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overriding importance of the children's interests, and either go beyond the minimum protections mandated by the court or find alternative means of reaching the same ends. The nominal continuation of parental authority does not excuse damaging confinement of children in mental institutions.

David J. Meadows

VII
REAL PROPERTY

JUDICIAL LIMITATIONS ON LOCAL GROWTH CONTROLS: REGIONAL NEEDS AS AN ELEMENT OF THE "GENERAL WELFARE"

Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore.[1] Reversing its earlier decision in *Hurst v. City of Burlingame*,[2] the California Supreme Court has upheld the use of the initiative process by a general law city in enacting zoning and land use ordinances.[3] The court further suggested that the power of a community to control development may be limited by the due process clause where local ordinances have a substantially detrimental impact on the housing opportunities of citizens located elsewhere in the metropolitan region.[4] Part I of this Note presents the facts of the case and the court's holding. Part II assesses the *Livermore* opinion's rejection of the *Hurst* doctrine and implications of the standard of due process review adopted by the court. Part III suggests some non-judicial solutions to the problems addressed by the opinion.

I. The Case

In 1972 Livermore voters adopted by initiative an ordinance that prohibited the issuance of building permits until adequate provision had been made for educational, water supply and sewage treatment facilities.[5] Unlike similar "growth control" ordinances adopted by other communities, the Livermore ordinance did not establish a growth plan or timetable for installation of the necessary facilities, nor did it provide for low or moderate income housing opportunities.[6]

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1. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (Tobriner, J.) (5-2 decision).
2. 207 Cal. 134, 277 P. 308 (1929).
3. 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48.
4. *Id.* at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.
5. Livermore, Cal. Initiative Ordinance Re Building Permits (April 28, 1972). For discussion of the historical and political factors in the town of Livermore that led to the enactment of the initiative, see STANFORD ENVIRONMENTAL LAW SOCIETY, A HANDBOOK FOR CONTROLLING LOCAL GROWTH 90-96 (1973), Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA LAW. 1, 12-14 (1974).
6. In the early 1970's, two other communities in the San Francisco Bay Area (San Jose and Petaluma) enacted ordinances that conditioned growth on the expansion or improvement of physical services in the community. These so-called phased growth or tempo controls are significantly different from the Livermore moratorium, which shows no concern for planning

Associated Home Builders of the Greater Eastbay, a trade association of land developers, sought an injunction against enforcement of the ordinance and a declaration of its invalidity on both statutory and constitutional grounds. The trial court granted relief,[7] relying on the *Hurst* decision, which prohibited general law cities from enacting zoning ordinances by the initiative process. The court also found that the ordinance was unconstitutionally vague, in that it failed to specify standards for termination of the moratorium or to designate the official charged with determining whether that standard had been met.[8]

The supreme court reversed. Rejecting the argument that Livermore was barred from zoning by initiative, the court expressly overruled the *Hurst* opinion. Writing for the majority, Justice Tobriner noted that the constitutional basis of the *Hurst* result had been withdrawn by the court's 1974 opinion in *San Diego Building Contractors' Association v. City Council*.[9] The court then disposed of the *Hurst* opinion's remaining substantial argument: that the legislature had intended that statutory notice and hearing requirements for zoning ordinances[10] apply to the initiative process. The statutory provisions, the majority argued, were "plainly drafted with a view" to zoning ordinances adopted by a city council.[11] To interpret the statute otherwise would raise serious questions of constitutionality, since the right of initiative is guaranteed by a constitutional provision which, by virtue of its incorporation of prior judicial interpretation, forbids all legislation "limiting or restricting" the exercise of that right.[12]

The court also rejected the claim that the ordinance was unconstitutionally vague. The ordinance's omission of explicit standards for termination of the moratorium was remedied by incorporating the standards found in the

alternatives or for low income housing. The San Jose ordinance, which imposed a two year moratorium on all housing construction in order to give the city time to develop a general plan, explicitly directs the planners to provide for low and moderate income housing in the completed plan. San Jose, Cal., Initiative Ordinance, §§ 2(a) and (d) (April, 1973), *cited in* Builders Ass'n v. Superior Court, 13 Cal. 3d 225, 228-29 n.1, 529 P.2d 582, 584-85 n.1, 118 Cal. Rptr. 158, 160-61 n.1 (1974), *appeal dismissed*, 427 U.S. 901 (1976). Similarly, the Petaluma ordinance, although it limits growth to 500 new units per year, nevertheless requires that eight to twelve per cent of the new units be constructed for low and moderate income persons. Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 908 n.16 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

7. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, Civil No. 425-754 (Cal. Super. Ct., Alameda County Dec. 29, 1972) (mem.).

8. The court of appeal affirmed on both grounds. 116 Cal. Rptr. 326 (1st Dist. 1974).

9. 13 Cal. 3d 205, 216, 529 P.2d 570, 576, 118 Cal. Rptr. 146, 152 (1974).

10. CAL. GOV'T CODE §§ 65853-65857 (West Supp. 1977).

11. 18 Cal. 3d at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

12. *Id.* at 594-95, 557 P.2d at 479-80, 135 Cal. Rptr. at 47-48 (citing CAL. CONST. art. IV, § 1 (1911, amended 1966) (current version at CAL. CONST. art. II, § 11 (West Supp. 1977)). The court noted that the 1966 revisors had eliminated the cited language as "mere surplusage," but pointed to legislative history indicating the revision had not been intended to change the meaning of the provision. 18 Cal. 3d at 595 n.12, 557 P.2d at 479-80 n.12, 135 Cal. Rptr. at 47-48 n.12.

enactments of other agencies.[13] Its failure to identify the person or agency responsible for lifting the moratorium was also easily cured, since whenever an application for a building permit was filed, the city building inspector would be required to consider whether the standards set by the ordinance had been met. That decision would in turn be subject to judicial review by writ of mandamus.[14]

Finally, the court considered the plaintiff's claim that the Livermore ordinance violated substantive due process limitations on the police power. At the outset, the majority carefully limited the reach of its holding to ordinances "limiting building permits in accord with standards that reasonably measure the adequacy of public services."[15] The majority rejected the argument that the challenged ordinance should be tested by the standard of strict scrutiny as an abridgement of the right to travel.[16] Instead, Justice Tobriner applied the formula for judicial review of land use regulations traditionally associated with *City of Euclid v. Ambler Realty Co.*:[17] the government's exereise of the police power will not be deemed a deprivation of property, in excess of its authority, so long as the exercise of that power has some rational relation to the public health, safety, morals, or general welfare.[18]

The *Livermore* court felt that the sparse, stipulated record[19] prevented it from deciding whether the plaintiff had shown the lack of such a rational relation and therefore remanded the case to the lower court for the development of a full evidentiary record. But the court continued, in dictum, to formulate a standard of review to guide the trial court on remand that substantially broadened the permissible judicial inquiry into the question of whether a land use ordinance serves the general welfare.[20]

Justice Tobriner noted that the *Euclid* test was designed for the review of land use regulations whose impact was largely limited to the residents of the enacting community. The impact of the Livermore ordinance, however, allegedly extended to persons living outside the community.[21] The court

13. *Id.* at 597-99, 557 P.2d at 481-82, 135 Cal. Rptr. at 49-50.

14. *Id.* at 599-600, 557 P.2d at 482-83, 135 Cal. Rptr. at 50-51.

15. *Id.* at 600-01, 557 P.2d at 483, 135 Cal. Rptr. at 51. The court's formulation attempted to limit the holding to so-called phased growth ordinances. The court declined to discuss the constitutionality of indirect control of population growth by means of "prohibitory standards." *Id.* (Presumably such standards would include the traditional so-called exclusionary zoning devices. See note 36 *infra*.) This distinction is unlikely to prove durable. See text accompanying notes 35-36 *infra*.

16. *Id.* at 602-03, 557 P.2d at 484-85, 135 Cal. Rptr. at 52-53.

17. 272 U.S. 365 (1926).

18. 18 Cal. 3d at 604, 557 P.2d at 485, 135 Cal. Rptr. at 53. *Accord*, Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925) (cited by the court as presaging *Euclid*).

19. The trial court decision was a judgment on the pleadings. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, Civil No. 425-754 (Cal. Super. Ct., Alameda County Dec. 29, 1972) (mem.).

20. See text accompanying notes 34-36 *infra*.

21. 18 Cal. 3d at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.

fastened on this fact to expand the traditional definition of "general welfare." The proper test of constitutionality, Justice Tobriner argued, is "whether the ordinance reasonably relates to the welfare of those whom it *significantly affects*."[22] Where an "ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region."[23] In determining whether a challenged restriction reasonably relates to the regional welfare, he continued, the trial court must: (1) forecast the probable effect and duration of the restriction; (2) identify the competing interests affected by the restriction; and (3) determine whether the ordinance, in light of its probable impact, represents a reasonable accomodation of the competing interests.[24] The burden of producing the information needed for this analysis will rest on the party challenging the ordinance.[25]

Two justices dissented strongly. Justice Clark dissented from the court's resolution of the *Hurst* issue.[26] Justice Mosk dissented on the ground that the ordinance violated the state constitution. In his view, the Livermore ordinance's failure to provide a timetable for meeting its own standards and the absence of any incentive for local residents or politicians to achieve compliance, demonstrated that its underlying purpose was "to keep newcomers out of the city."[27] A municipal policy of "preventing acquisition and development of property by nonresidents" constituted a "clear violation" of the inalienable rights,[28] due process and equal protection,[29] and privileges and immunities[30] clauses of the state constitution. Any absolute prohibition on housing development, he argued, should be presumptively invalid; and local communities adopting ordinances "based on parochialism" should be required to accept a reasonable share of the region's population pressures.[31]

II. Evaluation of the Court's Innovations

The court's decision to complete the interment of the *Hurst* decision

22. *Id.* (emphasis added). *See* Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?*, 3 CONN. L. REV. 244 (1971) (cited by the court). *See also* Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *General Welfare and "No-Growth" Zoning Plans: Consideration of Regional Needs by Local Authorities*, 26 CASE W. RES. L. REV. 215 (1975). *Cf.* Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972) (requiring a land use authority to consider the interests of citizens whose property is outside of, yet contiguous to, the authority's territorial jurisdiction).

23. 18 Cal. 3d at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.

24. *Id.* at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.

25. *Id.* at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57.

26. *Id.* at 611-16, 557 P.2d at 490-92, 135 Cal. Rptr. at 58-60.

27. *Id.* at 617, 557 P.2d at 493, 135 Cal. Rptr. at 61.

28. CAL. CONST. art. I, § 1 (West Supp. 1977).

29. *Id.*, § 7(a) (West Supp. 1977).

30. *Id.*, § 7(b) (West Supp. 1977).

31. 18 Cal. 3d at 623, 557 P.2d at 497, 135 Cal. Rptr. at 65.

was a wise one. Once deprived of constitutional support,[32] the *Hurst* court's contention that the legislature meant to apply the notice, hearing and comment procedures to public political campaigns on controversial subjects was obviously strained.[33]

The significance and adequacy of the court's substantive due process test poses a more difficult problem. On its face, the test appears to be markedly less deferential to local decisionmaking than the approach taken in recent California land use decisions.[34] The requirement in the second step of the test that trial courts identify competing interests implicitly invites these courts to go behind legislative policy determinations to consider the real world consequences of local land use decisions. Furthermore, the interest-balancing component in the third step appears to require that the reviewing court render an implicitly legislative judgment as to whether the community's regulations actually advance the general welfare.

Moreover, the court's attempt to limit its holding to phased growth ordinances is not persuasive.[35] All zoning ordinances, exclusionary or not, will have some impact on regional housing needs.[36] Therefore, under the logic of the court's regionalized view of the general welfare, any so-called exclusionary ordinance[37] shown to have a substantial impact on the region's

32. *See* San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974) and text accompanying notes 9-10 *supra*.

33. *See, e.g.*, Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 104-05 (1976) (cited by the court).

34. *E.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 783, 382 P.2d 375, 380, 31 Cal. Rptr. 335, 340 (1963); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 461, 202 P.2d 38, 43 (1949); Town of Los Altos Hills v. Adobe Creek Properties, Inc., 32 Cal. App. 3d 488, 508-09, 108 Cal. Rptr. 271, 286 (1st Dist. 1973).

35. See note 15 *supra* and accompanying text.

36. Where suburban communities limit the number of new houses, the region's total supply is thereby restricted. Low-income consumers are the first to be denied access to the market. The court's attempt to distinguish ordinances that exclude only low income persons from the new housing market from those that exclude all income levels, 18 Cal. 3d at 606, 557 P.2d at 487, 135 Cal. Rptr. at 55, is therefore unpersuasive, since the impact of anti-growth ordinances must inevitably fall first on the poor. *Cf.* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 581 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F. 2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (applying this marginal economic analysis to the housing supply in the San Francisco Bay Area). The economically discriminatory effect is all the more pronounced in view of the continued availability of existing higher-priced homes on the resale market. *See generally* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 390-404 (1977).

37. In addition to phased growth control ordinances of the Livermore or Petaluma types, other, indirect limitations on population growth have for many years been part of the arsenal of suburban land use regulators. Such devices include: prohibitions on multiple dwellings; large lot requirements; bulk requirements (*i.e.* square feet or height minimums); and oversized agricultural or industrial holding zones. Because they may often have the effect of excluding less affluent residents, many of these techniques have in recent years come under severe attack from academic critics. *See generally* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970'S (1973); M. MANN, THE RIGHT TO HOUSING: CONSTITUTIONAL ISSUES AND REMEDIES IN EXCLUSIONARY ZONING (1976); D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977). For a compilation of cases, see Annot., 48 A.L.R. 3d 1210 (1973).

supply and distribution of housing will also be subject to the more rigorous judicial review proposed by the court.

But the court's assertion of this sweeping power of review is highly equivocal. In introducing the new standard, the opinion expressly disowns the reasoning of recent decisions from activist courts in other states that have invalidated local zoning ordinances.[38] In a similar vein, the majority's discussion of the all important interest-balancing aspect of the test begins by suggesting that deference to the local legislative body will frequently be appropriate.[39] In the analysis that follows, the court phrases its new test in the language of earlier deferential opinions;[40] and it suggests a less deferential approach largely by rhetorical hints.[41]

The court's ambivalence is wholly understandable. There is a strongly felt need for a judicial remedy for exclusionary zoning practices.[42] As a result of the flow of low income minorities into central cities and the massive exodus of middle income whites, the disparity between the quality of housing in the suburbs and in some inner-city neighborhoods has grown dramatically.[43] In order to maintain their racial and class homogeneity and

38. 18 Cal. 3d at 606 n.23, 557 P.2d at 487 n.23, 135 Cal. Rptr. at 55 n.23. Among the decisions rejected were South Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), and National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). Justice Tobriner argued that these avowedly activist decisions were distinguishable, both because they relied on provisions of state law not applicable to California, and because they dealt with ordinances that discriminated against persons with low or moderate incomes. Both the *Mount Laurel* and *National Land* decisions, however, were instances of broad ranging judicial inquiry into the "general welfare," a type of review very similar to that proposed in the *Livermore* opinion. 18 Cal. 3d at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57. The court's distinction seems more concerned with protecting the appearance of judicial deference than with the substance of the opinions. *See generally* Comment, *A Regional Perspective of the "General Welfare"*, 14 SAN DIEGO L. REV. 1227 (1977).

39. 18 Cal. 3d at 609, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.

40. *Id.* (citing City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925)).

41. "The ordinance must have a *real and substantial* relation to the public welfare." 18 Cal. 3d at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57 (emphasis in original). "There must be a reasonable basis in fact, *not in fancy*, to support the legislative determination." *Id.* (emphasis added). The court also drew support from an infrequently cited statement in *Euclid* recognizing "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." *Id.* at 607, 557 P.2d at 488, 135 Cal. Rptr. at 56 (citing City of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926)). *See* Comment, *A Regional Perspective of the "General Welfare"*, 14 SAN DIEGO L. REV. 1227, 1250 (1977).

42. *See, e.g.*, 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 66.01-66.52 (1975), Williams & Doughty, *Studies in Legal Realism*: Mount Laurel, Belle Terre, *and* Berman 29 RUTGERS L. REV. 73 (1975) Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Aloi, Goldberg, & White, *Racial and Economic Segregation by Zoning: Death Knell for the Home Rule?*, 1969 U. TOL. L. REV. 65; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

43. *See generally* D. HARVEY, SOCIAL JUSTICE AND THE CITY (1973); HOUSING URBAN

exclusivity, many suburban communities have enacted land use restrictions that make it impossible for low and moderate income families to obtain housing in the suburbs.[44] Because of their limited constituencies, local elected officials have virtually no political incentive to consider the interests of outsiders, and the state legislature has been reluctant to interfere with local prerogatives.[45] In addition, the recent tendency of the United States Supreme Court to preclude federal court consideration of the constitutional issues raised by these problems[46] places the onus all the more clearly on the respective state judiciaries to develop solutions.[47]

On the other hand, the administration of a standard of review adequate to control suburban exclusionary practices tests the limits of the judicial role. Under the *Livermore* standard, once a plaintiff has established an impact on the regional housing supply,[48] trial courts will be required to identify and weigh the competing interests. These interests may be diverse and closely balanced,[49] leading to intense conflicts which courts, as the most politically insulated branch of government, are peculiarly unqualified to resolve.[50]

In seeking to identify and weigh these competing interests, trial courts may also approach or exceed the limits of their competence. The *Livermore*

AMERICA (J. Pynoos, R. Schafer, & C. Hartman eds. 1973); Angotti, *The Housing Question*, MONTHLY REV. Oct., 1977, at 39.

44. See note 36 *supra*.

45. *See, e.g.*, R. LINOWES & D. ALLENSWORTH, THE POLITICS OF LAND-USE LAW (1976), Ellickson, *supra* note 35, at 405-07. When the political process itself is the problem for which redress is sought, the judiciary has the special, and traditional role of fashioning new remedies. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

46. Warth v. Seldin, 422 U.S. 490 (1975). *See also* City of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); James v. Valtierra, 402 U.S. 137 (1971).

47. *See* Williams & Doughty, *supra* note 42, at 93. *See also* Falk, *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); *Mosk Speaks Out for State Court Authority*, The Recorder (San Francisco), Sept. 29, 1977, at 1, col. 5.

48. This is plaintiff's initial burden under the *Livermore* formulation. In two celebrated cases dealing with these problems, trials courts have found that an individual suburb's exclusionary regulations had a detrimental impact on the region's housing supply. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 578 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (finding of facts giving extensive documentation of the regional impact); Berenson v. Town of New Castle, No. 3582-73, N.Y. Times, Dec. 9, 1977, at 1, col. 3 (N.Y. Sup. Ct. Dec. 8, 1977), *on remand from* 38 N.Y. 2d 102, 341 N.E.2d 236, 378 N.Y.S. 2d 672 (1975).

49. In addition to the interests of nonresidents in better housing, see notes 41-42 *supra* and accompanying text, the *Livermore* court recognized the countervailing environmental interests of existing residents of suburban communities. 18 Cal. 3d at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56. *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (Douglas, J.) (suburban residents entitled to "the blessings of quiet seclusion").

50. If the experience in desegregating schools is in any way comparable, judicial attempts to deal with issues of this intensity without legislative support are likely to leave the courts politically isolated. *See generally* The Federalist, No. 78, 489-96 (Wright ed. 1961).

standard, for example, may require courts to decipher and assimilate a wealth of urban planning data—a task of empirical analysis for which a system based on adversary presentation, manned by generalist judges, and bound by strict rules of procedure and evidence seems ill-suited.[51] Faced with these difficulties, and with an inadequate record, the court may well have felt the need to present a moderate statement of views.[52].

III. Nonjudicial Alternatives

The preceding analysis of the limitations of the court's approach strongly suggests that the legislature is the more appropriate branch of government to address the issues raised in the *Livermore* opinion. The legislature has the factfinding capacity and the broad constituency needed to create some form of regional planning authority.[53] Such regional planning agencies would be able to muster the factfinding capacity that the courts lack. Their broader political base would allow them to assess and to respond to the impact of land use decisions on the welfare of regional as well as purely local interests.

In the absence of legislation, existing regional agencies may be able themselves to effect trade-offs among suburban communities and persuade them to absorb a fair share of the region's low income housing requirements.[54] Agencies can encourage this process by funneling state and federal financial assistance to those communities most willing or best suited to provide housing opportunities for low and moderate income families. As a defensive measure, communities may themselves seek regional planning approval of growth control proposals. The sanction of a regional planning agency would provide a useful shield against invalidating scrutiny by a regionally-conscious trial court.

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51. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1309 (1936); Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices*, 61 VA. L. REV. 1187 (1975). *But see* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 240-41 (1973).

52. *Cf.* Comment, *A Regional Perspective of the "General Welfare"*, 14 SAN DIEGO L. REV. 1227, 1247-48 (1977) (suggesting that the *Livermore* court took a middle-of-the-road approach: less deferential than the *Euclid* tradition, but less activist than *Mount Laurel*).

The imminent retirement of two members of the *Livermore* majority (Chief Justice Wright and Justice Sullivan) may well have been a factor contributing to the court's unwillingness to do more than foreshadow an activist judicial doctrine. With the replacement of a third member of the *Livermore* majority (Justice McComb), the court presently may be inclined to make a much less equivocal foray into exclusionary zoning problems.

53. *See, e.g.*, CAL. GOV'T CODE § 66620 (West Supp. 1977) (creating the San Francisco Bay Conservation and Development Commission); *Id.* §§ 66801, 67000-67130 (West Supp. 1977) (creating the Tahoe Regional Planning Agency); CAL. PUB. RES. CODE § 30300 (West 1977) (creating the California Coastal Zone Conservation Commission); CAL. GOV'T CODE §§ 65060-65069.5 (West 1966) (enabling the establishment of regional planning districts).

54. *Cf.* D. MOSKOWITZ, *supra* note 36, at 303-20, Williams & Doughty, *supra* note 42, at 107 (suggesting how trial courts can administer a "fair share" standard when evaluating suburban land use controls with exclusionary effects).