empowered to let stand or remove on the basis of no standard. *See* Valkanet v. City of Chicago, 13 Ill.2d 268, 148 N.E.2d 767 (1958). Note, *Consent Provisions in Modern Zoning Statutes*, 1954 U.ILL.L.F. 309. The Supreme Court has also distinguished and upheld zoning changes subject to, or accomplished by, a community-wide referendum. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976). The state courts are also divided on the issue. *Compare*, *e.g.* Arnel Dev. v. City of Costa Mesa, 28 Cal.3d 511, 620 P.2d 565, 169 Cal.Rptr. 904 (1980) (zoning by initiative is appropriate because zoning is a legislative act) *with* Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989) (zoning by initiative conflicts with planning requirements of Hawaii's Zoning Enabling Act). *See generally* Note, *Rezoning by Initiative and Landowners' Due Process Rights*, 70 CALIF.L.REV. 1107 (1982).

Despite *Eastlake*, there remains plenty of apparently viable state precedent that standardless delegations to neighbors, committees, zoning boards and so on are unconstitutional. In at least one case, an architectural review scheme quite like the one in the instant case was upset on this ground. Pacesetter Homes, Inc. v. Village of Olympia Fields, 104 Ill.App.2d 218, 244 N.E.2d 369 (1968). *But see*, in addition to the principal case, Town of Deering *ex rel*. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964) ("impair the atmosphere"); State ex rel. Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955) ("not be so at variance with . . . the exterior architectural appeal and functional plan of the structures . . . in the immediate neighborhood . . . as to cause a substantial depreciation in the property values of said neighborhood").

5. Does the first amendment set any limits on community control of architectural design? *See* p. S522 *infra*.

SOUTHERN BURLINGTON COUNTY N.A.A.C.P v. TOWNSHIP OF MOUNT LAUREL

Supreme Court of New Jersey
67 N.J. 151, 336 A.2d 713, *cert. denied* 423 U.S. 808

HALL, J. This case attacks the system of land use regulation by defendant Township of Mount Laurel on the ground that low and moderate income families are thereby unlawfully excluded from the municipality. The trial court so found [citation omitted] and declared the township zoning ordinance totally invalid. Its judgment went on, in line with the requests for affirmative relief, to order the municipality to make studies of the housing needs of low and moderate income persons presently or formerly [p*1055] residing in the community in substandard housing, as well as those in such income classifications presently employed in the township and living elsewhere or reasonably expected to be employed therein in the future, and to present a plan of affirmative public action designed "to enable and encourage the satisfaction of the indicated needs." Jurisdiction was retained for judicial consideration and approval of such a plan and for the entry of a final order requiring its implementation.

The township appealed . . . and those plaintiffs, not present or former residents, cross-appealed on the basis that the judgment should have directed that the prescribed plan take into account as well a fair share of the regional housing needs of low and moderate income families without limitation to those having past, present or prospective connection with the township. . . .

The implications of the issue presented are indeed broad and far-reaching, extending much beyond these particular plaintiffs and the boundaries of this particular municipality.

There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families. The situation was characterized as a "crisis" and fully explored and documented by Governor Cahill in two special messages to the Legislature—*A Blueprint for Housing in New Jersey* (1970) and *New Horizons in Housing* (1972).

Plaintiffs represent the minority group poor (black and Hispanic) seeking such quarters. But they are not the only category of persons barred from so many municipalities by reason of restrictive land use regulations. We have reference to you and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments. We will, therefore, consider the case from the wider viewpoint that the effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extend of their income and resources. In this connection, we accept the representation of the municipality's counsel at oral argument that the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal basis of race, origin or believed social incompatibility.

As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas . . . .

Mount Laurel is a flat, sprawling township, 22 square miles or about 14,000 acres, in area, on the west central edge of Burlington County. . . .

In 1950, the township had a population of 2817, only about 600 more people than it had it 1940. It was then, as it had been for decades, primarily a rural agricultural area with no sizeable settlements or commercial or industrial enterprises. The populace generally lived in individual houses scattered along country roads. There were several pockets of poverty, with deteriorating or dilapidated housing (apparently 300 or so units of which remain today in equally poor condition). After 1950, as in so many other municipalities similarly situated, residential development and some commerce and industry began to come in. By 1960 the population had almost doubled to 5249 and by 1970 has more than doubled again to 11,221. [p*1056] These new residents were, of course, "outsiders" from the nearby central cities and older suburbs or from more distant places drawn here by reason of employment in the region. The township is now definitely a part of the outer ring of the South Jersey metropolitan area, which area we define as those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden city. And 65% of the township is still vacant land or in agricultural use.

The growth of the township has been spurred by the construction or improvement of main highways through or near it.

The location and nature of development has been, as usual, controlled by the local zoning enactments. The general ordinance presently in force, which was declared invalid by the trial court, was adopted in 1964. We understand that earlier enactments provided, however, basically the same scheme but were less restrictive as to residential development. The growth pattern dictated by the ordinance is typical. . . .

[The court's detailed description of the zoning ordinance is omitted. The specific aspects of it deemed invalid are discussed *infra*.]

The legal question before us, as earlier indicated, is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of any obligation to make possible a variety and choice of types of living accommodations.

. . . We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.

We reach this conclusion under state law and so do not find it necessary to consider federal constitutional grounds urged by plaintiffs. We begin with some fundamental principles as applied to the scene before us.

Land use regulation is encompassed within the state's police power. . . .

It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Art. 1, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution. [Citations omitted.] It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others). Conversely, a zoning enactment which is contrary to the general welfare is invalid. [Citations omitted.] Indeed these considerations are specifically set forth in the zoning enabling act as among the various [p*1057] purposes of zoning for which regulations must be designed. [Citation omitted.] Their inclusion therein really adds little; the same requirement would exist even if they were omitted. . . .

The demarcation between the valid and the invalid in the field of land use regulation is difficult to determine, not always clear and subject to change. . . .

Frequently the decisions in this state . . . have spoken only in terms of the interest of the enacting municipality, so that it has been thought, at least in some quarters, that such was the only welfare requiring consideration. It is, of course, true that many cases have dealt only with regulations having little, if any, outside impact where the local decision is ordinarily entitled to prevail. However, it 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. . . .

This brings us to the relation of housing to the concept of general welfare just discussed and the result in terms of land use regulation which that relationship mandates. There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. . . .

. . . 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 and 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 long-standing 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 [earlier cases] to require . . . 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.

We have spoken of this obligation of such municipalities as "presumptive." The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which [p*1058] preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action. [Citation omitted.] The substantive aspect of presumptive" relates to the specifics, on the one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do. Both kinds of specifics may well vary between municipalities according to peculiar circumstances.

We turn to application of these principles in appraisal of Mount Laurel's zoning ordinance, useful as well, we think, as guidelines for future application in other municipalities.

The township's general zoning ordinance (including the cluster zone provision) permits, as we have said, only one type of housing—single-family detached dwellings. This means that all other types—multi-family including garden apartments and other kinds housing more than one family, town (row) houses, mobile home parks—are prohibited. Concededly, low and moderate income housing has been intentionally excluded. . . .

Mount Laurel's zoning ordinance is also so restrictive in its minimum lot area, lot frontage and building size requirements, earlier detailed, as to preclude single-family housing for even moderate income families. . . .

Akin to large lot, single-family zoning restricting the population is the zoning of very large amounts of land for industrial and related uses. Mount Laurel has set aside almost 30%, of its area, over 4,100 acres, for that purpose; the only residential use allowed is for farm dwellings. In almost a decade only about 100 acres have been developed industrially. . . .

Without further elaboration at this point, our opinion is that Mount Laurel's zoning ordinance is presumptively contrary to the general welfare and outside the intended scope of the zoning power in the particulars mentioned. A facial showing of invalidity is thus established, shifting to the municipality the burden of establishing valid superseding reasons for its action and nonaction. We now examine the reasons it advances.

The township's principal reason in support of its zoning plan and ordinance housing provisions, advanced especially strongly at oral argument, is the fiscal one previously adverted to, *i.e.*, that by reason of New Jersey's tax structure which substantially finances municipal governmental and educational costs from taxes on local real property, every municipality may, by the exercise of the zoning power, allow only such uses and to such extent as will be beneficial to

the local tax rate. In other words, the position is that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce, and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.

We have previously held that a developing municipality may properly zone for and seek industrial ratables to create a better economic balance for the community *vis-a-vis* educational and governmental costs engendered by residential development, provided that such was " * * * done reasonably as part of and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality." [Citation omitted.] We adhere to that view today. But we were not there concerned with, and did not pass upon, the validity of municipal exclusion by zoning of types of housing and kinds of people for the same local financial end. We have no hesitancy in now [p*1059] saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities.

The propriety of zoning ordinance limitations on housing for ecological or environmental reasons seems also to be suggested by Mount Laurel in support of the one-half acre minimum lot size in that very considerable portion of the township still available for residential development. It is said that the area is without sewer or water utilities and that the soil is such that this plot size is required for safe individual lot sewage disposal and water supply. The short answer is that, this being flat land and readily amenable to such utility installations, the township could require them as improvements by developers or install them under the special assessment or other appropriate statutory procedure. The present environmental situation of the area is, therefore, no sufficient excuse in itself for limiting housing therein to single-family dwellings on large lots. [Citation omitted.] This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered. Generally only a relatively small portion of a developing municipality will be involved, for, to have a valid effect, the danger and impact must be substantial and very real (the construction of every building or the improvement of every plot has some environmental impact)—not simply a makeweight to support exclusionary housing measures or preclude growth—and the regulation adopted must be only that reasonably necessary for public protection of a vital interest. . . .

We have earlier stated that a developing municipality's obligation to afford the opportunity for decent and adequate low and moderate income housing extends at least to " * * * the municipality's fair share of the present and prospective regional need therefor." Some comment on that conclusion is in order at this point. Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But, under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally. So long as that situation persists under the present tax structure, or in the absence of some kind of binding agreement among all the municipalities of a region, we feel that every municipality therein must bear its fair share of the regional burden. (In this respect our holding is broader than that of the trial court, which was limited to Mount Laurel-related low and moderate income housing needs.) . . .

There is no reason why developing municipalities like Mount Laurel, required by this opinion to afford the opportunity for all types of housing to meet the needs of various categories of

people, may not become and remain attractive, viable communities providing good living and adequate services for all their residents in the kind of atmosphere which a democracy and free institutions demand. They can have industrial sections, commercial sections and sections for every kind of housing from low cost and multi-family to lots of more than an acre with very expensive homes. Proper planning and [p*1060] governmental cooperation can prevent over-intensive and too sudden development, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty. We do not intend that developing municipalities shall be overwhelmed by voracious land speculators and developers if they use the powers which they have intelligently and in the broad public interest. Under our holdings today, they can be better communities for all than they previously have been. . . .

. . . [T]he trial court invalidated the zoning ordinance in toto and ordered the township to make certain studies and investigations and to present to the court a plan of affirmative public action designed "to enable and encourage the satisfaction of the indicated needs" for township related low and moderate income housing. Jurisdiction was retained for judicial consideration and approval of such a plan and for the entry of a final order requiring its implementation.

We are of the view that the trial court's judgment should be modified in certain respects. We see no reason why the entire zoning ordinance should be nullified. Therefore we declare it to be invalid only to the extent and in the particulars set forth in this opinion. The township is granted 90 days from the date hereof, or such additional time as the trial court may find it reasonable and necessary to allow, to adopt amendments to correct the deficiencies herein specified. It is the local function and responsibility, in the first instance at least, rather than the court's, to decide on the details of the same within the guidelines we have laid down. If plaintiffs desire to attack such amendments, they may do so by supplemental complaint filed in this cause within 30 days of the final adoption of the amendments.

We are not at all sure what the trial judge had in mind as ultimate action with reference to the approval of a plan for affirmative public action concerning the satisfaction of indicated housing needs and the entry of a final order requiring implementation thereof. Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mount Laurel must do in that regard. It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power. . . . The municipality should first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested, both by appropriate zoning ordinance amendments and whatever additional action encouraging the fulfillment of its fair share of the regional need for low and moderate income housing may be indicated as necessary and advisable. (We have in mind that there is at least a moral obligation in a municipality to establish a local housing agency pursuant to state law to provide housing for its resident poor now living in dilapidated, unhealthy quarters.) The portion of the trial court's judgment ordering the preparation and submission of the aforesaid study, report and plan to it for further action is therefore vacated as at least premature. Should Mount Laurel not perform as we expect, further judicial action may be sought by supplemental pleading in this cause.

The judgment of the Law Division is modified as set forth herein. No costs. . . .

MOUNTAIN and PASHMAN, J.J., concurring in the result.

Notes and Questions on Mt. Laurel

1. The notes that follow are more casual than most because they are dependent on reading that the author has done in secondary sources that he hopes are reliable.

The current population of New Jersey is almost 9 million, making it the 11th most populous state in the US. In terms of geograhic area it is the fourth smallest state. At 1196 inhabitants per square mile it is the most densely populated state in US.

In the early part of the 17th century, the colony had approximately the same boundaries as the state does today. In 1664, the king divided the colony. Sir George Carteret got East Jersy, basically what today is the northern half of the state, and John Lord Berkeley got West Jersey, basically what today is the southern half of the state. But the state was once more put together in 1689. That was huge mistake. In the mid-1990's 81% of NJ's suburban households were white; 85% of the urban households were African-American or Hispanic. NJ is about 80% suburban. The 2000 census showed some movement of minority populations into the suburbs. The 2010 census shows more, but some back-of-the-envelope calculations suggest that the NJ suburbs are still overwelmingly white, and that the movement of African-American and Hispanic populations out of the major urban centers, of which there has been some, has largely been to the benefit of lesser urban centers, such as Atlantic City, Bayonne, and Secaucus, not the suburbs.

2. There are three cases that are popularly known as 'Mt. Laurel':

(a) *Mt. Laurel I* (1975), the case extracted above held that there is a constitutional obligation on cities and towns to be open to low and moderate- income housing.

(b) Southern Burlington County NAACP v. Township of Mount Laurel ('Mount Laurel II'), 92 NJ 158 (1983) held that the courts will enforce this obligation by special procedures.

(c) Hills Development Co. v. Bernards ('Mt. Laurel III'), 103 N.J. 1 (1986) (1986)—the courts will defer to a legislatively-established commission to enforce the *Mt. Laurel* obligation

3. Where does the *Mt. Laurel I* obligation come from? Due process? Equal protection? By emphasizing how N.J. differs from the feds on the latter (largely edited out), court seems to be suggesting that it's equal protection, but when it gets through, it seems to be something else. What is it?

4. Courts are supposed to defer to legislative determinations. What happened here?

5. What are the mechanisms of *Mt. Laurel II*? How would you summarize this list of requirements:

(a) Must raise level of housing for resident poor.

(b) Realistic opportunity for fair share of present and prospective poor without regard to whether the area is "developing". Deference to the State Development Guide Plan.

(c) Proof of fair share in numeric terms.

(d) Three specialized judges.

(e) Affirmative steps must be taken, e.g., tax incentives.

(f) Both low and moderate housing.

(g) Just least cost housing won't do.

(h) Builder's remedies.

(i) One trial and one appeal.

(j) Long-term obligation and phase-ins.

6. What does *Hills Development* (*Mt. Laurel III*) hold?

(a) Delay does not make the Fair Housing Act unconstitutional when the delay is designed to allow the development of a State Development and Redevelopment Plan.

(b) Moratorium on builder's remedy not unconstitutional where limited, and it was never part of the constitutional law.

(c) No evidence that only delay will result nor that builders will lose interest. Must give it a chance.

(d) Not an interference with the judicial constitutional power to manage the courts.

(e) All cases must be transferred unless transfer would preclude the building of housing. ("Manifest justice" strictly construed.)

Lurking behind this decision was the fact the courts had not been notably successful at enforcing the *Mt. Laurel* doctrine. As of *Mt. Laurel II* at least 70 lawsuits had been filed challenging municipal housing policies, but relatively little affordable housing had been built. The situation was not much better in 1986. See Thomas Jay Hall, "Is Affordable Housing Unattainable? The Most Recent Chapter In *Mount Laurel* Litigation Addresses This Question," 169 NEW JERSEY LAW JOURNAL No. 14, pp. S7–S10 (September 30, 2002).

7. What happened as a result of all this? Some lower- and middle-income housing is being built, not enough to meet the need but probably more than was being built during the *Mt. Laurel* era. The fear of the enviromentalists that any attempt to increase the amount of housing, particularly cheaper housing, would lead to environmental disasters has not been realized. Many of the wealthier suburbs meet their fair share housing obligations by transferring money to the largely segregated New Jersey cities rather than by allowing lower- and middle-income housing to be built within their borders. I have little doubt that if the *Mt. Laurel* standard could have been made to work through judicial enforcement, it would have resulted both in more housing and in a more integrated New Jersey. The fact, however, is that it could not be made to work, and the reason why it could not be made to work may reflect something about the capacity of courts as institutions that goes beyond the immediate politics of New Jersey. On June 29, 2011, Governor Christie abolished the Council on Affordable Housing, and transferred its powers to the State Department of Community Development. On July 10, 2013, the NJ Supreme Court held the Governor's actions unconstitutional, ruling that such action could be accomplished only by the legislature. A State Development and Redevelopment Plan adopted in 2001 was revised, but the hearings on the revised plan encountered considerable opposition, particularly from environmental groups. The revised plan, scheduled to be adopted in 2012, was postponed because of Superstorm Sandy. New Jersey took a big hit from Superstorm Sandy. How and whether affordable housing is going to work into the substantial amount of redevelopment that will have to be done is anyone's guess.

Notes and Questions on Exclusionary Zoning More Generally

[p*1072] 1. Few state courts have made the full *Mount Laurel* trip, although some have gone a considerable part of the way. After seeming to espouse the *Mount Laurel* principle (*e.g.*, Berenson v. New Castle, 38 N.Y..2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); *cf.* Asian Ams. for Equality v. Koch, 129 Misc.2d 67, 492 N.Y.S.2d 837 (Sup.Ct.1984), *aff'd as modified*, 128 A.D.2d 99, 514 N.Y.S.2d 939 [p*1074] (1987)), the New York Court of Appeals held that municipalities had no obligation to foster low-income housing, or, at least, to remove the legally-sanctioned impediments that make construction of low-income housing by private developers infeasible. Suffolk Hous. Servs. v. Town of Brookhaven, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987); *see* Carter, *Judicial Deference and the Perpetuation of Exclusionary Zoning: A Case Study, Theoretical Overview, and Proposal for Change*, 37 BUFF.L.REV. 836 (1988). Beginning with one of the earliest cases that subjected large-lot zoning to heightened scrutiny (National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965)), Pennsylvania's courts have arrived at a position in which exclusionary zoning is held impermissible when it restricts reasonable growth and interferes with the landowner's

power to alienate his or her property. *Compare* Appeal of M.A. Kravitz Co., 501 Pa. 200, 460 A.2d 1075 (1983) (though only .6% of land zoned for multi-family use ordinance not unconstitutional because no expectation of growth in the area) *with* Fernley v. Bd. of Supervisors, 509 Pa. 413, 502 A.2d 585 (1985) (ordinance unconstitutional that totally prohibits multi-family housing even though no growth expected in the area). New Hampshire's Supreme Court leaned toward a judicial policy invalidating exclusionary zoning in Soares v. Town of Atkinson, 129 N.H. 313, 529 A.2d 867 (1987), but declined to award a builder's remedy or specific relief. It went one step further in Britton v. Town of Chester, 1991 WL 135947 (N.H.), where it invalidated the exclusionary portions of Chester's zoning ordinance and granted the plaintiff a builder's remedy. California has not adopted *Mount Laurel*, at least not yet, but it does have two notable decisions striking down efforts, one by initiative, the other by reference to the state's general plan, that sought to upset grants of building permits for multi-family housing. Verdugo Woodlands Homeowners & Residents Ass'n v. City of Glendale, 179 Cal.App.3d 696, 224 Cal.Rptr. 903 (1986); Arnel Dev. Co. v. City of Costa Mesa, 126 Cal.App.3d 330, 178 Cal.Rptr. 723 (1981). By contrast, Oregon seems to have achieved a position similar to *Mount Laurel* largely by legislation. *See* Williams, *A Look at Implementation*, 14 ENVTL.L. 831 (1984). *See generally* Annot., 48 A.L.R.3d 1210 (1973).

2. "Exclusionary zoning" is the popular and quite imprecise designation for a troublesome aspect of most land use controls. It was early recognized that one tendency of zoning was to segregate people according to income level, and perhaps other traits that relate closely to the style of housing that people do and are able to choose—that zoning directs not only where things go (factories, piggeries) but where people live. This is true of people en masse but also classes of people—apartment people, mobile home people, rooming house or boarding hotel people, expensive home or apartment people, low income people, two bedroom people, five bedroom people, fraternity people, commune people. Not only does the standard bundle of zoning powers produce a community with different residential districts, but it seems to allow a community without housing of certain types or prices—mobile homes or small, cheap bungalows, for example. In other words, some degree of exclusion is inherent in zoning. So far, we have been speaking of effect; but given the effect, it is predictable that some communities should consciously use the zoning ordinance to exclude or segregate groups of people considered undesirable neighbors by their majority. It is predictable that some communities should use zoning to exclude or quarantine blacks or other minorities.

Behind some of these actions often lurks a fiscal motive:

> . . . [S]ince most local revenue comes from land and buildings, and since different types of land use vary widely both in the tax revenue they produce [p*1075] and in the services required by their occupants, the financial consequences of any proposed land use are a matter of real importance to the municipality: is it a good ratable or a bad ratable? A "good ratable" is a type of land use which brings in a lot of taxes, but does not require much in public services, that is, which shows a net profit to the town, taxwise. The obvious example is a nice sanitary research laboratory or factory, but a shopping center will do, or perhaps even a multiple dwelling with only small apartments, and so almost no potential school children. A "bad ratable" is a form of land use which does not bring in much in taxes, but requires a lot in public services. A "bad ratable" is of course first of all any form of housing for most of the population, and especially for the middle and lower income groups who need good housing the most.
>
> Now there is of course a great deal of nonsense these days about "good ratables" and "bad ratables." An even minimally sophisticated economic analysis of the total impact of certain land uses would probably suggest that the "good ratables" are not all that good, and the "bad ratables" may not even be that bad. For example, the "good ratable" may end up by bringing

> in many new residents and so a heavy demand for public services, costing more than the tax revenue obtained from the "good ratable". The "bad ratable" requires a lot more in services, but also brings in more people to support the shops which are often the best ratables in town. All this is true enough—but not too important, because the municipal officials who make the decisions think primarily in crude terms of "good" and "bad" ratables, and act on that assumption. The actual economic impact is therefore not the real question. Granted that the situation is more complicated than indicated by the conventional terms; still, "good ratables" often are really good, "bad ratables" are usually bad, and in any event this is the motivation upon which most local governments are likely to act.

Williams, *The Three Systems of Land Use Control (Or, Exclusionary Zoning and Revision of the Enabling Legislation)*, 25 RUTGERS L.REV. 80 83–84 (1970).

Clear traces of "fiscal zoning" are to be found in the Mount Laurel ordinance. Can you identify some? Large-lot zoning is sometimes an explicit fiscal strategy. The National Commission on Urban Problems reported in 1969:

> In St. Louis County . . . the Parkway School District has calculated that any home costing less than $26,274 does not pay its own way in educational costs. On this basis, district officials oppose any change in zoning to permit lots of less than a quarter-acre, below which they believe housing costing less than this amount can be built.

NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 214 (1969).

3. The two legal weapons most frequently discussed in connection with "exclusionary zoning" are due process—the property owner's argument that the regulation in question is unreasonable—and equal protection. Which is the basis for the *Mount Laurel* decision?

How do the two compare in the case of a proposed low-income housing project, blocked by zoning? Under the *Mount Laurel* decision what questions about the community's zoning would have to be asked? If the majority of the residents of the project are likely to be black, under what circumstances would the community be held to have denied "equal protection"? Is this a case where motive is relevant? How is it to be found? Can it be inferred from the mere sequence of events? In this connection, consider the widely publicized case of Black Jack, Missouri:

> On December 24, 1969, ICUA, a Missouri nonprofit corporation, organized for the purpose of the effective use of the religious community's [p*1076] resources in alleviating St. Louis urban problems, signed a sales contract to buy 11.9 acres of land in an unincorporated area of St. Louis County. . . .
>
> [The following March two religious groups affiliated with ICUA submitted an application to the Federal Government seeking support under the section 236 low-income rental program for a project to be built on the 11.9 acre site.] Shortly thereafter, area residents began active opposition to the proposed location of the apartments. Led by the Black Jack Improvement Association and the Spanish Lake Improvement Association, residents held mass meetings, began a letter-writing campaign to federal administrative and elected officials, published circulars, and dispatched a delegation to present the Undersecretary of Housing and Urban Development with petitions and arguments against the apartments' location in the neighborhood.
>
> On June 5, 1970, the Department of Housing and Urban Development issued a "feasibility letter," which reserved federal funds for the apartments.
>
> Upon learning of the "feasibility letter," area residents began a drive to incorporate the area including the site of the proposed Park View Heights apartments . . . . Despite . . . opposition, [from the county planning department], the St. Louis County Council incorporated the city of Black Jack, Missouri, on August 6, 1970. . . .

> On October 20, 1970, the City Council [of Black Jack] passed [a] zoning ordinance [prohibiting construction of any new multifamily housing].

Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1210–11 (8th Cir.1972) (holding that the corporate sponsors had standing to assert the constitutional claims of those who would occupy the proposed housing). In a companion case that reached the merits, the district court found inadequate evidence of racial discrimination. United States v. City of Black Jack, 372 F.Supp. 319 (E.D.Mo.1974). The Court of Appeals reversed in an opinion stressing the effects of the ordinance. United States v. City of Black Jack, 508 F.2d 1179, (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

What would it take to establish a denial of equal protection, when a low income project is proposed for an area long zoned for detached single-family homes? The sponsors request a rezoning and are turned down.

The Supreme Court faced such a case in Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), where it held that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Elaborating, Justice Powell wrote: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available . . . . The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes . . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. [Citations omitted.] For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of . . . plans to erect integrated housing, we would have a far different case." He concluded that the evidence did not warrant overturning the findings below that discrimination had not been a motivating factor in Arlington Heights. However, the decision remanded the case to the Court of Appeals to consider plaintiffs' claim that the refusal to rezone violated the Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3631 (1976).

Upon remand, the U.S. Court of Appeals for the Seventh Circuit held that a violation of the Federal Fair Housing Act could be established without proof of intent to discriminate. Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 [p*1077] F.2d 1283 (7th Cir.1977), *cert. denied*, 434 U.S. 1025 (1978). *See generally* Comment, *A Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent*, 53 N.Y.U.L.REV. 150 (1978). The case ended with a consent decree pursuant to which the village annexed and rezoned an alternate site. Metropolitan Hous. Dev. Corp. v. Arlington Heights, 469 F.Supp. 836 (N.D.Ill. 1979).

In a recent case, where the town board had rejected a proposal to amend the zoning ordinance in order to allow a private low-income housing project in a predominantly white neighborhood, the Second Circuit held that the discriminatory effect of exclusionary zoning makes out a prima facie case under the Fair Housing Act, without proof of specific intent. Huntington Branch N.A.A.C.P. v. Town of Huntington, 844 F.2d 926 (2d Cir.1988). There is a good note on the case in 37 WASH.U.J.URB. & CONTEMP.L. 257 (1990).

4. In any "exclusionary zoning" case in which race is not prominent, a key question is whether there is something else which forces more rigorous judicial scrutiny than that implied by the standard "rational basis test." Thus, appraisals of the vitality of equal protection in this context have fluctuated as hopes that the Supreme Court would treat low-income as a suspect class, like race, rose and then fell (*see* James v. Valtierra, 402 U.S. 137 (1971)), and as hopes that housing might be treated as a fundamental interest followed the same cycle (*cf.* Lindsey v. Normet, 405 U.S. 56 (1972)). A reading of the Supreme Court's evolving equal protection stance, by the Second Circuit, led it to invalidate a zoning ordinance which, as is quite common, sought to limit occupancy in certain residential districts to families—defined as those related by blood, marriage

or adoption. The court held that this denied equal protection to a group of students who wanted to live together. *See* Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir.1973).

On appeal the Supreme Court reversed in an opinion by Mr. Justice Douglas:

> The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a state; that it bars people who are uncongenial to the present residents; that the ordinance expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the National's experience, ideology and selfperception as an open, egalitarian, and integrated society.
>
> We find none of these reasons in the record before us. It is not aimed at transients. [Citation omitted.] It involves no procedural disparity inflicted on some but not on others . . . . It involves no "fundamental" right guaranteed by the Constitution . . . . We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" [citation omitted] and bears "a rational relationship to a [permissible] state objective." [Citation omitted.]
>
> It is said, however, that if two unmarried people can constitute a "family," [which was the case under the Belle Terre ordinance] there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative not a judicial function. [p*1078]
>
> It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a "family" two unmarried people belies the charge.
>
> The ordinance places no ban on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever they like.
>
> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 7–9 (1974).

Notice that the exclusion attacked in *Belle Terre* did not necessarily involve either race or low-income status. How do "equal protection" and "due process" compare as standards in this kind of case?

Relying on *Belle Terre*, the Ohio Court of Appeals and Ohio Supreme Court upheld an even tighter "single family residence" zone of East Cleveland which in essence, defined a family as parents and their children, thus excluding most "extended family" configurations. In *Moore v. City of East Cleveland*, the Supreme Court reversed. The plurality opinion, written by Justice Powell, distinguished *Belle Terre* in these terms.

> . . . [O]ne overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by "blood, adoption, or marriage" to live together, and in sustaining the ordinance we were careful to note that it promoted "family needs" and "family values." [Citation omitted.] East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here. When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate.

Moore v. City of East Cleveland, 431 U.S. 494, 498–99 (1977).

Justice Stevens concurred in the judgment on the ground that *Euclid* and *Nectow*, did govern:

> The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins. Since this ordinance has not been shown to have any "substantial relation to the public health, safety, morals, or general welfare" of the city of East Cleveland, and since it cuts so deeply into a fundamental right normally associated with the ownership of residential property—that of an owner to decide who may reside on his or her property—it must fall under the limited standard of review of zoning decisions which this Court preserved in *Euclid* and *Nectow*. Under that standard, East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation. [p*1079]

Id. at 520–21.

Consider these further examples:

(a) In 1967 a Norwegian couple bought a home in one of the nicer residential sections of Minneapolis, an area zoned for single-family residence. More particularly the ordinance provided that "a family plus . . . roomers shall not exceed a total of five persons . . . [but] . . . that the limit of five persons shall not apply where the entire group living in the dwelling unit consists of persons related by blood, marriage or adoption, including foster children and domestic servants." When the couple moved in they were accompanied by eight retarded or handicapped women for whom they were caring under an arrangement with the county welfare department which paid them $115 per month for the family care of each. They consider and treat these women as members of their family. At the insistence of the neighborhood homeowners' association the city threatens prosecution for violation of the zoning ordinance if the number of "boarders" is not reduced to three. There are substantial areas of the city in which boarding houses are allowed. *See* Minneapolis Tribune, Oct. 10, 1968, at 1, col.1.

On the specific question of group homes for the mentally retarded the Supreme Court has held that the requirement of a special use permit for such homes when other group users were not required to obtain such a permit is invalid, at least on the facts of the case that it had before it, because the requirement did not protect a significant governmental interest and was based primarily on the unsubstantiated fears of nearby residents. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Many states now have statutes on the topic that attempt to put an end to community conflicts by restricting the number of occupants of such homes and controlling concentration of them. For a good discussion, see Salsich, *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP.PROB. & TR.J. 413 (1986). *See also* Charter Tp. v. Dinolfo, 419 Mich. 253, 351 N.W.2d 831 (1984) (six unrelated adults living in single-family residence succeed in having court hold that township's restrictive definition of "family" unrelated to a significant governmental interest and therefore in violation of the due process clause); McMinn v. Oyster Bay, 66 N.Y.2d 544, 488

N.E.2d 1240, 498 N.Y.S.2d 128 (1985) (ordinance which restricts number of unrelated people in a single family house to two individuals 62 years of age or older is an unreasonable exercise of the police power and therefore unconstitutional).

(b) Nether Providence, a suburban township in the Philadelphia metropolitan area, has a zoning ordinance which allocates 75%, of its 4.64 square miles to single-family residence, the balance being divided between commerce and industry. In none of its districts is an apartment house a permitted use. A Mr. Girsh bought 17« acres in the more restrictive of the two residential districts on which he proposes to build two nine-story "luxury" apartment buildings. He contends the ordinance is unconstitutional in blocking these plans. *See* Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).

(c) In a hypothetical county bearing a strong resemblance to Will County, Illinois, the zoning map shows a variety of districts, including both F (farming) and B (business). On a parcel of some 160 acres located in an F district, a corporation plans to build an elaborate mobile home park. The site is not especially suitable for farming. Quite a spectrum of other uses are permitted in F districts, however, including, airports, landfill garbage disposal, penal institutions, monasteries, recreational camps, etc., but not mobile homes. They are permitted only in B districts. The B districts of this county are pretty well filled up [p*1080] and the price of the remaining land in them probably precludes mobile home park development. An action is commenced by the corporation seeking a declaration that the ordinance is unconstitutional as applied to the 160 acres. *See* Lakeland Bluff, Inc. v. County of Will, 114 Ill.App.2d 267, 252 N.E.2d 765 (1969).

In the Nether Providence case, the Pennsylvania Supreme Court found the ordinance, described above, unconstitutional. Both the facts of the case and the language of the opinion show the court is not simply concerned with racial or income exclusion:

> . . . Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels. . . . [I]f Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden. Certainly it can protect its attractive character by requiring apartments to be built in accordance with (reasonable) set-back, open space, height, and other light-and-air requirements, but it cannot refuse to make any provision for apartment living. The simple fact that someone is anxious to build apartments is strong indication that the location of this township is such that people are desirous of moving in, and we do not believe Nether Providence can close its doors to those people.
>
> It is not true that the logical result of our holding today is that a municipality must provide for all types of land use. This case deals with the right of people to live on land, a very different problem than whether [a township] must allow certain industrial uses within its borders.

Girsh Appeal, 437 Pa. 237, 244–46, 263 A.2d 395, 398–99 (1970). Does this approach have any force in situations (a) and (c) above, neither of which involves total exclusion from the zoning jurisdiction? Is it consistent with the "equal protection" test applied in *Belle Terre*? Is *Girsh* an equal protection decision?

Some other decisions in this area include: Dequindre Dev. Co. v. Charter Tp., 359 Mich. 634, 103 N.W.2d 600 (1960) (exclusion of mobile home parks held unreasonable); Simmons v. Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (1972) (similar to *Girsh*); Vickers v. Tp. Comm'n of Gloucester Tp., 37 N.J. 232, 181 A.2d 129, *cert. denied*, 371 U.S. 233 (1962) (upholding total exclusion of mobile home parks over forceful dissent of Judge Hall); Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970) (large lot case, striking down 2 and 3 acre minima); Medinger

Appeal, 377 Pa. 217, 104 A.2d 118 (1954) (building size requirements invalid as aesthetic zoning).

5. The literature on the many aspects of this question has cascaded. Most recently a curious coalition of members of the law-and-economics school and advocates of civil rights have been arguing for a radical reduction in the amount of land-use control. *E.g.*, W. TUCKER, THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICIES (1990) (argues that there is a statitistically valid positive correlation between the amount of land-use regulation and homelessness); Lloyd, *American Middle Class Values and Land Use: The Exportation of Prejudice*, 8 URB.L. & POL'Y 357 (1987); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW.U.L.REV. 435 (1983) (land use controls "devastatingly adverse" for the domestic economy generally and residential housing market in particular); Symposium, *Land Use and Housing on the San Francisco Peninsula*, 4 STAN.ENVTL.ANN. 3–180 (1982) (studies of how regulation bids up cost of housing in this area); Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S.CAL.L.REV. 1167 (1981) (inclusionary zoning is a tax on the production of new housing which drives up prices and ends up being exlcusionary). *See* [p*1081] *also* Siegan, *Conserving and Developing the Land*, 27 SAN DIEGO L.REV. 279 (1990); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U.PA.L.REV. 28 (1981).

Note on Collisions Between Zoning and Other Interests or Values of Arguable Public Importance

While it oversimplifies the issue, it is possible to frame the question of an exclusionary zoning case as whether the test of reasonableness and presumption of legislative validity act as usual when the ordinance in question keeps certain groups of people from living where they might otherwise. If the discussion proceeds along due process lines, the issue is whether a regulation premised on the general welfare can be considered reasonable if it acts contrary to a recognizable public need of the region. If the ground is equal protection, it is put in terms of an asserted right not to be denied housing in a certain area because of race, income and so forth.

Similar questions arise with respect to a large number of other interests and values. Some examples follow. The question to be answered in each case is not whether the restriction or exclusion is reasonable but whether judicial treatment of that issue should be any more rigorous because of the interest at stake:

(a) A rather large suburban community is zoned predominantly residential with a bit of commerce and industry at the fringes. It has no place for hospitals, private schools, colleges or half-way houses. *See, e.g.*, Sisters of Bon Secours Hosp. v. City of Grosse Pointe, 8 Mich.App. 342, 154 N.W.2d 644 (1967).

(b) The same community either excludes churches totally or limits them to commercial or industrial districts. *Compare* Islamic Center of Mississippi, Inc. v. City of Starkville, 840 F.2d 293 (5th Cir.1988) (group of Muslim students may not be prohibited from establishing a center in a residential district where they could live and worship) *with* Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir.1983), *cert.denied*, 464 U.S. 815 (1983) (Lakewood may constitutionally prohibit the construction of a church in a residential district) *and* Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir.1983), *cert.denied*, 469 U.S. 827 (1984) (holding of private religious services on residential property may be strictly limited if property is located in a district where churches are prohibited). *See* Note, *In Search of Objective Criteria for a National Standard of Review in Church Zoning*, 11 GEORGE MASON U.L.REV. 147 (No.3, 1989). *See generally* Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM.L.REV. 1562 (1984).

(c) Its list of specified uses for residential districts precludes a person from boosting a political candidate or protesting taxes with a sign in the front yard. *See* Gibbons v. O'Reilly, 44 Misc.2d 353, 253 N.Y.S.2d 731 (Sup.Ct.1964); *cf.* Linmark Assocs. v. Willingboro Township, 431 U.S. 85, 93–94 (1977); Barrick Realty, Inc. v. City of Gary, 354 F.Supp. 126 (N.D.Ind.1973); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S. 734 (1963).

(d) It has a design ordinance of the sort upheld in *State* ex rel. *Stoyanoff v. Berkeley*, *supra*, p. S502, frustrating a form of artistic expression important to some individuals. *See* Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 URB.L.ANN. 273 (1979); Note, *Architecture, Aesthetic Zoning, and the First Amendment*, 28 STAN.L.REV. 179 (1975).

(e) Its tight limits on commercial and industrial activity have a direct effect on the amount and types of employment available within the community. [p*1082] *See* Blumrosen, *The Duty to Plan for Fair Employment: Plant Location in White Suburbia*, 25 RUTGERS L.REV. 383 (1971).

Section 5. IS IT REGULATION OR A TAKING?

When private property is "taken" for a public purpose compensation must be paid. This is required of the federal government by the fifth amendment and of the states by the fourteenth. Legitimate police power regulations impose uncompensated burdens, often of a substantial dollar amount, without offending this principle. But sometimes a property owner succeeds in having a particular regulation voided as it applies to certain land with the argument that it amounts to an attempt to "take" property without compensation. As we noted *supra*, p. S500, state courts proceeded for a long period in this area without the benefit of much, if any, guidance from the Supreme Court. Doctrines varied from state to state, results perhaps even more so. The return of the Supreme Court to this area may serve at least to focus the debate, but before we get to that, it is well to consider a few situations that have given rise to a number of state cases. In all cases one should ask the question whether one can frame the issue in a coherent way. After you have had an opportunity to consider the recent Supreme Court cases, you might want to return to these fact situations and ask what light the recent cases cast on them:

(1) Following unsuccessful negotiations for the purchase of a seventy-five acre tract, the Borough of Middlesex created a new "park, playground, and school" district covering the tract. The ordinance was held unconstitutional by the Superior Court of New Jersey:

> While it is conceivable that [the owner] could find a private school willing to build on the property, as a practical matter the effect of the zoning ordinance is to limit the purchaser to defendant borough . . . . However desirable the property may be for defendant for parks and playgrounds, the defendant cannot use its power to zone as a method of depreciating the value of the property for purposes of purchase.

Joint Meeting of the City of Plainfield v. Borough of Middlesex, 69 N.J.Super. 136, 141, 173 A.2d 785, 787 (1961). The court relied on an earlier New Jersey Supreme Court decision striking down zoning height restrictions that protected the flight path into Newark Airport, quoting this portion of that opinion:

> . . . We conclude that this ordinance undertakes to zone without authority of any statute and is in fact the taking of private property without due process of law, in violation of the