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A Regional Perspective of the "General Welfare"

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The city of Livermore was once a small community located in the Livermore-Amador Valley of Central California. Following World War II, the population increased eightfold within a twenty-year-span, reaching 37,703 in 1970. This massive influx of new residents overwhelmed the local school, sewage, and water facilities. When the Livermore city council refused to limit new growth, the residents passed an initiative in 1972 which prohibited further residential building until local school, sewage, and water facilities met specified standards. A local construction association sued to enjoin enforcement of the initiative.

1. For a discussion of the background to the Livermore initiative, see Deutsch, Land Use Growth Controls: A Case Study of San Jose and Livermore, California, 15 SANTA CLARA LAW. 1, 12-15 (1974) [hereinafter cited as Deutsch].

2. The Livermore Initiative, Apr. 11, 1972, provides as follows:

INITIATIVE ORDINANCE RE BUILDING PERMITS

An ordinance to control residential building permits in the City of Livermore:

A. The people of the City of Livermore hereby find and declare that it is in the best interest of the City in order to protect the health, safety, and general welfare of the citizens of the city, to control residential building permits in the said city. Residential building permits include single-family residential, multiple residential, and trailer court building permits within the meaning of the City Code of Livermore and the General Plan of Livermore. Additionally, it is the purpose of this initiative measure to contribute to the solution of air pollution in the City of Livermore.

B. The specific reasons for the proposed position are that the undersigned believe that the resulting impact from issuing residential building permits at the current rate results in the following problems mentioned below. Therefore, no further residential permits are to be issued by the said city until satisfactory solutions, as determined in the standards set forth, exist to all the following problems:

1. EDUCATIONAL FACILITIES—No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code.

2. SEWAGE—The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board.
The California Supreme Court, in Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, recently followed the rapidly emerging national trend toward a regional perspective in the judicial review of exclusionary zoning. The supreme court held that a zoning ordinance having significant regional impact must bear a reasonable relation to the welfare of the region’s citizens. The test formulated in the Livermore decision examined the effect of the zoning on the region. The decision held that the local legislature may no longer consider the effect of its ordinance within the municipal boundaries alone. Now it must also consider whether its ordinance has a significant effect upon the larger region outside the municipality.

The zoning process has been developing for the past fifty years while the judicial standard of review has remained static. The Livermore decision marked a profound shift in the California judicial standard of review. It brought the California constitutional standard up to date, enabling it to deal with the consequences of fifty years of urban and zoning evolution.

The constitutional test of a zoning ordinance since Village of Euclid v. Ambler Realty Co. and Miller v. Board of Public Works has required that the ordinance bear a rational relation to the health, safety, and general welfare of the community. The application of the test traditionally involved two related corollaries. First, courts deferred to the local judgment. Second, the “general wel-

3. WATER SUPPLY—No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.

C. This ordinance may only be amended or repealed by the voters at a regular municipal election.

D. If any portion of this ordinance is declared invalid the remaining portions are to be considered valid.

3. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

4. See text accompanying notes 41-44 infra.

5. 18 Cal. 3d at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55. For the court’s holding in the instant case, see text accompanying note 109 infra.

6. More than half a century ago, Mr. Justice Holmes remarked in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), that “[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” The question thus arose: How far is too far? In Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926), the Supreme Court held that the municipality’s regulation must bear a “rational relation to the health, morals, safety and general welfare of the community.” Accord, Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925).


9. Note, General Welfare and “No-Growth” Zoning Plans: Considera-
fare" was defined in local terms. The judiciary gave little substantive consideration to a zoning ordinance under these traditional corollaries.

The Livermore decision purported to adopt the regional perspective of the general welfare by extending traditional principles.


See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974), in which the Supreme Court found a rational basis in the community's desire for a pleasant environment.

The Lockard facts involved an appeal from a trial court decision finding that a city ordinance was arbitrary and discriminatory. The California court held that "[t]he findings and conclusions of the trial court as to the reasonableness of a zoning ordinance are not binding on an appellate court if the record shows that the question is debatable and that there may be a difference of opinion on the subject." Id. at 460, 202 P.2d at 42, and that the court will not consider the wisdom of the legislative act, id. at 461, 202 P.2d at 43. Then the court moved beyond deference into the area of indifference: The ordinance will not be set aside unless "clearly wrong" and the error must appear "beyond reasonable doubt from facts or evidence which cannot be controverted." Id. This standard of review appears even less exacting than minimal scrutiny.

The supreme court restricted the function of the jury to weigh and to judge the evidence. If the appellate court does not agree with the trial findings, the appellate court may substitute its own findings in zoning cases. In his dissent, Justice Carter argues that the Lockard majority calls for appellate courts to become trial tribunals. He points out that the credibility of evidence is to be determined at the trial. Id. at 469, 202 P.2d at 47.

See text accompanying note 88 infra.
It sought to extend the scope of the "general welfare" while continuing to defer to local judgment.

To apply the Euclid test with a regional perspective, a court must reverse each of the two traditional corollaries. The judiciary cannot adopt a regional perspective while deferring to a parochial view of the "general welfare." First, courts may not defer to, but must actively\textsuperscript{13} review the effect of the local judgment. Second, the "general welfare" must be defined in regional terms. The Livermore court adopted both new corollaries to the constitutional test. It explicitly took a regional view of the general welfare and implicitly required active review of local zoning legislation.

The purpose of this Comment is to analyze the Livermore decision and its constitutional basis, to locate the decision within the framework of the national judicial trend toward regional review, and to illustrate why the judiciary has started, and must continue, toward a regional standard. This Comment advocates the regional perspective of the "general welfare" as a device to avoid the exclusionary results of judicial deference,\textsuperscript{14} without calling upon the courts to become legislatures.

This Comment will first establish the zoning background to illustrate the changed circumstances that now mandate active regional review. The national precedents, requiring a regional perspective, will then be reviewed to elucidate the wide range of approaches manifested within that perspective. The Livermore decision then will be analyzed with reference to the national precedents.

**BACKGROUND**

The principle of judicial deference was derived from a common concern of landowners,\textsuperscript{15} local legislatures,\textsuperscript{16} and courts\textsuperscript{17} for sta-
bility in land use and value. Once the courts labeled the local decision as legislative, the constitutional principle of separation of powers limited judicial review of zoning. The separation of powers principle served to reinforce judicial deference to local legislatures.

The original Euclidean zoning separated different land uses into different use districts. The Euclid ordinance barred particular uses from specified areas. The resultant exclusion was indirect at most. When a court deferred to a Euclidean zoning plan it was not deferring to a directly exclusionary practice.

Following World War II municipalities began experimenting with new means to cope with the demands of urban expansion. Established residents began to question the value of growth, displaying a "new mood" to deny further growth and preserve the status quo. Local legislatures imposed lot size and structure requirements. Some ordinances discriminated against the immigration of identifiable groups.


20. Id. at 380.


24. Some growth control ordinances exclude particular types of resi-
trol plans, however, are non-discriminatory, excluding all new growth that exceeds specified limits. Whereas Euclidean zoning only indirectly affected the number of residents in an area, lot size restrictions, performance standards plans, and other growth control systems have been expressly designed to deny new growth. The indirect exclusion of Euclidean plans has given way to direct exclusion of newcomers.

Commentators have discussed the problems of increased cost and inadequate quality and supply of housing that result from exclusionary zoning practices. These problems are felt throughout the region. "[M]unicipalities are not islands remote from the
dential uses, such as multi-family dwellings, apartments, or apartments with more than one bedroom. Courts tend to see these as disguised forms of exclusion. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (only detached single-family dwellings were allowed); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 256, 378 N.Y.S.2d 972, cert. denied, 423 U.S. 808 (1975) (multi-family residential uses were excluded); In re Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (apartments, in effect, were excluded.)

25. For a discussion of the various types of growth controls, see STANFORD ENVIRON. L. SOC., A HANDBOOK FOR CONTROLLING LOCAL GROWTH Ch. IV (1973); Deutsch, supra note 1, at 8.
26. Exclusion is defined in the text accompanying note 136 infra.
29. Large lot and floor space requirements increase the cost of housing. One court found that such restrictions established a minimum price of $45,000 in 1971. "Only those with incomes in the top 10% of the nation and county could finance new housing in [the zone concerned]." 283 A.2d 358, 356 (N.J. Super. 1971). See Bosselman, Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?, 1 FLA. ST. U.L. Rev. 234, 245-50 (1973), for a discussion of the increased cost of housing resulting from development timing controls.
31. Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897, 908 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976). The Petaluma court recognized an exclusionary purpose and the regional effect of the ordinance, but refused to take it upon itself to find a due process
needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective. Consequently, the developing municipality is faced with a dilemma. The power to zone is delegated to the local legislature, but the pre- eminent problem of growth transcends its jurisdictional boundaries.

The extra-territorial effect of local zoning legislation now requires active judicial review to assure compliance with the regional welfare. Judicial deference to the local legislature is not justified under the principle of separation of powers.

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violation "merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state." Id. at 908. The New York Court of Appeals in Ramapo declared that there is "something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available." The court, however, called upon the state legislature to require regional planning. Golden v. Planning Bd. (Ramapo), 30 N.Y.2d 359, 375, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 149, appeal dismissed, 409 U.S. 1003 (1972). This court later extricated itself from its dilemma in Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). See text accompanying note 65 infra.


33. See text accompanying note 141 infra.

34. R. Healy, Land Use and Democratic Law and Democratic Living, 20 Law & Contemp. Prob. 317, 318 (1955) (calls on judiciary to "watch over" parochial and exclusionist local governments); The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 128 (1974) (critical of the Supreme Court's implication that as a general rule it will be deferential in reviewing zoning cases.); Note, General Welfare and "No-Growth" Zoning Plans: Consideration of Regional Needs by Local Authorities, 26 Case W.L. Rev. 215, 238 n.104 (1975).

35. In Fasano v. Board of County Comm'r's, 264 Or. 574, 580, 507 P.2d 23, 26 (1973), the Oregon Supreme Court said:

[W]e would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and
tirely appropriate for the Supreme Court to defer to a Congressional judgment. However, it does not logically follow from this principle that the Supreme Court or a state supreme court must also defer to a local legislature. Yet some courts, including the Supreme Court, continue to defer to local legislative judgments that are parochial and exclusionary.

Small decision groups are simply not the equivalent in all respects of state and national legislatures.

In practice, some judges have been unwilling to accord deference to the local body. In R. Babcock, The Zoning Game (1966), the author states:

This lack of confidence in legislative responsibility, particularly when exercised by small political units, seems most evident in those judges who have come up through local politics. A state supreme court justice told me he decided at least one well-noted case against the municipality because he simply could not accept the view that officials of a small government unit were capable of exercising fairness where decisions on land use matters required considerable discretion.

Id. at 105.

37. STAN. ENVIRON. L. SOC., A HANDBOOK FOR CONTROLLING LOCAL GROWTH 13 (1973):

[L]egislative deference is most justified when it is granted to Congress, as Congressmen are responsive to a wide-ranging public, and must balance several competing points of view. Zoning and other growth control regulations have traditionally been characterized as legislative decisions which the courts ought to defer to; however, as one slides down the scale from Congress, to the State Legislature, to the City Council, and to the planning commission, it is questionable whether the factors that normally justify legislative deference are still in operation. Generally, the smaller the decision-making body, the smaller the representation of varying political views, and the greater the chance for action which is arbitrary and discriminatorily narrow in scope.

38. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (the Court found a rational relation in the community's desire for a quiet environment. But see note 145 infra); Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976); Golden v. Planning Bd. (Ramapo), 30 N.Y.2d 359, 375, 285 N.E.2d 291, 300, 334 N.Y.S.2d 138, 149, appeal dismissed, 409 U.S. 1003 (1972) (the New York Court of Appeals deferred to a local plan that restricted land use for up to 18 years despite the court's suggestion that there is "something inherently suspect" about the scheme). Ramapo's precise status is in doubt in light of Berenson which specifically called upon municipalities to consider the needs of the region (see text accompanying note 71 infra) while it also approved of Ramapo (see text accompanying note 70 infra). In Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 600, 350 N.E.2d 381, 389, 385 N.Y.S.2d 5, 13 (1976), the New York Court of Appeals cited Ramapo in a string cite. See also Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 961 (1st Cir. 1972) (upheld three- and six-acre minimum lot size restrictions).

39. In Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574, 580-81 (N.D. Cal. 1974), the district court found that the Petaluma Plan had an exclusionary purpose and that if it was adopted throughout the San Francisco Bay area, the region would experience a shortage of 105,000 units in the decade of 1970 to 1980. On appeal, the Ninth Circuit did not directly question these findings. 522 F.2d 897, 906 (9th Cir. 1975). However, the court of appeals felt it could not actively scrutinize
A Regional Perspective

Precedents to the Livermore Decision

Several jurisdictions have adopted the regional perspective of the "general welfare." They are Virginia, Pennsylvania, New Jersey, and New York. The Virginia, Pennsylvania, and New Jersey Supreme Courts aggressively review exclusionary zoning ordinances. These three courts do not balance the demands upon the municipality against the needs of the region for housing.

the Petaluma Plan without becoming a super-zoning board. Id. at 908. But see note 119 and accompanying text infra.


41. Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959). The Virginia Court modified Carper in Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973). It said the effect of Carper "is to prohibit socio-economic zoning"—that is, a municipality may not exclude or include any particular socio-economic group. This latter decision seems to call into question the continuing vitality of Virginia's regional perspective, since the regional concern of Carper was to provide for low income housing. However, the Virginia Supreme Court continues to be concerned with the regional housing need and has recognized the continued validity of the Carper decision. See Board of Supervisors v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975).


45. In Virginia the supreme court will reconsider the facts and review the trial findings to discover the implicit purpose of the local legislation. Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

The supreme court in Pennsylvania will substitute its judgment for the local legislature's judgment of an adequate lot size. The court found that a one-acre lot would be adequate for a house since "[t]he Kaufman's Department store in Pittsburgh is built on approximately a one-acre lot." See In re Kit-Mar Builders Inc., 439 Pa. 466, 471 n.4, 268 A.2d 765, 767 n.4 (1970).

The New Jersey case concerned a zoning plan that made no provision for low income housing. The supreme court found that the Township of Mount Laurel is motivated by "selfish" and "parochial" interests. NAACP v. Township of Mount Laurel, 67 N.J. 151, 171, 336 A.2d 713, 723, cert. denied, 423 U.S. 808 (1975).

46. The courts focus on whether an exclusionary purpose is present in
Pennsylvania and New Jersey hold the need for housing paramount. Virginia recently adopted a unique rule that finds a taking of private property when low income housing is excluded or included in a zoning plan.

The New Jersey Supreme Court offers the most strident repudiation of local motives in *NAACP v. Township of Mount Laurel*. Rather than accepting the traditional discretion granted to local legislatures, the supreme court stated the local legislature has a "presumptive obligation" to consider a "broader view of the general welfare." At three points in its opinion, the court said the local legislature has an affirmative obligation to make available a variety and choice of housing. The court in *Mount Laurel* spoke to a state-wide, extreme pattern of exclusion.

The New Jersey Supreme Court recently modified the *Mount Laurel* holding to require that the local legislature make available...
the “least cost” housing, rather than low income housing. The nonavailability of federal funds for subsidized low income housing rendered the Mount Laurel decision hollow. Land zoned for low income housing remained vacant. Thus, the court held that the local legislature must fulfill its obligation to provide for its fair share of the regional lower income housing need by zoning for the least cost housing that private industry will build.

The supreme courts in Pennsylvania and New Jersey shift the burden of proof to the zoning proponent in certain circumstances. The Mount Laurel opinion held that when the zoning opponent in New Jersey demonstrates that a developing municipality has not, by its zoning laws, made possible a variety and choice of housing, including low and moderate income housing, he has made a prima facie showing of a violation of substantive due process or equal protection under the state constitution. A “heavy burden” then shifts to the local legislature to establish a valid basis for its action or non-action. The New Jersey Supreme Court, in shifting the burden, goes further than any other court in the nation to require the local legislature to justify its exclusion of low and moderate income housing. In Pennsylvania, the burden shifts when a zoning ordi-

53. Id. at 33-37. The court notes that some suspended federal programs have been replaced. Id. at 34 n.20. Query whether a sudden availability of federal low income housing funds will call for another change in the New Jersey constitutional mandate?
54. In January 1973, President Nixon impounded the federally subsidized housing funds (id. at 34 n.20) and private industry would not proceed unaided to build low income housing. Id. at 35.
55. Id. at 36. The resolution of what is to be the “fair share” of the community is a legislative, not judicial, determination. Id. at 78. The supreme court suggests that least-cost housing will not provide new housing for low income people but that they will be indirectly assisted by a “filtering down” process—that is, the effect of a presumed greater supply of new housing will make available used low income housing. Id. at 38.
56. 67 N.J. at 181-82, 336 A.2d at 728. The burden continued to shift under the Oakwood at Madison decision when the plaintiff made a “prima facie” case of exclusion.
57. Id. at 181, 336 A.2d at 728.
58. In California, under the Livermore rule, once the zoning opponent established (1) a regional effect and (2) regional exclusion, he has only made out a prima facie case. See text accompanying notes 99 & 100 infra. In New Jersey the opponent need only have the allegation of exclusion of low and moderate income housing in his complaint remain unrefuted to shift the burden of proof to the proponent of the local legislation. For an
nance totally bans a legitimate business.  

Prior to adopting the regional perspective, the above states varied in their acceptance of the traditional corollaries to constitutional review of land use regulation. Pennsylvania and New York formerly adhered to both traditional corollaries, viewing the “general welfare” in local terms and deferring to the local land-use decision. New Jersey has considered the “general welfare” in broad terms for almost thirty years, but chose to defer to the local judgment until its Mount Laurel decision. Virginia adopted the regional perspective early in 1959.

_Berenson v. Town of New Castle_, a New York decision, offers a middle ground between deference to the local definition of general welfare and invalidation of all ordinances found to have an exclusionary purpose or effect. The _Berenson_ ordinance excluded multi-family residential housing and required one- and two-acre minimum lot sizes. _Berenson_ is the only regional zoning precedent


61. For a statement of the traditional corollaries, see text accompanying notes 9 & 10 supra.


66. The _Petaluma_ decision is offered as an example of a deferential court. See note 31 supra.

67. See cases cited in note 45 supra.

68. 38 N.Y.2d at 105, 341 N.E.2d at 239, 378 N.Y.S.2d at 676.
that purports to make allowance for some measure of exclusion in local zoning legislation. In this respect, it is similar to Livermore.\footnote{69. For a discussion of the Livermore balancing test, see text following note 108 infra.}

The New York Court of Appeals faced a dilemma in Berenson. It acknowledged Golden v. Planning Board (Ramapo\footnote{70. See note 61 supra.}) in so far as Ramapo provided for a balanced community, but the court also wanted to put that balanced community into a regional perspective.\footnote{71. See text accompanying notes 76 & 77 infra.} The Ramapo decision upheld the local ordinance.\footnote{72. See note 38 supra.} The Berenson decision found that the exclusion of multi-family housing could be so substantial that it would be unconstitutional, and remanded for a factual determination of this issue.\footnote{73. 38 N.Y.2d at 105, 341 N.E.2d at 239, 378 N.Y.S.2d at 677.} It did not rule on the constitutionality of the lot size restrictions, but its discussion limited the permissible use of lot size restrictions.\footnote{74. See note 75 infra.} Berenson represents a shift from a local definition of “general welfare” to a regional definition.\footnote{75. Judge Jasen, who dissented three years earlier to the Ramapo decision, wrote the unanimous opinion in Berenson. No member of the Ramapo majority participated in Berenson. The court observed that the traditional test considered only the impact of an ordinance upon the local community, and then held that the constitutional test must consider the impact upon the region. The court pointed out that it will now actively consider “whether . . . [the ordinance] is ‘really designed to accomplish a legitimate public purpose.’” Berenson v. Town of New Castle, 38 N.Y.2d 102, 107, 341 N.E.2d 236, 240, 378 N.Y.S.2d 672, 678 (1975). The Livermore court used even stronger language to describe the appropriate level of scrutiny. See note 93 and accompanying text infra. The Berenson court served notice that only an isolated community may make even limited use of two-acre minimum lot size restrictions. The court observed that even Ramapo did not purport to countenance exclusion.}
ment: "[I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements." The court held that when the judiciary considers whether the local legislature has satisfied the second element, the court must balance the "local desire to maintain the status quo within the community and the greater public interest that the regional needs be met."  

Collateral Approaches to the Regional Perspective  

Three states have allowed exclusion of business from the community where adequate services may be readily obtained in nearby communities. Florida courts have upheld the validity of exclusionary zoning ordinances without any qualification.  

Many states have passed statutes that require some form of regional control. State zoning has not generally been adopted, however. Existing state zoning plans usually involve either small states or areas of special environmental concern, such as coastal or  

77. Id. at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.  
78. Id.  

The California Department of Housing and Community Development, pursuant to the authority vested by CAL. HEALTH & SAFETY CODE § 41134 (West Supp. 1977), to make specific CAL. GOV. CODE § 65302 (c) (West Supp. 1976), proposes to adopt regulations CAL. ADMIN. CODE, tit. 25, ch. 1, sub. ch. 5. The proposed effective dates are: Nov. 1, 1978—Southern Calif.; Feb. 1, 1979—Bay Area; May 1, 1979—Sacramento Region. These regulations would require that the housing element of a local legislature's general plan provide for the community's "fair share" of the regional housing needs. Letter from Mr. Arnold C. Sternberg, Director of the California Department of Housing and Community Development, to "All Interested Persons," Jan. 31, 1977 (on file with the San Diego Law Review).
Landowners and local governments have strenuously opposed state zoning. Such problems and the magnitude of the task suggest that widespread state zoning will not be forthcoming.

**The Livermore Decision**

The residents of Livermore passed an initiative designed to deny further residential growth until city facilities met specified standards. The plaintiff construction association sued to enjoin enforcement of the initiative. The trial court invalidated the ordinance on grounds not pertinent here. The decision on the merits was based on the pleadings.

The California Supreme Court reversed the two trial holdings and remanded for trial of the remaining issue. That question is whether the Livermore ordinance unconstitutionally exceeded the scope of the police power. The court did not rule on that issue, electing instead to "reaffirm" and "clarify" traditional zoning principles. It would seem that these "traditional" zoning principles will soon be tested in the appellate courts of California.

The Livermore court's majority and two dissenting opinions reflected the court's ambivalence toward exclusionary zoning. The

82. R. Healy, Land Use and the States 149 (1976).
83. Id.
84. The trial court held, pursuant to the rule announced in Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929), that a zoning ordinance could not be enacted by initiative, as this would deny to affected landowners the due process elements of notice and opportunity to be heard. See Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d at 588, 557 P.2d at 475, 135 Cal. Rptr. at 43. The Livermore decision overruled Hurst. 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48. Also the trial court held the initiative unconstitutionally vague. Id.
85. The plaintiff zoning opponent filed suit to enjoin enforcement of the ordinance. After the city filed its answer, all parties moved for judgment on the pleadings and stipulated that the court could decide the merits on the basis of the pleadings and other documents. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 590, 557 P.2d 473, 476, 135 Cal. Rptr. 41, 58 (1976).
86. Id. at 611, 557 P.2d at 490, 135 Cal. Rptr. at 58.
87. Id. at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51.
88. Id. at 599, 557 P.2d at 476, 135 Cal. Rptr. at 44.
89. In addition to the possibility that the instant parties will again seek appellate review, another case of regional import is working itself through the courts. Orange County Fair Housing Council v. City of Irvine, No. 226,824 (Super. Ct., filed Mar. 7, 1973).
majority purported to adopt the regional perspective while retaining the rational relation standard of review. However, it is arguable not only that the court has replaced both traditional corollaries, but also that its rule is an extension of the regional perspective trend. Mr. Justice Mosk dissented, arguing that any absolute prohibition on housing development should be presumptively invalid.

The court equivocated when it described the level of scrutiny to be employed by a court reviewing local zoning legislation. On the one hand, it set forth exacting criteria to be used in determining reasonableness. On the other hand, it said a court may defer to local judgment. The court then said a court may not abdicate its responsibility of review.

The California court may not require exacting judicial review and consistently uphold the Lockard v. City of Los Angeles level of scrutiny. Lockard calls for such a minimal level of scrutiny as to suggest that zoning ordinances will ordinarily withstand attack. The Livermore court said that deference is not to be judicial abdication and that “we can no longer assume that an ordinance will never be overturned.”

The shift in emphasis is so dramatic that Livermore should be read as implicitly overruling Lockard, at least where the local ordinance has a regional impact.

90. 18 Cal. 3d at 606, 557 P.2d at 486, 135 Cal. Rptr. at 54. See also text accompanying note 88 supra.
91. Id. at 623, 557 P.2d at 497, 135 Cal. Rptr. at 65. Justice Clark dissented. He would have invalidated the ordinance, arguing that its enactment by initiative denies due process to affected landowners. Id. at 615, 557 P.2d at 492, 135 Cal. Rptr. at 61.
92. The New Jersey approach is discussed in the text accompanying notes 56–57 supra.
93. The California court used aggressive language when it described the reviewing court’s role in assessing whether a regulation relates to the regional general welfare. “[T]he court must ascertain,” “must inquire,” “must determine,” must “identify the competing interests,” must determine the “probable impact,” and must find a reasonable basis “in fact, not in fancy.” 18 Cal. 3d at 608–09, 557 P.2d at 488–89, 135 Cal. Rptr. at 56–57. “The ordinance must have a real and substantial relation to the general welfare.” Id. at 608–09, 557 P.2d at 488–89, 135 Cal. Rptr. at 56–57. Compare this language with the approach taken in Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949). See note 11 supra.
94. This suggestion of deference is designed to avoid any inference that the court’s strong language denoted a strict scrutiny test. Interview with Mr. C. Foster Knight, Deputy Attorney General, at the Attorney General’s office in San Diego, California (Feb. 18, 1977).
95. 18 Cal. 3d at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57.
96. See note 9 supra.
97. See note 11 supra.
98. 18 Cal. 3d at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57.
The supreme court adopted the regional perspective of the "general welfare," however, without equivocation. Thus, it adopted both of the new corollaries of review: non-deference and a regional perspective.

The Regional Test

Under the Livermore test, the plaintiff zoning opponent must establish first that the local zoning legislation has a substantial regional impact, and second, that the challenged restriction does not reasonably relate to the regional welfare. The zoning opponent has the burden of presenting this evidence of unconstitutionality.

If the effect of the ordinance is local, so is the definition of the "general welfare" to be served. The judiciary will not demand that the ordinance bear a reasonable relation to the welfare of the region's citizens when the ordinance's impact is limited to the city boundaries. However, even where the impact is local only, a court will make an active inquiry into the effect of the ordinance. The issue of the extent of the effect of the ordinance is a question of fact to be determined by the trial court.

Livermore set out a three step analysis to be employed by a court in determining whether the zoning opponent has proved that the restriction does not reasonably relate to the regional welfare. The first step is to forecast the probable effect and duration of the restriction. When an ordinance posits a "total ban" on construction, the court is to consider the extent of the current shortage of public facilities and whether and when the city plans to rectify the shortage. The local legislature must justify its exclusion and describe its efforts to provide services. The supreme court assumed that

99. Id. at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.
100. Id. at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57. Compare this approach with that taken in Pennsylvania and New Jersey in certain circumstances where the plaintiff's unrebutted allegation will reverse the burden. See note 58 supra.
101. 18 Cal. 3d at 607, 55 P.2d at 487, 135 Cal. Rptr. at 55.
102. Id. at 607 n.24, 557 P.2d 487 n.24, 135 Cal. Rptr. at 55 n.24. In Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949), the supreme court said that trial findings of fact are not binding on an appellate court. The Livermore court did not similarly suggest that an appellate court may review the credibility of evidence. However, it did find, sua sponte, that the Livermore ordinance has, on its face, regional impact. 18 Cal. 3d at 607, 557 P.2d at 497, 135 Cal. Rptr. at 55.
103. 18 Cal. 3d at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.
local government has an obligation to provide services. However, this obligation is not absolute.104

"The second step is to identify the competing interests affected by the restriction."105 The court’s reference to "competing interests" suggests that there may be a variety of interests on each side. However, it identified these competing interests as environment and housing. The court discussed environment in a broad sense to include concerns for quiet seclusion as well as for clean air.106 Its concern for both sides was demonstrated by its statement that "deep social antagonisms"107 compete with one another.

Once a court has identified the competing interests, the third step requires it to determine the net effect of the ordinance and whether such effect represents a reasonable accommodation of the interests.108 This stage calls upon a court to balance the competing interests. A court must weigh the respective interests of environment and housing to determine which one dominates.

The Livermore court chose not to rule on the case before it, preferring instead to remand to the trial court for further development of the record.109 It assumed that the city would endeavor to provide facilities and that the housing ban would be temporary. The plaintiff was invited to introduce evidence to the con-
The court called upon the plaintiff to substantiate his allegation of an acute housing shortage in the San Francisco Bay area. The City of Livermore was called upon to substantiate its claim that problems of air pollution and inadequate public facilities made it reasonable to divert new housing, at least temporarily.

The definition of the nature of the balance between environment and housing awaits future litigation. However, the constitutional parameters have been drawn. On the one hand, the local legislature must, in good faith, present an environmental concern if it is to successfully exclude outsiders. On the other hand, the court’s regional concern is for the regional housing demand.

The court cited four cases, without any elaboration, to illustrate the balancing process. These cases offer the only clues to the direction the court will take when it balances conflicts. Two of the cases cited dealt with temporary building restrictions, and the other two dealt with phased growth ordinances. The first decision, *Builders Association of Santa Clara-Santa Cruz v. Superior Court,*

110. *Id.*
111. The *Livermore* court presumed that the Livermore municipality is acting in good faith and will attempt to provide adequate school, sewage, and water facilities. The zoning opponent was invited to rebut this presumption. *Id.*

Problems of governmental bad faith have come up in several contexts. The city of Palo Alto’s open space classification was recently attacked. A United States district court, after reviewing a substantial amount of evidence tending to show bad faith by the city, found that the city’s open space restriction was not “bona fide” and that the city must pay for the condemnation. *Arastra v. City of Palo Alto,* 401 F. Supp. 963, 978 (N.D. Cal. 1975). Upon stipulation the *Arastra* decision was vacated. 417 F. Supp. 1125 (N.D. Cal. 1976). See *Dahl v. City of Palo Alto,* 372 F. Supp. 647 (N.D. Cal. 1974) (dealing with the same Palo Alto open space classification); *Eldridge v. City of Palo Alto,* 57 Cal. App. 3d 613, 129 Cal. Rptr. 757 (1976). See generally *Foster v. City of Detroit,* 405 F.2d 138 (6th Cir. 1968) (plaintiff’s land tied up for ten years); *Drakes Bay Land Co. v. United States,* 424 F.2d 574 (Ct. Cl. 1970) (federal government contemplated buying plaintiff’s land for eight years thereby making it unsaleable).

112. The court cited *Village of Belle Terre* for the proposition that suburban residents may validly seek “to secure ‘the blessings of quiet seclusion and clean air’ and to ‘make the area a sanctuary for people.’” 18 Cal. 3d at 609, 557 P.2d at 488, 135 Cal. Rptr. at 56.
113. *Id.* at 609, 557 P.2d at 489, 135 Cal. Rptr. at 56. This housing demand has been the concern of the regional precedents. For example, in *Board of County Supervisors v. Carper,* 200 Va. 653, 661, 107 S.E.2d 390, 396 (1959), the exclusionary purpose was found in the regional effect on housing supply.
114. 18 Cal. 3d at 609 n.27, 557 P.2d at 489 n.27, 135 Cal. Rptr. at 57 n.27.
upheld a zoning moratorium of two years. The supreme court emphasized the temporary nature of the restriction. It also pointed out that the trial court had found the ordinance in question had not reduced the housing supply and that the plaintiff had not challenged that finding. Thus, a valid city concern prevailed when there was no reduction in the housing supply.

The second case, Metro Realty v. County of El Dorado,\textsuperscript{116} upheld a temporary ordinance restricting the use of plaintiff's land while the county contemplated a county-wide water development and conservation plan. Again, this court was impressed with the temporary nature of the restriction.\textsuperscript{117} The Builders Association and Metro cases dealt with the balancing of good faith restrictions whose temporary effect imparted little loss to the region concerned.

Construction Industry Association v. City of Petaluma\textsuperscript{118} is the third case. The Ninth Circuit's opinion is an anomaly as a precedent for regional balancing. Whereas the court's opinion could have been a precedent for balancing a good faith local concern against the regional need for housing, its opinion instead represents a precedent for deference to exclusion.\textsuperscript{119} It held that a local legislature could validly zone in its own self-interest even though its decision might affect the "needs and resources of an entire region."\textsuperscript{120} The Petaluma decision is consistent with the Lockard decision's level of scrutiny,\textsuperscript{121} but contrasts sharply with the Livermore approach.\textsuperscript{122} The Livermore citation of Petaluma may be taken as further evidence of the supreme court's ambivalence toward the traditional corollary of deference.

\begin{itemize}
\item[116.] 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).
\item[117.] Id. at 515, 35 Cal. Rptr. at 484. Annot., 30 A.L.R.3d 1196 (1970) collects cases dealing with the validity of interim zoning ordinances.
\item[118.] 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
\item[119.] The circuit court noted that the Petaluma Plan reduced an explosive annual growth rate of 12\% to a more reasonable 6\%. It also found that the plan actually increased the availability of low income housing. Id. at 900 & 902. Thus, it apparently did not agree with the trial court's finding that the Petaluma Plan had an exclusionary purpose. Rather than deny the trial court's finding (pursuant to Lockard, note 11 supra), the circuit court chose to avoid that finding by deferring to the local legislature. To support its position the court said it had earlier deferred—in Ybarra v. City of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974)—to an ordinance that denied housing to low income people. 522 F.2d at 907.
\item[120.] Thus, the circuit court was presented with the opportunity to balance a local concern to merely reduce growth against a regional need for housing. Instead it purported to recognize and defer to an exclusionary purpose.
\item[121.] 522 F.2d at 908.
\item[122.] See note 11 supra.
\end{itemize}
The fourth case is Ramapo, a New York Court of Appeals decision. The New York court was reluctant to adopt the regional standard. The Ramapo opinion recognized the regional concern, but called upon the New York legislature to provide a regional remedy. The Ramapo decision should be read in light of Berenson v. Town of New Castle, because the latter decision reflected a concern for balanced communities and regions. The resolution of the contradictions in these four cases is commended to the ingenuity of future litigants.

A COMPARATIVE ASSESSMENT OF Livermore

The Livermore "balancing test is conceptually mid-way between deference and strict scrutiny." The reviewing court is to actively consider the effect of the zoning restriction. It will not be enough for the local legislature's proponent to allege an environmental purpose. The reviewing court will look beyond the stated motives and consider the actual effect of the local legislation.

The plaintiff challenged the Livermore ordinance on the ground that it exceeded the municipality's authority under the police power. As authority for this proposition he cited several of the regional precedents, but not the Berenson decision. The supreme court refused to follow the cited precedents because they "all involve ordinances which impede the ability of low and moderate income persons to immigrate to a community but permit largely unimpeded entry by wealthier persons." The court stated three times that the plaintiff had not alleged any denial of equal protection on any basis, either wealth or migrant status. It is at least arguable that the Livermore building ban affects low income families disproportionately.

124. See generally notes 31, 38, 61 & 75 supra.
125. See text accompanying note 65 supra.
126. Interview with Mr. C. Foster Knight, Deputy (Cal.) Attorney General, at the Attorney General's office in San Diego, California (Feb. 18, 1977).
127. 18 Cal. 3d at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51.
128. The plaintiff cited Mount Laurel, National Land, Appeal of Kit-Mar, Appeal of Girsh, Carper, and Bristow (see notes 41-43 supra). 18 Cal. 3d at 606 n.23, 557 P.2d at 487 n.23, 135 Cal. Rptr. at 55 n.23.
129. 18 Cal. 3d at 606, 557 P.2d at 487, 135 Cal. Rptr. at 55.
130. Id. at 600 n.18, 601, 602, 557 P.2d at 483 n.18, 483, 484, 135 Cal. Rptr. at 51 n.18, 51, 52.
131. Wealthier individuals will not be denied housing in Livermore be-
The court also purported not to follow the regional precedents because it found them too aggressive in their review. The precedents cited by the plaintiff did employ an aggressive review. However, the Livermore opinion is consistent with the substance of the regional precedents, adopting a regional view of the “general welfare” and declining to defer to the local judgment. The distinction between Livermore and Mount Laurel lies in the level of scrutiny each court accords to exclusionary zoning. The California approach is mid-way between strict scrutiny and deference, whereas New Jersey takes a strict view. The California level of scrutiny is entirely consistent with the New York Berenson balancing approach. Moreover, the Livermore decision may offer an extension of the regional concern.

Exclusion can be given a broad or narrow interpretation. Some courts refer to an ordinance as exclusionary in the narrow sense when its purpose or effect is to exclude particular classes of persons from the community, such as low income groups, families with school age children, racial minorities, or the poor. Growth control plans are exclusionary in a broader sense when the public at large is kept from immigrating to the barred community.

While the regional precedents were concerned with the narrow definition of exclusion, the facts in the Livermore case involved the broader form of exclusion. The public at large was barred from buying a residence in Livermore until city facilities met requisite standards. When the supreme court specified the regional interest in housing, it referred to “the opportunity of people in general to settle.” Thus, it would seem that the regional interest is to be

cause they can afford to bid up the price of an existing house until the owner agrees to sell; the lower income groups do not have this option. It is also arguable that the building ban inflates the price of existing homes beyond the ability to pay of low income groups. See text accompanying notes 29 & 30 supra.

132. See text accompanying notes 45-47 supra.
133. See text accompanying notes 93-98 supra.
134. For the California standard of review, see text accompanying note 126 supra. For the New Jersey standard of review, see notes 50-58 and accompanying text supra.
135. For the Berenson balancing test, see text accompanying note 78 supra.
136. See, e.g., cases cited in note 24 supra.
137. See notes 41-44, supra.
138. See note 2 supra.
139. 18 Cal. 3d at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.
140. The Livermore court held that the indirect burden upon the right to travel imposed by the Livermore ordinance does not call for strict judicial scrutiny. The court found that “an ordinance which has the effect of limiting migration to a community does not necessarily abridge
broadly defined as housing in general, rather than merely housing for low and middle income groups.

The California Supreme Court found the regional perspective of the "general welfare" implicit in the police power. The local legislature is acting pursuant to a state grant of authority, so the local legislature must consider the welfare of the state's citizens.\(^{141}\) To support its regional perspective,\(^{142}\) the California Supreme Court looked back over fifty years of zoning practice to reconsider lan-
guage from *Euclid* that has lain dormant. The United States Supreme Court did not "exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."

**CONCLUSION**

The regional perspective of the "general welfare" is an evolving standard of review for zoning legislation. It avoids deference without calling on the courts to become legislatures. A court applying the regional standard need not exercise its judgment to determine the specific allocation of land uses. Instead, it will examine the reasonableness of the local regulation in light of its regional impact.

California's *Livermore* decision brings to five the number of state courts that have adopted the regional standard. These states continue to follow the substance of the constitutional test enunciated by *Euclid* and *Miller v. Board of Public Works*. It is the reversal of the traditional corollaries that produces the regional standard. The states employing the regional standard continue to require that zoning legislation bear a reasonable relation to the "general welfare." However, they have shifted their application of that constitutional standard to accommodate fifty years of urban change. Municipalities are no longer isolated islands.

These states vary substantially in their implementation of the regional standard. One may postulate a continuum of review. The traditional standard for zoning legislation, epitomized by *Lockard*, applied minimal scrutiny. Virginia and Pennsylvania exert what is nearly a strict scrutiny standard. New Jersey wields a tough strict scrutiny application. California and New York employ a middle level of scrutiny.

The New Jersey court addressed a state-wide pattern of exclusion when it set forth its inflexible standard. When a court takes a strict scrutiny approach, the municipality faces a burden that as a

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143. The *Mount Laurel* decision also cited this language. 67 N.J. at 177, 336 A.2d at 726.


145. 195 Cal. 477, 234 P. 381 (1925). The United States Supreme Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), in interpreting the United States Constitution, adhered to the traditional rule of deference to the local legislature in zoning matters. Thus, it is not surprising that two subsequent regional cases, *Mount Laurel* and *Livermore*, base their regional perspective in their respective state constitutions. See text accompanying note 130 supra. The California Supreme Court recently held that since it is not limited by the principle of federalism, it may review legislative acts more aggressively than may the Supreme Court. Serrano v. Priest, 18 Cal. 3d 728, 768-67, 557 P.2d 929, 952, 135 Cal. Rptr. 345, 368 (1976).
practical matter cannot be met. The strict scrutiny approach is too inflexible. A constitutional standard should be able to survive temporal and geographical changes. Constitutional interpretations should not vary with the availability of federal funds. California courts have not faced such extreme exclusion. The California approach to exclusion is therefore more pliable.

The zoning opponent in California must establish a substantial regional effect and an unreasonable burden on the region. Once this is done, the local legislature must justify its exclusion. The supreme court has indicated that it will be receptive to arguments on both sides. The California regional standard is a flexible yardstick that accommodates varying environmental and housing needs.

The Livermore decision's three step analysis of reasonableness gives a court a firm grip on the regional tool. Courts that have been reluctant to exercise their judgments of local zoning are provided with specific guidelines. This analysis serves as a guide to sharpen courts' inquiries into the reasonableness of an ordinance.

The task of resolving problems of exclusionary zoning is complex and onerous. The California Supreme Court has now shouldered that burden. Its rendition of the regional perspective refines the standard and points the way for further evolution.

Curtis A. Rankin

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146. When a statute is subjected to strict scrutiny, only a compelling state interest will satisfy the test. A compelling state interest has been found only in rare circumstances. See, e.g., American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Korematsu v. United States, 232 U.S. 214 (1944).