

THE DILEMMA OF LOCAL LAND USE CONTROL: POWER WITHOUT RESPONSIBILITY*

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The Problem

Land use planning and control has traditionally been perceived as a set of issues best dealt with by local government.¹ State governments historically have been called upon to provide nothing more than a suitable framework of planning and land use control enabling legislation.² In recent years some states have sought to address land use issues having regional or statewide impact.³ This has usually

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1. See generally N. WILLIAMS, AMERICAN LAND PLANNING LAW (1974); R. ANDERSON, AMERICAN LAW OF ZONING (2d ed. 1976); *Developments in the Law — Zoning*, 91 HARV. L. REV. 1427 (1978). The idea that local governments should have primary responsibility for land use control was given early impetus by federally sponsored research authorized by then Secretary of Commerce, Herbert Hoover. This research culminated in the publication of the Standard State Zoning Enabling Act. See E. BASSETT, ZONING (1936).

2. See generally, R. ANDERSON & B. ROSWIG, PLANNING, ZONING AND SUBDIVISION: A SUMMARY OF STATUTORY LAWS IN THE 50 STATES (1966); J. DELAFONS, LAND USE CONTROLS IN THE U.S. (2d ed. 1969); Loo, *State Land Use Statutes: A Comparative Analysis*, 45 FORDHAM L. REV. 1154 (1977).

3. See generally ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONAL DECISION MAKING: NEW STRATEGIES FOR SUBSTATE DISTRICTS (1974); Godschalk & Brower, *Beyond the City Limits: Regional Equity as an Emerging Issue*, 15 URB. L. ANN. 159 (1978); Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970). A number of courts have recognized the need for regional approaches to land use planning and control. See, e.g., *Oakwood at Madison, Inc., v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975). A statutory example of such an approach is the San Francisco Bay Conservation and Development Commission Act, CAL. GOV'T CODE §§ 66600-66661 (West Supp. 1966-1979), which sought to protect a unique physical resource from continued despoilation resulting in large part from fragmented planning and self-serving land use policies which each of the 91 cities and 9 counties abutting the bay had historically undertaken. See Comment, *San Francisco Bay: Regional Regulation for its Protection and Development*, 55 CALIF. L. REV. 728 (1967);

been done on an intra-state basis, however, and meaningful inter-state or multi-state approaches to land use problems, though much discussed in the literature, are almost non-existent in practice.⁴ Federal involvement in land use issues has also been limited. There are a handful of landmark court cases and some legislative efforts principally designed to provide and channel funds to state and local planning efforts.⁵

This historical penchant to leave land use planning and control activities in the hands of local government officials has been strengthened in recent years by the rising tide of populism, the anti-big government feeling evident in almost all parts of the country. "Local control" over a wide range of public policy and fiscal matters (not just land use related issues) has in the last few years become almost an article of faith. It is an idea shared by the political left and right, often without regard to the ramifications and practicability of having local levels of government address particular issues.

Thus, "the dilemma of local land use control" has been created by a number of factors. Local governments have the power to plan, to enact land use controls, and to shape development by spending policies and capital budgeting processes. They are being encouraged by sixty years of land use law and the present conventional political wisdom to utilize these powers more fully. At the same time, local governments have the most microcosmic view of the society as a

Note, *Saving San Francisco Bay — A Case Study in Environmental Legislation*, 23 STAN. L. REV. 349 (1971).

4. See Roberts, *River Basin Authorities: A National Solution to Water Pollution*, 83 HARV. L. REV. 1527 (1970). The Tahoe Regional Planning Agency is a rare example of the type of multi-state arrangement referred to. California and Nevada with federal approval have created an instrument for planning and land use control which preempts all inconsistent local and state actions. See CAL. GOV'T CODE § 66801 (West Supp. 1966-1979); NEV. REV. STAT. § 277.200 (1979); An Act to Grant the Consent of the Congress to the Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969). See also Comment, *Regional Government for Lake Tahoe*, 22 HASTINGS L.J. 705 (1971).

5. See generally F. BOSSELMAN, D. FEURER, & T. RICHTER, *FEDERAL LAND USE REGULATIONS* (1977); see also *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (allowing an "as applied" attack on zoning); *Village of Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926) (broadly endorsing zoning). More recently there have been several Supreme Court cases which suggest the Court's general discomfort with this area of law as well as their penchant for focusing on the trivial. See, e.g., *Agins v. City of Tiburon*, 100 S. Ct. 2138 (1980) (exhaustion doctrine reconfirmed); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (narrow definition of family struck down); *City of East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (exclusion must be intended and proved); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (narrow definition of family sustained). An example of facilitating federal legislation aimed at achieving more comprehensive state and local land use planning and management is the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1974 and Cum. Supp. 1980). See also Comment, *Toward Better Use of Coastal Resources: Coordinated State and Federal Planning under the Coastal Zone Management Act*, 65 GEO. L.J. 1057 (1977).

whole. They see the world from the ground up often in the most parochial terms, limited by municipal boundaries, tax considerations, and a skewed sense of what is good or bad in the short-run from the individual town's perspective. These latter views are often colored by local biases, tastes, fears, aesthetic values, political philosophy, and a host of other factors.⁶ This invariably leads individual towns to promulgate land use control ordinances and regulations that make it difficult, if not impossible, for large, unsightly, potentially troublesome, but nonetheless essential, development activities (in an overall social sense) to locate within the town.⁷

If the range and number of excluded activities or development types were few, the dilemma posed might be resolved by some gentle legislative or judicial urging.⁸ Alternatively, the heterogeneous character of municipalities (what one town would reject another would accept) or developers' persistence might solve the problem. The fact is, however, that the number of excluded development types and activities is large and growing. It includes: multi-family housing,⁹ low income housing (including mobile homes),¹⁰ waste treatment facilities,¹¹ sanitary landfills,¹² sludge and hazardous waste disposal ar-

6. This point was recognized by Norman Williams, author of one of the seminal pieces on land use law, Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317 (1955). See also *South Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975) (note particularly concurring opinion of Judge Pashman); *Vickers v. Township Comm.* 37 N.J. 232, 181 A.2d 129 (1962) (dissenting opinion of Judge Hall).

7. See generally Evans & Vestal, *Local Growth Management: A Demographic Perspective*, 55 N.C.L. REV. 421 (1977); Freilich, *Development Timing, Monitoring and Controlling Growth*, in PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 147 (1974); Note, *Public Utility Land Use Control on the Urban Fringe*, 63 IOWA L. REV. 889 (1978); Comment, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

8. Cf. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1624 (1978) (section 8 deals extensively with exclusionary zoning problems). See also C. PERIN, *EVERYTHING IN ITS PLACE* (1977); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385 (1977).

9. *Berenson v. Town of Newcastle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (town sought to exclude multi-family housing); *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977) (same); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970) (same).

10. See, e.g., *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980) (town sought to exclude blacks and low-income housing); *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974) (town sought to exclude mobile homes); *Fuerst & Petty*, *Public Housing in the Courts: Pyrrhic Victories for the Poor*, 9 URB. LAW 496 (1977); Note, *The Immobile Mobile Home—Brownfield Subdivision, Inc. v. McKee*, 25 DEPAUL L. REV. 553 (1976). Cf. Polikoff, *Tolerance for the Intolerable*, 30 LAND USE L. & ZONING DIG., No. 3, at 4 (1978) (attitudes towards mobile homes have been and are changing).

11. *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962) (zoning ordinance of City of Tempe would exclude an apparently appropriate site for Scottsdale's construction of a sewage treatment plant); *City of Des Plaines v. Metro-*

eas,¹³ prisons,¹⁴ reform schools,¹⁵ alcohol and drug-rehabilitation facilities,¹⁶ homes for unwed mothers,¹⁷ homes for retarded individuals,¹⁸ automobile junk yards,¹⁹ materials recycling facili-

politan Sanitary Dist., 48 Ill. 2d 11, 268 N.E.2d 428 (1971)(Des Plaines could not interpose zoning to block regional treatment plant). *See generally* Annot., 59 A.L.R.3d 1244 (1974).

12. *See, e.g.,* Monroe-Livingston Sanitary Landfill, Inc., v. Town of Caledonia, 72 A.D.2d 957, 422 N.Y.S.2d 249 (1979)(town excluded sanitary landfill operations that would serve regional needs); Lincoln County v. Johnson, 257 N.W.2d 453 (S.D. 1977)(county and unincorporated township resist locating sanitary landfill outside of corporate limits of city; no discussion of site suitability, need, etc.).

13. Village of Wilsonville v. SCA Services, Inc., 77 Ill. App.3d 618, 396 N.E.2d 552 (1979)(town sought to enjoin operation of a landfill on an abandoned mining site arguing that hazardous substances and chemicals were among waste being stored); Pride's Corner Concerned Citizens Ass'n v. Westbrook Bd. of Zoning Appeals, 398 A.2d 415 (Me. 1979)(citizens of Westbrook, Maine, sought to exclude a sludge composting facility from the town). *Cf. in re* Ryerson Hill Solid Waste Disposal Site, 379 A.2d 384 (Me. 1977)(neighbors sought to exclude sludge disposal facility). *See also* McAvoy, *Hazardous Waste Management in Ohio; The Problem of Siting*, 9 *Cap. U.L. Rev.* 435 (1980).

14. Mayor and City Council of Baltimore v. State of Maryland, 281 Md. App. 217, 378 A.2d 1326 (1977)(city unsuccessfully sought to use zoning ordinance to exclude state correctional facility); City of Richmond v. Board of Supervisors, 199 Va. 679, 101 S.E.2d 641 (1958)(county successfully resisted construction of a jail and jail farm outside of corporate city limits); Green County v. City of Monroe, 3 Wis.2d 196, 87 N.W.2d 827 (1958)(city unsuccessfully sought to regulate county jail project located within municipality).

15. Wiltwyck School for Boys, Inc., v. Hill, 14 App. Div. 2d 198, 219 N.Y.S.2d 161 (1961)(town excluded boys correctional facility); Lakeside Youth Serv. v. Zoning Hearing Bd., ___ Pa. Commw. Ct. ___, 414 A.2d 1115 (1980)(town excluded group home for delinquent women); State v. City of Bellingham, 24 Wash. App. 33, 605 P.2d 788 (1979)(town unsuccessfully sought to exclude foster juvenile home).

16. Brownfield v. State, 63 Ohio St.2d 282, 407 N.E.2d 1365 (1980)(town sought to exclude halfway house for patients discharged from psychiatric institutions). *See generally* Annot., 100 A.L.R.3d 876 (1980).

17. *See* Bossier City Medical Suite, Inc., v. City of Bossier City, 483 F. Supp. 633 (W.D.La. 1980)(town excluded an abortion clinic); Framingham Clinic, Inc. v. Board of Selectmen, 373 Mass. 279, 367 N.E.2d 606 (1977)(same); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975).

18. Penobscot Area Housing Dev. Corp. v. Board of Appeals, *appeal docketed*, No. Pen. 80-39 (1980)(This case, currently on appeal before the Supreme Judicial Court of Maine, will test the Town of Brewer's claimed right to exclude by zoning a group home for mentally retarded individuals arguably required pursuant to a federal court consent decree to which the state was a party. The town's position was sustained at the trial court level.) *See also* Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law*, 25 DEPAUL L. REV. 918 (1976). Garcia v. Siffrim Residential Ass'n, 407 N.E.2d 1369 (1980)(town sought to exclude a residential treatment facility for mentally retarded persons); Fitchburg Housing Auth. v. Board of Zoning Appeals, ___ Mass. ___, 406 N.E.2d 1369 (1980)(town sought to exclude group home for former mental patients).

19. *See, e.g.,* Building Inspector of Seekonk v. Amaral, ___ Mass. App. Ct. ___, 401 N.E.2d (town sought to exclude automobile junkyard); *see generally* Annot., 50

fities,²⁰ rendering plants,²¹ power plants,²² oil storage and refining facilities,²³ mining and mineral processing facilities,²⁴ and a wide range of heavy industrial equipment storage and fabricating facilities.²⁵ The range of developments and activities which individual towns frequently seek to exclude encompasses both public and private sector undertakings that are essential and integral parts of our society in both an economic and social sense.

This then is the land use dilemma we have fashioned. Local governments have been given the power to control land use. They have in turn interpreted their power (with only slight judicial or legislative intervention) as a right to keep out what they individually do not want. This is precisely what they are doing, often with overwhelming constituent support and by means which usually comport

A.L.R.3d 837 (1973).

20. See *City of Portsmouth v. John T. Clark & Son of N.H., Inc.*, 117 N.H. 797, 378 A.2d 1383 (1977)(city through zoning sought to exclude metals recycling firm). Recycling may be the new wave for environmentalists and resource economists but it is still junk to many others. This point was emphasized recently in Maine when the City of Portland's plan to relocate and consolidate several recycling operations, which were not well situated, in an appropriate and remote area served by railroad and in close proximity to the turnpike, was abandoned in the face of overwhelming (and in many cases irrational) resistance by neighboring landowners.

21. See *State v. Braun*, 378 A.2d 640 (Del. Super. Ct. 1977)(rendering plant located on the outskirts of Dover, Delaware forced to comply with rigid state air pollution control laws); *Fidler v. Zoning Bd. of Adjustment*, 408 Pa. 260, 182 A.2d 692 (1962)(neighbors sought to enjoin commercial turkey raising operation on basis of provisions in zoning ordinance and noise and order grounds). See generally Annot., 97 A.L.R.2d 702 (1964)(annotation discusses the construction and application of terms "agricultural", "farm", "farming", or the like in zoning regulations).

22. See note 31 *infra*. See generally *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Bronstein, State Regulation of Power Plant Siting*, 3 ENV'T L. 273 (1973); *Tarlock, Tippy & Francis, Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502 (1972).

23. See, e.g., *City of Baton Rouge v. Herbert*, 378 So. 2d 144 (La. 1979) (city excluded oil storage facility); *Steuart Inv. Co. v. Board of Comm'rs*, 38 Md. App. 381, 381 A.2d 1174 (1978)(town sought unsuccessfully to block expansion of an oil storage facility by interposing procedural burdens nominally required by its zoning ordinance); *Value Oil Co. v. Town of Irvingtown*, 152 N.J. Super. 354, 377 A.2d 1225 (1977)(town sought unsuccessfully to exclude gas station).

24. See *Willis v. Menard County Bd. of Comm'rs*, 55 Ill. App. 3d 26, 370 N.E.2d 636 (1977)(county tried to block through zoning extraction of a unique and valuable limestone resource); *Meyer Material Co. v. County of Will*, 51 Ill. App. 3d 821, 366 N.E.2d 1149 (1977)(court sustained a refusal to rezone to permit a mining and quarrying activity on property well-suited to that activity and where there was an abundance of residential land); *Syracuse Aggregate Corp. v. Weise*, 72 App. Div.2d 254, 424 N.Y.S.2d 556 (1980)(town sought to exclude gravel pit operation).

25. *Valley View Village, Inc. v. Proffett*, 221 F.2d 412 (6th Cir. 1955)(town excluded all industrial and commercial activities); *Duffcon Concrete Prod., Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949)(town excluded heavy industry); see generally Annot., 9 A.L.R.2d 683 (1950).

fully with democratic decision-making processes.²⁶ There are few, if any, incentives for individual towns to act differently. Indeed, our tax laws and the absence of state land use control statutes which site and allocate large or unattractive development activities on a regional or statewide basis encourage narrowly focused local land use control. The hope that individual municipalities will act responsibly to meet larger social needs, permitting a reasonable number of land use activities which offend or threaten them, is a naive hope. Municipalities have not acted in this manner, and there is no reason to believe that this pattern will change. It is increasingly apparent that if the land use needs of essential and unwanted activities are to be met, a new ingredient must be added to our present construct of land use control mechanisms. As unpopular as it may be, this new ingredient must involve a higher level of government (probably the state) in land use decision-making. Local powers cannot be absolute. This does not mean that local land use decision making must be totally preempted, but it does mean that local interests and larger social interests, which higher levels of government recognize and articulate, must be balanced.²⁷

Though an argument can be made for extensive federal involvement in land use decision making, involving large or difficult to locate development types and activities, such an approach seems both politically unwise and unnecessary. A limited federal role in certain circumstances can be defended,²⁸ but in most situations the state government is best situated to provide locational alternatives for development activities which individual towns for some reason cannot accommodate. The remainder of this Article will deal with ways in which this delicate problem in inter-governmental relations may be solved.

A New State Role in Land Use Decision Making

Total preemption of land use decision making by the state, at

26. See generally, Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978); Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74 (1976); Comment, *Voter Zoning: Direct Legislation and Municipal Planning*, 1969 LAW & SOC. ORD. 453; Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819 (1977).

27. See generally Comment, *Exclusionary Zoning in California: A Statutory Mechanism for Judicial Nondeference*, 67 CALIF. L. REV. 1154 (1979); Note, *State Intervention into Local Land Use Regulation: A Proposal for Reform of Minnesota Legislation*, 63 MINN. L. REV. 1259 (1979).

28. A federal role in nuclear power plant siting, nuclear waste disposal, hazardous and toxic materials disposal and, of course, the siting of military and national defense facilities already exists or is imminent. Cf. Mills & Woodson, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405 (1976) (author's emphasis on the role of states in formulating national energy policy).

least with respect to essential, but difficult to locate activities and land uses, is possible as a matter of law. However, like federal involvement, preemption would be bitterly resisted by local governments caught up in the rhetoric of "local control." They would see such an approach as a fundamental attack on "the citadel"²⁹ — on the idea that the widest ambit of decision making ought to be left in the hands of elected local government officials. Moreover, this extreme approach does not seem necessary at this point. A state role, well short of preemption, need address only those factors and conditions which give rise to the dilemma — the problems previously described.

A three pronged state approach is suggested. The three steps are complimentary in character and minimally necessary if large and small unwanted activities are to find a place in our society. First, each state must develop siting standards for major facilities³⁰ and identify actual locations within the state which meet these standards. Developers of such facilities would then have to be licensed in proceedings which invite the participation of local governments both to apprise the licensing agency of local conditions and potential harms which should be avoided, and to insure appropriate design by the developer. Local actions or local land use control mechanisms should not override the decision of the agency. The types of facilities and activities which almost certainly must be handled in this manner include nuclear and conventional electric generating facilities;³¹ solid and hazardous waste disposal storage areas and facilities;³² regional hospital and correctional facilities;³³ regional airport

29. The term "The Citadel" was originally used by Prosser in his article, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960). It had reference to the concept of "privity" in relation to contract law. As used here, the term implies the significant weight which is attached to the concept of "local control" in the area of state/local relationships.

30. See note 35 *infra*. Cf. Reidy, H. B. 2876: *Providing Cities with Flexibility in Land Use Decisionmaking*, 56 OR. L. REV. 270 (1977) (this article describes Oregon's Land Conservation and Development Commission, a state level body with authority to review local planning and control mechanisms to ensure their consistency with statewide planning objectives). See also *Fazano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973) (this case expanded the scope of judicial review in situations where conflicts arise between private land owners and state and local land use control mechanisms).

31. See *Consolidated Edison v. Hoffman*, 43 N.Y.2d 598, 374 N.E.2d 105, 403 N.Y.S.2d 193 (1978) (cooling tower for nuclear generating plant denied required variance — court reversed); *Cleveland Electric Illuminating Co. v. Village of Mayfield*, 53 Ohio App. 2d 56, 371 N.E.2d 567 (1977) (city attempted to block through zoning construction of a component portion of a regional utility project); Luce, *Power for Tomorrow: The Siting Dilemma*, 25 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 13 (1970); Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257 (1972).

32. See, e.g., MASSACHUSETTS SPECIAL COMM. ON HAZARDOUS WASTE, *THE PROCEDURES AND GUIDELINES FOR SITING HAZARDOUS WASTE FACILITIES IN THE COMMON-*

and harbor facilities;³⁴ regional industrial, commercial and recreational facilities and similar large-scale activities.³⁵ Decisions as to whether a particular type of development should be included within the coverage of such legislation might turn on such factors as the following: the size of the facility as measured by capital investment or by the number of people it would employ, the size of the area intended to be served by the development, the number of such facilities needed within the state, and the relative difficulty of siting such facilities.³⁶

Developers, whether public or private, seeking to utilize an earmarked site for any activity included within the proposed facilities siting legislation should be able to request that the state licensing proceeding include and dispose of all required state and local permits and approvals. This will avoid the conflict generated when a site is approved for a particular development by one state agency but another agency (state or local), charged perhaps with issuing waste discharge licenses or with assuring that design standards are met, withholds its approval. The so called "one window"³⁷ approval

WEALTH (House Document 6756)(1979)(the problem with the Massachusetts approach, however, is that though it purports to be a state level siting mechanisms, its focus, undoubtedly for political reasons, is overwhelmingly local. Local Boards of Health are given veto power over state authorizing permits).

33. See *American Univ. v. Prentiss*, 113 F. Supp. 389 (D.D.C. 1953)(the District of Columbia Zoning Commission sought through a rezoning amendment to prevent construction of a hospital).

34. See *Village of Schiller Park v. City of Chicago*, 26 Ill. 2d 278, 186 N.E.2d 343 (1962); *Aviation Serv. Inc. v. Board of Adjustment*, 20 N.J. 275, 119 A.2d 761 (1956); *Village of Blue Ash v. City of Cincinnati*, 173 Ohio St. 345, 182 N.E.2d 557 (1962). The above cases as well as any show the inter-municipal conflicts which arise with relation to taxation, exercise of eminent domain, the application of zoning laws in situations where large regional facilities are located in jurisdictions which do not particularly want them. State siting laws of the type suggested could clarify and ease many of these problems. See generally *Hawn v. County of Ventura*, 73 Cal. App.3d 1009, 141 Cal. Rptr. 111, cert. denied, 436 U.S. 917 (1977)(The court characterized the ordinance as "more of an attempt to regulate airport site selection than to prohibit airports. . . within [city] borders [and] . . . 'dump' the problem upon disenfranchised residents of an unincorporated area." *Id.* at 1020, 141 Cal. Rptr. at 116.).

35. See *Murray & Seneker, Industrial Siting: Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301 (1978); *Wolpert, Regressive Siting of Public Facilities*, 16 NAT. RESOURCES J. 103 (1976); Comment, *Industrial Site Selection: Existing Institutions and Proposals for Reform*, 55 NEB. L. REV. 440 (1976). Cf. *Levi, Gehring & Groethe, Application of Municipal Ordinances to Special Purpose Districts and Regulated Industries: A Home Rule Approach*, 12 URB. L. ANN. 77, 96-107 (1976)(application of municipal zoning ordinances to disruptive special government land uses).

36. The fact that a handful of major land using activities and facilities may be sited by state legislation does not, of course, end the problem. See notes 50-59 *infra* and accompanying text, which develops a mechanism enabling smaller but nonetheless difficult to locate land using activities and facilities to find locational options within municipalities or regions of a state.

37. Cf. Comment, *California's Energy Commission: Illusions of a One-Stop Power Plant Siting Agency*, 24 U.C.L.A. L. REV. 1313 (1977). See also OR. REV. STAT.

process suggested here is not a novel idea. It is being utilized to some extent in a number of states to shorten development approval time. Because hearings will be consolidated and witnesses need appear only once, the proposed process will undoubtedly save time and money for both the developer and regulatory bodies.

Developers may also need to be given limited eminent domain powers to ensure that selected, approvable, and presumably optimal locations will in fact be available for the activities contemplated.³⁸ The private developer's inability to purchase a parcel of land suitable for an essential major facility should not be allowed to frustrate the state's siting legislation. Alternatively, as part of the legislative approach being suggested, the state could acquire appropriate sites and resell them to developers at prices reflecting actual acquisition costs and with conditions insuring that the developer will meet all of his commitments.³⁹ In circumstances where the developer is a public instrumentality, some form of eminent domain power probably already exists. In these cases appropriate modifications of a state's eminent domain law designed to ensure that the purposes of the state's siting legislation will be achieved, should, if necessary, be enacted.

The second part of the overall state approach being suggested is one which would fashion a mechanism for sharing the tax benefits and costs which developments of the type discussed create.⁴⁰ The

§ 197.420 (1979)(joint application and permit procedure where two or more permits are required for a particular development activity).

38. There is ample authority for conferring eminent domain powers on private corporations undertaking activities of a quasi-public character or which are highly regulated by state government. See, e.g., ME. REV. STAT. ANN. tit. 35, § 2306 (1978)(conferring eminent domain powers on certain electric power companies); MINN. STAT. ANN. § 473.217 (1977)(conferring eminent domain powers on regional, metropolitan airport developers).

39. This approach was suggested in Maine by the GOVERNOR'S TASK FORCE REPORT, ENERGY, HEAVY INDUSTRY AND THE MAINE COAST (1972):

Our principal proposal for implementing the two heavy industry zones is for the establishment of a Maine Coast Industrial Development Corporation by early action of the state legislature. This agency would have basic responsibility for planning and managing the two zones. It would acquire (through condemnation if necessary) and own land and port facilities and enter into leases with tenants.

Id. at 25.

40. See D. HAGMAN & V. MISCZYNSKI, WINDFALLS FOR WIPEOUTS (1978)(note particularly chapters 8 and 9); Hirsch & Hirsch, *Exclusionary Zoning: Local Property Taxation and the Unique-Ubiquitous Resource Distinction*, 52 S. CAL. L. REV. 1671 (1979); Walker, *Fiscal Aspects of Metropolitan Regional Development*, 105 U. PA. L. REV. 489 (1957). See, for example, Minnesota's legislation dealing with metropolitan areas generally, MINN. STAT. ANN. § 473.01-.872 (West 1977), and Metropolitan Revenue Distribution in particular, MINN. STAT. ANN. § 473F.01-.13 (West 1977). The Legislature's statement of purpose with respect to revenue distribution is extremely perceptive.

The legislature finds it desirable to improve the revenue raising and dis-

present system which allocates the benefits and burdens of unwanted facilities primarily to the single municipality in which the facility is located has several undesirable consequences. When the proposed facility happens to be a profit-making private venture, there is often an unseemly competition between towns to attract the development.⁴¹ The prospect of an enlarged property tax base, not

tribution system in the seven county Twin Cities area to accomplish the following objectives:

(1) To provide a way for local governments to share in the resources generated by the growth of the area, without removing any resources which local governments already have;

(2) To increase the likelihood of orderly urban development by reducing the impact of fiscal considerations on the location of business and residential growth and the highways, transit facilities and airports;

(3) To establish incentives for all parts of the area to work for the growth of the area as a whole;

(4) To provide a way whereby the area's resources can be made available within and through the existing system of local governments and local decision making;

(5) To help communities in different stages of development by making resources increasingly available to communities at those early stages of development and redevelopment when financial pressures on them are the greatest;

(6) To encourage protection of the environment by reducing the impact of fiscal considerations so that flood plains can be protected and land for parks and open space can be preserved; and

(7) To provide for the distribution to municipalities of additional revenues generated within the area or from outside sources pursuant to other legislation.

Id. at 473F.01. See also Note, *Metropolitan Government: Minnesota's Experiment with a Metropolitan Council*, 53 MINN. L. REV. 122 (1968).

41. See Burchell, Edelman & Listokin, *Fiscal Impact Analysis as a Tool for Land Use Regulation*, 7 REAL EST. L.J. 132 (1978). See also R. WOOD, 1400 GOVERNMENTS (1961); Wood pointedly notes:

More frequently, the drive for industry becomes a major objective of county or local planning boards. Under their direction, land is set aside for future industrial development, transportation plans are made with a view to enhancing the area's industrial potential, and the private acquisition and improvement of land for business purposes are facilitated by public action.

Id. at 78. He further states:

Yet, if these policies have little effect in shaping the Regional economy, they do keep the local-government system continuously agitated about economic affairs. Indeed, they engender a pattern of behavior more closely approximating rivalries in world economic affairs than a domestic system of government intent on aiding the processes of economic development. Because particular combinations of strategies may be effective for any one jurisdiction, there is a strong tendency for each to "go it alone" to develop appropriate protective devices to escape the expensive public by-products of the private process of development. Municipalities come to concentrate on ways and means of getting as large a slice of the existing economic pie as possible and of mitigating the effects of new residential settlement. The development of hundreds of separate policies, in various combinations, among hundreds of jurisdictions engenders a spirit of contentiousness and

the suitability of the site for the proposed development, dictates the town's posture. When the particular development is of a public character, is nontaxable, or presents real or imagined threats which outweigh any tax advantages, towns often resist the development even though the location may be well suited to the developer's and the state's needs.⁴² Municipalities know that existing taxpayers will inevitably have to bear the school, police, fire protection, and road maintenance costs which the activity and the employees that will be drawn to the development will require. In addition, the town's self-image may be diminished by a sense of a stigma associated with the activity.

The type of mechanism contemplated to relieve these stresses is one which shares the tax benefits generated by large-scale developments either on a statewide basis (utilizing a per capita formula) or on a regional basis focusing on towns within a given radius of the development.⁴³ In the latter case a sliding scale of tax advantage which declines with the distance from the development site can be fashioned. Whatever tax sharing approach is utilized, a larger allocation should almost certainly be made to the host municipality, which will inevitably bear a larger share of the direct and indirect costs of the development. The municipality should be compensated for this.⁴⁴ Smaller taxable developments, though perhaps unwanted for one reason or another, should be exempted from the sharing leg-

competition. As the possibilities of shifting burdens within a municipality diminish, as development programs fail to counteract the economic considerations which predominate in locational decisions, as urbanization goes on apace, the temptation to embark on municipal mercantilism becomes stronger. Paradoxically, the policies also become less effective, since a government's neighbors are likely to adopt comparable tax rates, make the same zoning policy, and grant equal concessions to new industries. In these circumstances, the management of the political economy goes forward in ways localized, limited, and largely negative in character.

Id. at 112-13.

42. In recent years municipalities have been exerting increased pressure on state governments to provide payments in lieu of taxes for these public or private tax exempt facilities. As the pressure on local fiscal resources increases, the whole issue of tax exemption is being re-examined. See, e.g., Hilbert, *Illinois Property Tax Exemptions: A Call for Reform*, 25 DEPAUL L. REV. 585 (1976); Note, *Public Land in Minnesota: Should It Pay Its Fair Share of Compensation in Lieu of Taxation?*, 54 MINN. L. REV. 179 (1969). See also ME. CONST. art. 4, pt. 3 § 23 (requiring the state to compensate municipalities for 50% of the tax loss arising from future state created property tax exemptions or credits).

43. The reasoning which underlies the latter approach is that these towns to a greater or lesser degree bear some of the cost burdens which regional developments give rise to. As one moves beyond the commuting distance of employees of the regional facility, tax advantages are something of a windfall to the towns involved.

44. Minnesota's approach, see note 40 *supra*, contains this feature. It allows the host municipality to retain sixty percent of the increased tax value—forty percent is shared throughout the metropolitan area. MINN. STAT. ANN. § 473F.08 (West 1977 & Supp. 1980).

isolation. A cut-off of one half to one million dollars in assessed valuation seems appropriate.⁴⁵ This will act as an incentive for towns to accept such development types and facilities.

Conversely, when regional or unwanted developments and facilities (without regard to size) produce no property tax revenues, the state must be prepared to compensate the host municipality and adjacent municipalities in a manner which substantially, if not fully, offsets the actual costs imposed on each.⁴⁶ These offset monies must be paid to the affected municipalities either from general state funds or from a special fund established to meet those costs arising out of state fashioned inclusionary mechanisms and siting legislation. This is not only equitable; it is essential if local opposition to these development types on justifiable fiscal grounds is to be avoided or blunted. Such payments must be in addition to, not a substitute for, other state aid or grant monies to which an individual town is entitled.

The total annual cost of the compensation arrangements suggested seems readily calculable. In most states cost data or estimates are either in hand or readily ascertainable for almost all of the municipal services which the development itself or its employees will require. Distinctions may need to be made between direct municipal costs and indirect costs arising as a result of the ripple effect which any development creates. For example, employees' children must be educated, and other municipal services may have to be expanded. The former are direct costs; the latter are indirect.⁴⁷ Direct municipal costs probably should be compensated at a higher level than indirect costs. These, however, are mere refinements. Fashioning a mechanism which helps municipalities bear the costs of accepting unwanted and nontaxable development types is the central idea.

Finally, it may be desirable to extend these compensation ar-

45. This figure could be set higher or lower as one may wish to create a greater or lesser incentive to accept unwanted but taxable developments. In any event, the cutoff level should be adjusted upward from time to time to account for inflation.

46. See note 42 *supra*. This approach has long been a part of federal policy, particularly where federal installations give rise to significant municipal costs. See, e.g., 20 U.S.C. §§ 236-246 (Supp. I, II, & III 1976) (provides for payments in lieu of property taxes to school districts impacted by federal facilities).

47. Direct costs include road construction, road maintenance, water and sewer line extensions, waste water treatment and fire protection costs arising as a result of the development itself. In most cases these municipal services provide an immediate benefit to the development and/or the project area. (Some of these costs may be recovered by subdivision exactions or by special assessments.) Indirect costs may be thought of as first, second, or third generation. The development will employ a number of people. Many of these employees must be housed within the community. They will increase the need for street, water, and sewer improvements. Their children will need to be educated, and additional teachers will have to be hired. Many of the activity's employees will live within the community. The town will grow giving rise to the need for an ever widening range of services, ad infinitum.

rangements to private property owners living in close proximity to the unwanted development activity or facility.⁴⁸ To a greater or lesser degree, adjacent landowners will be imposed upon by such development and may well experience a decline in the value of their property. Compensation payments to these landowners may not turn them into advocates of the development, but it will certainly lessen their opposition and deflect the force of their equitable argument that they should not be imposed upon. Here too, it seems possible to estimate the costs involved. Such estimates are akin to the valuation of easements or of consequential damages in eminent domain proceedings.⁴⁹

The third step in the panoply of suggested state actions is designed to handle those smaller-scale unwanted development types and facilities (public and private) not covered by the previously proposed major facilities siting legislation. It involves setting up an administrative mechanism (a court or reviewing body) which would be empowered at the request of any developer to determine the reasonableness of any local land use regulations or processes, which prevented the petitioner from proceeding with his development in a particular town.⁵⁰ The reviewing body would need to be clothed with the power to issue the equivalent of local approval including build-

48. Cf. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970)(payment by industry to landowners of permanent damages in compensation for nuisance on land). See Bosselman, *The Third Alternative in Zoning Litigation* (pts. 1-2), 17 ZONING DIG., 73, 113 (1965); Krasnowiecki & Strong, *Compensable Regulations: A Means for Controlling Growth through the Retention of Open Space*, 89 J. AM. INST. OF PLANNERS 87 (1963); Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969). Hagman and Misczyaski's volume (see note 40 *supra*) contains in its notes to chapter 11 an extensive bibliography to materials addressing the question of compensation to private landowners for various direct and indirect governmental actions which adversely affect land values.

49. See generally P. NICHOLS, *ON EMINENT DOMAIN* (rev. 3d ed. 1973)(note particularly § 12.4, valuation of interests other than the fee, and § 12.41, where the interest is an easement).

50. A mechanism along these lines has recently been adopted in Oregon. It is part of Oregon's Comprehensive Planning Coordination legislation. See OR. REV. STAT. § 197.005-.430 (1979). The new legislation creates a state level "Land Use Board of Appeals" with power to review and set aside final land use decisions made by any city, county, or special district if it finds that the body:

- A. Exceeded its jurisdiction;
 - B. Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
 - C. Made a decision that was not supported by substantial evidence in the whole record;
 - D. Improperly construed the applicable law; or
 - E. Made a decision that was unconstitutional; or
- (b) . . . has determined that the city, county or special district . . . violated state-wide planning goals.

Id. at § 5.

ing permits, appropriately conditioned as the circumstances of particular projects may dictate. In proceedings before the reviewing body the town should be given every opportunity to defend its ordinances and actions. Such a defense may consist of a showing that the developer has not exhausted his local administrative remedies; or that there are regional locational alternatives which would permit the very activity which the developer seeks to undertake; or that the excluding controls are in fact reasonable. The developer, of course, must be given the opportunity to negate the defenses which the local unit of government asserts. He must be given the opportunity to explain fully the nature and social utility of the undertaking and his inability to find economically feasible locational options in the particular town and surrounding areas.

The reviewing body should not be seen as a super zoning mechanism. It should not have the power to allocate unpopular and difficult to locate activities among towns. Its role is not to facilitate the egalitarian distribution of undesirable but socially necessary land use activities. Rather, its task is merely to look at physical realities to determine if a particular developer and activity have been totally and unreasonably excluded from an entire town. If this has occurred, the administrative body should authorize the developer to proceed with his project on the proposed site under whatever conditions the circumstances may warrant.⁵¹ The reviewing body should not be motivated by any concept of quota.⁵² There is no minimum number of halfway houses, homes for unwed mothers, low income housing projects, etc., that each town should have. Nor should the reviewing body be empowered to examine or weigh the tax and cost consequences of proposed developments since providing fiscal resources is a legislative obligation outside the province of administrative or judicial review processes.

If the proposed review process perpetuates an unequal distribution of development types and activities, so be it. The state, if it

51. The conditioning of an approval is an established device giving flexibility to land use control mechanisms. The alternative would be to deny the application, stating the defect (which may be minor), and inviting the applicant to reapply once he has corrected the deficiency. The costs in time and money is self-evident. See ME. REV. STAT. ANN. tit. 38, § 484 (1978); *In re Ryerson Hill Solid Waste Disposal Site*, 379 A.2d 384 (Me. 1977); *In re Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977) (generally approving the procedure described).

52. The legislature could, of course, order a reviewing body of the type suggested to be guided by "fair share" quota guidelines they may wish to establish. See, e.g., MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1979) (establishing quotas to be observed by state reviewing agency for low income housing). See generally Rose, *Fair Share Housing Allocation Plans: Which Formula Will Pacify the Contentious Suburbs?*, 12 URB. L. ANN. 3 (1976); Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. REV. 37 (1974); *Developments in the Law - Zoning*, 91 HARV. L. REV. 1427, 1635-59 (1978) (addressing the issue of regional fair share).

wishes, may then legislatively undertake to allocate unwanted development activities. It can set minimum and maximum inclusionary quotas for individual towns predicated on geographic size, population size, available tax base, or any other criteria it deems appropriate.⁵³ Alternatively, the legislature may clothe regional planning bodies with the responsibility for finding and earmarking appropriate locations within the region for unwanted but necessary developments.⁵⁴ It should be reemphasized that these tasks are legislative and ought not to be performed by the proposed reviewing body.

Final judicial review of decisions of the reviewing body, based on the record compiled both at the local and administrative levels, should be by the highest state court. It goes without saying that review in the appellate court should not be a *de novo* proceeding. The court, however, should have the power to affirm, reverse, or modify decisions of the reviewing body, including modification of conditions attached to an approval (adding new conditions, if necessary).

The probable consequences of the reviewing process outlined above are numerous. Almost all are desirable. Towns faced with the prospect of outside review of land use decisions which unreasonably exclude essential activities from an entire community will begin to rethink and reshape their controls to avoid exclusion.⁵⁵ They will be encouraged to fashion regulations which are stringent but reasonable, and which locate undesirable developments appropriately within the town. Overly cumbersome regulations or those which cannot be justified by empirical data, and which are thus tantamount to an outright prohibition, will inevitably be discouraged because they will trigger the review process and will almost certainly be struck down. Failure of towns to act in a more responsible manner would almost certainly enable developers with sound proposals to obtain

53. In spite of the pressure to share burdens more or less equally, one would hope that site suitability for any particular difficult to locate activity would continue to be the dominant factor in an allocation process. See N. Y. UNCONSOL. LAWS §§ 6251-6285 (McKinney Supp. 1977-78) (New York's Urban Development Corporation Law was a move in this direction. It originally included the power to override local zoning ordinances.); Osborne, *New York's Urban Development Corporation: A Study on the Unchecked Power of a Public Authority*, 43 BROOKLYN L. REV. 237 (1977). See also OR. REV. STAT. §§ 197.400, 197.405 (1979) (Oregon's approach for identifying and locating "activities of state-wide significance").

54. See *National Merritt, Inc. v. Weist*, 41 N.Y.2d 438, 361 N.E.2d 1028, 393 N.Y.S.2d 379 (1977) (sustained municipal denial of required zoning permit on grounds that alternative locations for siting such developments existed in the region); OR. REV. STAT. § 197.190 (1979) (providing a role for regional bodies in the state's Overall Comprehensive Planning Coordination Act); Note, *Impact of Regional Facilities on Local Variance Decisions: National Merritt, Inc. v. Weist*, 16 URB. L. ANN. 405 (1979). See also note 3 *supra*.

55. Two factors at least will encourage them in this direction: first, the desire to avoid litigation costs and second, the desire to maintain the largest possible control over land use planning and locational decisions.

through the proposed review process the right to proceed in locations they have chosen.⁵⁶

The proposed review process would also prevent towns from initially enacting unreasonable regulations, and then, if an adverse decision by the reviewing body seemed imminent, pleading that a more suitable locational alternative (not the developer's site) exists.⁵⁷ Towns are encouraged at the outset to develop reasonable regulations and to earmark, through zoning, suitable sites for necessary but unwanted activities. Developers of such facilities will then know where they may go and what will be required of them. They will be less likely to challenge such controls and less likely to succeed when they do. Additionally, the activity, though not particularly wanted, will still be reasonably controlled and placed in the best setting available.

The review mechanisms described would also make it attractive for towns to begin to explore appropriate siting measures with neighboring communities thus enabling these issues to be addressed in a larger geographical context. The motive for each town to par-

56. The chosen location may not be ideally suited to the proposed activity. Presumably, however, the developer's site is not totally unsuited for the proposed activity or reviewing approval could not be granted, even conditionally. See generally Hartman, *Beyond Invalidation: The Judicial Power to Zone*, 9 URB. L. ANN. 159 (1975); Hyson, *The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation*, 12 URB. L. ANN. 21 (1976); Comment, *Judicial Relief in Exclusionary Zoning Cases: Pennsylvania's Definitive Relief Approach*, 21 VILL. L. REV. 701 (1976). See also Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 MAINE L. REV. 29 (1980) (note section dealing with "The Fashioning of Relief," at 79-80 and accompanying footnotes, particularly n. 153).

57. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977):

An express condition of this holding, moreover, is that the trial court, after consideration of the ecological and environmental proofs referred to in IX, *supra*, determine that the plaintiff's land is environmentally suited to the degree of density and type of development plaintiffs propose. Subject to these conditions it is our purpose to assure the issuance of a building permit to incorporate plaintiffs within the very early future.

The municipality has not borne its consequent burden of establishing valid reasons for the deficiencies of the ordinance.

The basic law is by now settled. Further, the defendant was correctly advised by the trial court as to its responsibilities in respect of regional housing needs in October 1971, over five years ago. It came forth with an amended ordinance which has been found to fall short of its obligation. Considerations bearing upon the public interest, justice to plaintiffs and efficient judicial administration preclude another generalized remand for another unsupervised effort by the defendant to produce a satisfactory ordinance. The focus of the judicial effort after six years of litigation must now be transferred from theorizing over zoning to assurance of the zoning opportunity for production of least cost housing.

Id. at 551-53, 371 A.2d at 1227-28 (footnotes & citations omitted).

ticipate meaningfully in regional decision making is found in the risks of nonparticipation. Several unpopular activities may seek to locate in a single town in more or less suitable settings. If there were no reasonable basis for excluding them the town would be compelled by the reviewing process described to receive them all. Coordination of regulations and allocative land use decisions between townships will permit individual towns to exclude some unwanted activities. Although reasonable local land use control laws may exclude some unwanted activities, only state-level siting laws and regional decision-making processes can distribute the harms and burdens of these activities in a manner which takes into account both site suitability and distributive justice.⁵⁸

Conclusions and a Warning

The problems outlined to this point and the suggested approaches to them have been grounded largely on arguments of economic and social utility. We are dependent on some of the things we are prone to exclude. Moreover, aspects of fiscal and tax equity entered into the analysis to some extent. An alternative rationale, less pragmatic and more philosophic in tone, would assert simply that lawful activities which are undeniably valid uses of private and public property must be allowed to exist somewhere.⁵⁹ Piecemeal exclusionary regulations which result in total, or near total, exclusion of these activities are constitutionally impermissible. Such traditional maxims of the law as "where there is a right, there is a remedy"⁶⁰ may justifiably be invoked to support inclusion of these activities. The proposal suggested herein, then, may be characterized not as a radical assault

58. A Maine example of the approach suggested is to be found in the GOVERNOR'S TASK FORCE REPORT, ENERGY, HEAVY INDUSTRY AND THE MAINE COAST (1972). See notes 53-54 *supra*.

59. The root of this assertion is to be found in the concept of due process within the federal and most state constitutions. Though it is implicit in most judicial decisions dealing with land use matters generally and exclusion in particular, only a handful of courts have addressed this issue directly. See, e.g., Appeal of Girah, 437 Pa. 237, 263 A.2d 395 (1970):

We must start with the basic proposition that absent more, an individual should be able to utilize his own land as he sees fit. U.S. Const. Amends. V, XIV. Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights, it goes without saying that the use of the police power cannot be unreasonable.

Id. at 241 n.3, 263 A.2d at 397 n.3. (citations omitted). See also National Land and Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965):

[W]e 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.

Id. at 522, 215 A.2d at 607.

60. See D. DOBBS, REMEDIES 1-3 (1973).

on local government, but as the least intrusive alternative which meets concepts of equity and justice, our constitutional obligations, and conservatively oriented views of the rights of private property owners.⁶¹ The fact that the proposed state actions also have social and economic utility is a bonus. Each individual and town may choose the most comfortable rationale for accepting the suggestions offered, but we must proceed in accordance with the suggestion. The objective is to proceed, not to proceed because of a particular ideological orientation.⁶²

61. See note 60 *supra*. See also Delogu & Gregory, *Planning and Law in Maine, Part 1: Private Property and Public Regulation in Maine*, MAINE AGRIC. EXP. STAT. BULL. 653 (1967) ("Private property rights are not superior to public interests; nevertheless the state, like individuals must be subject to a system of law," *id.* at 7). Cf. F. BOSSELMAN, D. CALLIES, & J. BANTA, *THE TAKING ISSUE* (1973) (limits imposed by taking clause are largely mythical).

62. It is anomalous that on one hand we decry the wrongful dumping of hazardous wastes but on the other we have not allocated or licensed a single hazardous waste disposal area in all of upper New England; on one hand we order the retarded to be treated more humanely, placed in family-type environments, but on the other we exclude them from residential neighborhoods; on one hand we opt to retain (perhaps we will even expand) nuclear generating facilities, but state and local governments reject the idea that they should make room for nuclear waste disposal facilities; on one hand we would appropriately house all Americans, but on the other we frequently exclude or regulate to the point of exclusion mobile homes, multi-family housing and public or privately assisted low income housing, the only viable options for many low and even middle income Americans.

The cataloging of aberrant, inconsistent (some would say hypocritical) behavior could be extended. However, before we do so, we must ask what results have been produced and whether our actions have resolved any of the existing problems. The literature suggests that although there are some encouraging signs, the answer is, by and large, no. **Hazardous waste disposal:** See, e.g., [1980] 11 ENVIR. REP. 1107 (BNA). An EPA report indicated that there are 5 areas within the country, New England among them, with insufficient hazardous waste disposal sites and facilities to meet the needs of generators under the Resource Conservation & Recovery Act.

Housing for the retarded: See, e.g., *Wuori v. Zitnay*, Civ. No. 75-80-SD (D. Me., July 14, 1978) (consent decree); *The Community Home for Handicapped Children is a Breath of Fresh Air*, Maine Times, March 28, 1980. See also note 18 *supra*; Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Power*, 25 VILL. L. REV. 273 (1979); Note, *Zoning the Mentally Retarded into Single Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 ARIZ. ST. L.J. 385; Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853 (1979); Note, *A Review of the Conflict Between Community Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1979).

Nuclear waste disposal: See generally Mills & Woodson, *Energy Policy: A Test for Federalism*, 18 ARIZ. L. REV. 405 (1976); Note, *Judicial Review of Federal Environmental Decisionmaking: NRC Regulation of Nuclear Waste Management and Disposal*, 58 TEX. L. REV. 355 (1979); Note, *Disposal of High Level Nuclear Waste; An Abdication of Responsibility?* 1979 U. ILL. L.F. 915; Note, *Nuclear Waste Disposal Dilemma: A Case For Judicial Intervention*, 26 WAYNE L. REV. 173 (1979). Recent comments by Maine's Governor, as reported in the press are also pertinent: *Brennan Urged to Begin Talks on Radioactive Waste*, Portland Press Herald, Dec.

The failure to find enough suitable locations for unwanted development activities does not avoid problems; it multiplies them, increases a wide variety of risks we all must bear, imposes large direct and indirect money costs, and demeans us as a people in a variety of ways. The failure of state government to act responsibly produces an ever widening range of irresponsible actions by lower levels of government and individuals, permitting our worst instincts to surface.

12, 1980, at 29 (describing in part the state's opposition to nuclear waste storage facilities being located in Maine); *see also* [1980] 11 ENVIR. REP. 1030 (BNA) (Oregon voters approve curbs on storage of nuclear waste products).

Mobile Homes: Reed v. Zoning Hearing Bd., 31 Pa. Commw. Ct. 605, 377 A.2d 1020 (1977) (township sought to exclude mobile home by defining it as other than a single-family detached dwelling); R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970's (1973); Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 MAINE L. REV. 29, 39-43 (1980) (showing variety of ways in which mobile homes are excluded). *See also* notes 9-10 *supra*; *End to Housing Bias Sought*, Portland Press Herald, Dec. 12, 1980 at 1 (describing a legislative study committee report detailing local government discrimination against unconventional housing: "It's too expensive for a young couple or even an older established couple to afford a home now with the current economic conditions so they're turning to mobile parks and manufactured housing that is more affordable.").

L.D. 1758, submitted to the second regular session of the 109th Maine Legislature, sought to "prevent the exclusion of manufactured housing from Maine towns by unduly restrictive police power ordinances." The accompanying Statement of Fact noted:

The lower cost of manufactured housing vis-a-vis the conventional site-built housing remains a significant factor even when the differences in size, furnishings and land costs are omitted from the calculations. In June, 1979, the United States Bureau of Census, Housing Starts Division, estimated the average square foot cost of manufactured housing to be \$15.79 — the average square foot cost of site-built housing was \$30. for the 2nd quarter of 1979.

Id. at 2. The proposed legislation was not enacted but did lead to the aforementioned legislative study, Resolves of the Legislature, ch. 54, (Apr. 1980).

Other low and middle income housing: *See generally* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968):

The passage of the National Housing Act in 1934 signalled a new federal commitment to provide housing for the nation's citizens. Fifteen years later Congress made the commitment explicit in the Housing Act of 1949, establishing as a national goal, the realization of "a decent home and suitable environment for every American family."

Today, after more than three decades of fragmented and grossly underfunded federal housing programs, decent housing remains a chronic problem for the disadvantaged urban household. Fifty-six percent of the country's nonwhite families live in central cities today, and of these, nearly two-thirds live in neighborhoods marked by substandard housing and general urban blight. For these citizens, condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment is as far distant as ever.

Id. at 467. Nothing has happened in the last 10 years to significantly alter these assessments. Moreover, few of the Commission's recommended actions with respect to housing, *see id.* at 474-83, have been implemented.

If these realities, as painful or unpalatable as they may be, are finally recognized and if we further recognize that these conditions are unlikely to change on their own or by recourse to mere exhortation,⁶³ the suggested three part role for state government advanced in this paper seems like a modest proposal.

In summary, states must enact major facilities siting legislation; they must equalize among towns the fiscal benefits and burdens which public or private, regional, small-scale, or unwanted development activities give rise to; and finally they must develop a mechanism which tests the reasonableness of any local governmental exclusion of an otherwise legal development type or activity. All of these measures must be pursued in concert with the focus on "inclusion,"⁶⁴ with a recognition of the fact that every societal activity must be capable of being situated somewhere. The suggested approach does not envision either a significant federal role in land use planning and decision making or a state preemption of these areas of concern. Local governments would continue to have the dominant voice in these matters but their powers would no longer be absolute. Their interests and larger social concerns articulated by the contemplated state legislation would be balanced. This set of proposals cannot, of course, guarantee that the dilemma posed at the outset will be ended, but they are a step in the right direction. It is absurd and unwise to continue to pursue our present course.⁶⁵

63. One is reminded of the extremely perceptive analysis of Hardin in *Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). He carefully demonstrated why appeals to conscience do not work. He called instead for "mutual coercion mutually agreed upon." The latter in lawyers' language is nothing more than police power controls. Hardin recognized, and this article would underscore, that such controls must be applied by that level of government capable of addressing the "common."

64. See generally Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 *SYRACUSE L. REV.* 509 (1971); Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 *MAINE L. REV.* 29, 32-33 n.11, 58-62 nn.81-92 (1980). For a contrary position, see Note, *Zoning for the Regional Welfare*, 89 *YALE L.J.* 748 (1980).

65. It seems safe to predict that if legislative approaches along the lines suggested do not materialize, the litigating assault on exclusion will continue. See Frelich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 *URB. LAW* 344 (1971); Comment, *A Survey of Judicial Responses to Exclusionary Zoning*, 22 *SYRACUSE L. REV.* 537 (1971); *Developments in the Law—Zoning*, 91 *HARV. L. REV.* 1427 (1978):

With state and local reform hampered by the political clout of suburbanites anxious to perpetuate their homogeneous communities, the judiciary has inherited the responsibility of articulating and enforcing meaningful limitations upon the exercise of local zoning power. Such responsibility has not been misplaced. Courts, in contrast to local or state zoning authorities, can effectively represent the interests of those adversely affected by exclusionary zoning schemes, while remaining insulated from the intense political pressures associated with the development of low-income housing in wealthy suburbs. The judiciary, therefore, can formulate most effectively doctrines which balance the importance of nonexclusionary communities against the concern with local autonomy.