provisions of the New Jersey Constitution and that the judiciary was required to construe statutory provisions liberally in favor of a municipality.[37] He concluded:

> When the enabling statutes . . . are read in the light of the constitutional mandate to construe them liberally, there can be no

32. *See* cases cited in note 2 *supra* & accompanying text.

33. *See* notes 4-10 *supra* & accompanying text.

34. N.J. CONST. art. IV, § 7.

35. *See, e.g.*, Collins v. Board of Adjustment, 3 N.J. 200, 69 A.2d 708 (1949); Duffcon Concrete Prod., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949); Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951).

36. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

37. 89 A.2d at 695. *See* notes 6 & 9 *supra* and accompanying text.

> doubt that a municipality has the power by a suitable zoning ordinance to impose minimum living-floor space requirements for dwellings.
>
> . . . .
>
> To the traditional presumption with respect to the validity of every legislative act there has been added, moreover, the constitutional mandate to construe such legislation liberally in favor of the municipalities.[38]

After stating that the scope of judicial review should be tightly circumscribed, Vanderbilt had no difficulty finding that the minimum floor space requirements were reasonably related to the public health and that the Wayne Township zoning ordinance was therefore a valid exercise of police power.

Justice Oliphant's dissent in *Lionshead* focused upon the exclusionary effect of the ordinance. He was not willing, as was the majority in his view, to assume "that the discretion of the zoning board or governing body amounts to wisdom." [39]

Justice Oliphant's fear that the *Lionshead* holding would precipitate the enactment of more exclusionary zoning ordinances by other municipalities seems justified in light of subsequent cases.[40] In *Fischer v. Bedminster Township*,[41] for example, the supreme court sustained a zoning ordinance which restricted construction of residences on plots less than five acres. In reaching this decision, the court concluded that the presumption of constitutionality places upon the party assailing an ordinance the burden of producing evidence and the burden of persuading the court that the ordinance is unreasonable. Since the plaintiff had sustained neither burden, the court was compelled to decide whether the five acre zoning provision was unreasonable *per se*. It noted that other jurisdictions had sustained one, two, and three acre requirements[42] and that

38. 89 A.2d at 696.

39. 89 A.2d at 702.

40. *See, e.g.*, Hohl v. Township of Readington, 37 N.J. 271, 181 A.2d 150 (1962); Napierkowski v. Township of Gloucester, 29 N.J. 481, 150 A.2d 481 (1959); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955); Loveladies Property Owners Ass'n v. Barnegat City Service Co., 60 N.J. Super. 491, 159 A.2d 417 (App. Div. 1960); Clary v. Borough of Eatontown, 41 N.J. Super. 47, 124 A.2d 54 (App. Div. 1956); Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (App. Div. 1951); Chrinko v. South Brunswick Township Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963).

41. 11 N.J. 194, 93 A.2d 378 (1952).

42. Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942) (one acre); Flora Realty & Inv. Co. v. City of Ladue, 361 Mo. 1025, 246 S.W.2d 771 (1952) (three

"[n]o case has been presented where a five-acre provision has been struck down as unreasonable and arbitrary." [43] In upholding the ordinance, the court observed that it was sufficient that there "appeared" to be ample justification for the ordinance.[44] Justice Oliphant's concern in *Lionshead,* however, surfaced in the majority's concession that "[i]t must, of course, be borne in mind that an ordinance which is reasonable today may at some future time by reason of changed conditions prove to be unreasonable." [45]

The presumption of validity received its strongest support in *Vickers v. Township Committee of Gloucester Township,*[46] which involved a challenge to a zoning ordinance excluding trailer camps and trailer parks from an industrial district. In sustaining the provision, the court reiterated that the role of the judiciary in reviewing zoning ordinances adopted pursuant to the enabling legislation is extremely narrow.[47] The burden of proof needed to rebut the presumption of validity is heavy:

> By these standards which control judicial review, the plaintiff to prevail must show *beyond debate* that the township in adopting the challenged amendment transgressed the standards of [the zoning enabling act]. In other words, if the amendment presented a debatable issue we cannot nullify the township's decision that its welfare would be advanced by the action it took.[48]

From a procedural standpoint, this statement means that the court would sustain a zoning ordinance if there are any facts which support a finding that the municipal action was not arbitrary and unreasonable. In searching for facts to support the validity of the zoning ordinance, the *Vickers* court looked beyond the record, taking judicial notice of the fact that "trailer camps bring problems of congestion with all

acres); Dilliard v. Village of North Hills, 276 App. Div. 969, 94 N.Y.S.2d 715 (1950) (two acres). *But see* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); Board of Co. Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

43. 93 A.2d at 393.

44. 93 A.2d at 384.

45. *Id.*

46. 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied,* 371 U.S. 233 (1963).

47. "The role of the judiciary in reviewing zoning ordinances adopted pursuant to the statutory grant of power is narrow. The court cannot pass upon the wisdom or unwisdom of an ordinance, but may act only if the presumption in favor of the validity of the ordinance is overcome by an affirmative showing that it is unreasonable or arbitrary." 181 A.2d at 134.

48. *Id.* (emphasis supplied).

their attendant difficulties." [49] The narrow scope of review, combined with the fact that appellate courts, if necessary, will take judicial notice of questionable facts to support a local ordinance, reflects the view that zoning is basically a legislative function, and thus an appellate court should not substitute its judgment for that of the local governing body.

In *Vickers*, Justice Hall was concerned with the result of the majority decision allowing a municipality to prohibit its residents from living in mobile homes. Of even greater concern to him was the judicial process by which the case was resolved and the apparent breadth of the court's rationale.[50] In his view, the judiciary should not be a rubber stamp for local action; instead its role should be "to watch over the parochial and exclusionist attitudes and policies of local governments, and to see to it that these do not run counter to national policy and the general welfare." [51] In his dissent, Justice Hall reviewed the line of cases[52] which had combined the presumption of legislative validity with the New Jersey constitutional provision requiring liberal construction and concluded:

> Analysis demonstrates that the mandate has no true application in this situation. It was intended to reverse the former rule of construction of municipal power which had required . . . [a]ny reasonable or fair doubt of the existence of the asserted power . . . be resolved against the municipality. . . . The new constitutional provision did not create a new concept of limitless home rule or give omnipotence to a local government to do anything it desires without regard to the limits of the delegated power supposedly exercised.[53]

Consistent with his view of the judicial role, Justice Hall believed that it was "a misapplication of the constitutional mandate to utilize it . . . for the purpose of glossing over or watering down the requisite inquiry as to the reasonableness with reference to the particular action under review." [54] Noting that the New Jersey judiciary recently had cre-

49. 181 A.2d at 137.

50. 181 A.2d at 140.

51. 181 A.2d at 141, *citing* Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955).

52. *See* cases cited in note 40 *supra*.

53. 181 A.2d at 143.

54. *Id.* Justice Hall believed that the function of judicial review was to balance the need for governmental regulation with the injury to private interests:

> Proper judicial review to me can be nothing less than an objective, realistic consideration of the setting—the evils or conditions sought to be reme-

ated procedural rules which make it virtually impossible to attack municipal zoning regulations, Hall maintained that the municipality, with all its resources, should assume the burden of producing evidence to justify its action. This suggestion is especially relevant when the challenged ordinance on its face is susceptible of extreme application.[55]

THE SUPERIOR COURTS: PRESENT APPROACH

The change urged by Justice Hall in *Vickers* has not been accepted by the New Jersey Supreme Court, but recent decisions in the superior courts indicate that his views have not been ignored.[56] Particular emphasis has been given to Hall's observation that the presumption of validity has lost its value because of the perfunctory manner in which it has been applied.[57] In *Molino v. Mayor and Council of the Borough of Glassboro*,[58] for example, the borough enacted a zoning ordinance designed to exclude children[59] from the community in order

> died, 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.

181 A.2d at 144.

Hall's view of the role of the judiciary in reviewing legislation is similar to that expressed by Justice Stone in United States v. Caroline Prods. Co., 304 U.S. 144, 152 (1937). Justice Stone suggested that the presumption of constitutionality is proper only insofar as the political process from which the challenged legislation emerges is a meaningful process which permits the expression and consideration of legitimate interests of all groups affected by the legislation.

55. The test of validity is certainly something much more than bad faith or corruption. Local officials, no matter how conscientious and sincere in their own minds, may be legally wrong in formulating into legislation what they think is best for the community. The only place that question can be tested and individual rights and privileges safeguarded is in the courts. The judicial branch does not meet its full responsibility when, as here, its concept of review gives unquestioned deference to the views of local officials.

181 A.2d at 145. For a similar position regarding the role of the judiciary, see Feiler, *Metropolitonization and Land Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971).

56. Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); Molino v. Mayor & Council, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971).

57. 181 A.2d at 143.

58. 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971).

59. The zoning ordinance provided, *inter alia:*

> 1. In any given garden apartment complex, at least 70 percent of all units could have no more than one bedroom. No more than 25 percent may have two bedrooms, and no more than 5 percent could have three bedrooms.

to minimize the costs of education. Because of the suspect purpose of the regulation (fiscal purposes are not included in the enabling act's enumerated purposes for zoning), the superior court adopted Hall's rationale and found it unnecessary to assume that the ordinance was not arbitrary or unreasonable:

> The purpose of zoning is well known. The actions taken under the guise of zoning continue to cause great concern. . . . There is a presumption of validity *if* [the zoning ordinance] meets the statutory and constitutional requirements.[60]

That the judiciary should look to the underlying objective of a zoning ordinance before applying the presumption of validity also was shown in *Oakwood at Madison, Inc. v. Township of Madison*.[61] Because the apparent purpose of the challenged zoning ordinance (limiting the number of housing units which could be constructed in certain areas) was to stabilize the tax rate, the court said that the zoning regulation was invalid unless it was defensible on some other ground. Implicit in the decision is a judicial posture also reflected in recent Pennsylvania cases: If the zoning ordinance appears to the court to have been enacted for a suspect purpose, the burden of proving the reasonableness of the legislation shifts to the municipality.[62]

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2. Minimum floor space requirements: 750 sq. feet—one bedroom units, 900 sq. feet—two bedroom units, 1200 sq. feet—three bedroom units.

. . . .

5. Two off street parking spaces must be provided for each unit.

. . . .

11. Each apartment must have an automatic garbage disposal.

281 A.2d at 403.

60. 281 A.2d at 404 (emphasis supplied).

61. 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971).

62. The *Madison* court appears to have been influenced by the following statement in National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965):

> While recognizing this presumption [of constitutionality], we must also appreciate the fact that zoning involves governmental restrictions upon a landowner's constitutionally guaranteed right to use his property, unfettered, except in very specific instances, by governmental restrictions. The time must never come when, because of frustration with concepts foreign to their legal training, courts abdicate their judicial responsibility to protect the constitutional rights of individual citizens. Thus, the burden of proof imposed upon one who challenges the validity of a zoning regulation must never be so onerous as to foreclose, for all practical purposes, a landowner's avenue of redress against infringement of constitutionally protected rights.

215 A.2d at 607.

The most recent expression concerning the role of the judiciary in reviewing zoning ordinances is *Southern Burlington County NAACP v. Township of Mount Laurel*,[63] where plaintiffs sought declaratory and injunctive relief against a township zoning ordinance permitting multifamily dwellings on a farm only if the dwelling was 200 feet from the property line. Without initially stating a presumption of validity, the court heard evidence showing that the township had used its zoning power to discriminate against the community's poor citizens. The court noted that, although there is a general principle against judicial inquiry into municipal exercise of police powers, "[t]he courts . . . must be ever watchful of any discriminatory acts of local units of government against the rights and privileges of the poor and underprivileged." [64]

CONCLUSION

Having reasoned around the procedural barriers enunciated in *Lionshead* and *Vickers*, the New Jersey superior courts have found further justification for their approach in the substantive constitutional dogma which emanated from the United States Supreme Court during the 1960's.[65] The creation of barriers against the poor in the guise of zoning ordinances no longer falls outside the pale of judicial scrutiny. As was observed in *Mount Laurel:*

> [W]hen municipalities give reasons for the exclusion of [the poor], although they gloss them with high-meaning phrases, they lack sincerity. . . . [W]hile it is proper to zone in certain instances against factories, it is improper to build a wall against the poor . . . [for] it [is] clear that the Constitution nullifies sophisticated as well as simple-minded modes of discrimination.[66]

Having thus rejected the procedural straightjacket imposed by earlier decisions of the New Jersey Supreme Court and having found

63. 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972).

64. 290 A.2d at 471.

65. *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 242-63 (1971); Johnson, *Exclusionary Zoning: Damage Actions Under the Civil Rights Act*, LAW & SOC. ORDER 538 (1971).

66. 290 A.2d at 472, *citing* Gomilion v. Lightfoot, 364 U.S. 339 (1960). In Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353, 358 (L. Div. 1971), the court instructed that "[i]n pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare [and the] general welfare does not stop at each municipal boundary."

new substantive remedies to relieve the inequities inherent in exclusionary zoning devices, the superior courts have voiced a significant challenge. Perhaps the words of the New Jersey Supreme Court in *Pierro v. Baxendale*[67] provide a sufficient apothegm to sustain the present view of the superior courts: "If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not long be delayed." [68] Indeed, it has been 21 years since the court rendered its decision in *Lionshead* and 11 years since its decision in *Vickers;* it is doubtful, therefore, that the attitude of these cases will survive the more enlightened perspective of *Mount Laurel, Madison,* and *Molino.*[69] Perhaps more importantly, it is hoped that other communities will benefit from the New Jersey experience so that urgent housing needs can be met without a time-consuming struggle.

67. 20 N.J. 17, 118 A.2d 401 (1955).

68. 118 A.2d at 408.

69. 118 A.2d at 408. The majority opinion written by Justice Hall in Desimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 267 A.2d 31 (1970), may presage the supreme court's acceptance of the superior court's attitude. In *DeSimone* the court seized upon the general welfare concept in the state's enabling legislation to advance the construction of public housing.