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Promoting Rational Land Use Planning: The Municipal Incorporation Statute as a Comprehensive Plan Implementation Device

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PROMOTING RATIONAL LAND USE PLANNING: THE MUNICIPAL INCORPORATION STATUTE AS A COMPREHENSIVE PLAN IMPLEMENTATION DEVICE

The orderly growth of any city is achieved in direct proportion to its willingness to plan for that growth. Just as Rome was not built in a day, nor the Appian Way completed overnight, so a city will not be able to achieve totality in its planning activities from the rising to the setting of a single sun. The word 'plan' connotes longevity of time. We must ever plan for the future.†

In the early 1920's, the United States Department of Commerce promulgated the Standard State Zoning Enabling Act (SZEA)[1] which authorizes local governments to enact land use regulations and zoning ordinances "in accordance with a comprehensive plan."[2] Although the comprehensive plan has come to be widely recognized as a viable tool for land use planning,[3] local zoning regulations, an initial means of controlling land use, originally met with some resistance.[4] Indeed, in *Village of Euclid*

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† E. YOKLEY, LAW OF SUBDIVISIONS § 10, at 36 (2d ed. 1981).

[1] ADVISORY COMM'N ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (rev. ed. 1926) [hereinafter cited as SZEA].

[2] *Id.*; *see* 1981 ZONING AND PLANNING LAW HANDBOOK § 7.01, at 95 (F. Strom ed. 1981) [hereinafter cited as HANDBOOK]; Larsen & Siemon, *"In Accordance With A Comprehensive Plan"—The Myth Revisited*, 1979 INST. ON PLAN. ZONING & EMINENT DOMAIN 105, 106; *infra* notes 16 & 21 and accompanying text. Prepared for the purpose of satisfying the demand for municipal zoning, the SZEA "constitutes a general delegation of power to a community (city or county) to regulate and control the use of property in zoning districts established by ordinance or resolution." 1 E. YOKLEY, ZONING LAW AND PRACTICE § 1-4, at 6 (4th ed. 1978). As of 1974, 47 states had enacted some form of a state zoning enabling act. *See Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1435 (1978) [hereinafter cited as *Zoning*].

[3] *See infra* notes 28, 49-50 and accompanying text.

[4] *Zoning, supra* note 2, at 1435; *see, e.g.*, Willison v. Cooke, 54 Colo. 320, 327-28, 130 P. 828, 831 (1913) (property "owner has the right to erect such buildings covering such portions [of his property] as he chooses, and put his property, as thus improved, to any legitimate use which suits his pleasure, provided that in so doing he does not imperil or threaten harm to others"); Calvo v. City of New Orleans, 136 La. 480, 482, 67 So. 338, 339 (1915) (the exercise of the police power does not encompass the aesthetic), *overruled*, 154 La. 271, 97 So. 440 (1923); Goldman v. Crowther, 147 Md. 282, 309-12, 128 A. 50, 60-61

v. Ambler Realty Co.,[5] the zoning power was challenged as an unconstitutional exercise of the municipality's police power.[6] Removing any doubt as to the constitutional validity of the local government's power to regulate land use, the Supreme Court declared that the power to zone emanates from the expanding police power of the state.[7] Given their virtual free reign over zoning and land use decisions,[8] local governments soon recognized that their authority could be exercised for the benefit of the community, albeit oftentimes to the simultaneous disadvantage of state or regional concerns.[9]

In the exercise of this broad power, the residents of a particular area in an existing town may incorporate as a separate governmental entity,[10] and irrespective of the residual effect upon the surrounding areas, enact measures designed to protect and

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(1925).

[5] 272 U.S. 365 (1926).

[6] *Id.* at 386-87.

[7] *Id.* at 387. The *Euclid* Court upheld the constitutionality of a municipality's exercise of its police power to enact and enforce a zoning ordinance which restricted the plaintiff's use of his land. *Id.* at 390. The Court indicated that it would not hesitate to defer to the judgment of local legislatures in the zoning area, declaring that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. The Court further noted, however, that the municipality's exercise of its zoning power must be consistent with the general welfare. *Id.* at 390.

[8] *See* Bagne, *The Parochial Attitudes of Metropolitan Government: An Argument to a Regional Approach to Urban Planning and Development*, 22 ST. LOUIS U.L.J. 271, 280 (1978). The broad power provided to local governments under the SZEA, together with the judicial deference afforded the exercise of such authority, give localities virtual free reign over zoning and land use decisions. *See id.* at 280.

[9] *See* Vestal, *Government Fragmentation in Urban Areas*, 43 U. COLO. L. REV. 155, 155-56 (1971). Local governments may wield their power over land use in order to achieve exclusionary goals. *See, e.g.*, Crow v. Brown, 457 F.2d 788, 789 (5th Cir. 1972) (per curiam). In *Crow*, the court held that a county's zoning policies and its denial of building permits for the construction of low-cost apartments constituted a violation of the equal protection clause. *Id.* at 790. The Fifth Circuit noted that although whites were "fleeing" to unincorporated areas on the outskirts of Atlanta, rising costs were forcing black residents to move into the inner city. *Id.* at 789 (quoting Crow v. Brown, 332 F. Supp. 382, 385 (N.D. Ga. 1971)). The court then endorsed the district court's prediction that "[w]ithin the immediate future, unless drastic changes occur, it is not merely possible but certain that Atlanta will become, in essence, a black city with a solid white perimeter." 457 F.2d at 789 (quoting Crow v. Brown, 332 F. Supp. 382, 385 (N.D. Ga. 1971)); *see infra* notes 133-36 and accompanying text.

[10] *See generally* C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 26.13, at 736-37 (1980) (a municipality has the potential ability to legislate to maintain the status quo in the area). For a discussion of the various reasons why a community may choose to incorporate, see *infra* notes 66-84 and accompanying text.

preserve parochial interests.[11] These "defensive incorporations," while inuring to the benefit of the new municipality, also may serve to disrupt or destroy the implementation of any comprehensive plan that may be in effect in the town or region in which the new municipality is located.[12] It would appear, therefore, that a regional or community land use planning scheme, of which the comprehensive plan is an integral part, may be compromised by such incorporations.[13]

In an attempt to promote rational and orderly land use planning, this Note initially will focus upon the comprehensive plan itself and the power of government entities to implement such plans. The Note then will examine the reasons for a community's incorporation and the governmental fragmentation spawned by the attractiveness of municipal status. After considering the incorporation statute as a method of plan implementation, the Note proffers a model statute which is designed to preclude the phenomenon of "defensive incorporation" and to promote the effective implementation of comprehensive plans. Following an analysis of the legislative and judicial roles in land use planning, the Note will conclude that until a state-wide planning program which includes a substantive incorporation statute is effected, the courts should accord substantial weight to such a program existing on the local level, even though "home rule" is compromised in furtherance of "regional general welfare."

THE COMPREHENSIVE PLAN

The Origin and Meaning of the Comprehensive Plan

The SZEA's delegation of authority to local governments was designed to enable a locality to regulate land use for the "health, safety, morals or . . . general welfare of the community."[14] One of

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[11] *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1974) (new municipality enacts ordinance designed to prevent the construction of multifamily dwelling units), *cert. denied*, 422 U.S. 1042 (1975).

[12] *See* Marcus v. Baron, 84 App. Div. 2d 118, 123, 445 N.Y.S.2d 587, 592 (2d Dep't 1981); Ramapo, N.Y., [1967] N.Y. Local Laws 1909 (No. 3).

[13] *See* Vestal, *supra* note 9, at 155, 174 (governmental fragmentation prevents injection of regional considerations into local decisionmaking).

[14] SZEA, *supra* note 1, § 1. As a broad delegation of authority, the SZEA permits a local government to act for "the full inventory of constitutionally permissible purposes—promotion of health, safety, morals, and general welfare—but the purely local public interest was dominant." MODEL LAND DEV. CODE art. 1 commentary at 2-3 (1976).

the few guidelines set forth in the SZEA as to the proper exercise of this authority is that the zoning must be effected "in accordance with a comprehensive plan."[15] Since the concept of long-range planning and the power to zone were not rationally linked when the SZEA was promulgated, and because the draftsmen of the Act failed to define the meaning of "comprehensive plan," such language became a fertile source of confusion.[16] Indeed, many courts equated zoning with the comprehensive plan itself.[17] Thus, if a zoning ordinance was comprehensive and well-planned, the ordinance would be held to satisfy the requirement.[18] Additional confusion was engendered by the Commerce Department's promulgation of another model enabling statute, the Standard City Planning Enabling Act (SPEA),[19] which authorized the adoption of a "master plan"[20] but neglected to relate this concept to the

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[15] *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation,* 74 MICH. L. REV. 899, 902 (1976). The enabling acts adopted by the states contained few substantive provisions to guide local land use decisionmaking. *Id.* at 951. Furthermore, although zoning regulations have to comply with an existing comprehensive plan, the content, goals, and form of such plan were not clearly prescribed in the SZEA. *Id.*; *see* Cunningham, *Land-Use Control—The State and Local Programs,* 50 IOWA L. REV. 367, 383-84 (1965).

[16] *See* Tarlock, *Consistency With Adopted Land Use Plans as a Standard of Judicial Review: The Case Against,* 9 URB. L. ANN. 69, 73 n.13 (1975). Although not expressed as such in the SZEA, the comprehensive plan requirement of that Act was viewed as an attempt to prevent arbitrary zoning by local governments. *See* 1 E. YOKLEY, *supra* note 2, § 5-2, at 214. In stressing the importance of the comprehensive plan, Yokley analogizes that "[t]he comprehensive plan has relationship to legal and proper zoning as does the balance staff to the proper operation of a watch. Without the balance staff, we have no watch, and, by the same token, without the comprehensive plan we have no zoning." *Id.* at 216. Some courts, however, have not shared Yokley's enthusiasm for the importance of the plan, reasoning that it merely serves an advisory function in land use planning. *See infra* notes 33-39 and accompanying text. *See generally* Bagne, *supra* note 8, at 280-81 (the absence of guidelines as to the meaning of the phrase "in accordance with a comprehensive plan" resulted in delegation of the interpretative task to local governments and courts, notwithstanding that the meaning "was often beyond the ken of most judges and perhaps the passers of the [SZEA] itself in the respective states").

[17] *E.g.,* Mott's Realty Corp. v. Town Plan & Zoning Comm'n, 152 Conn. 535, 537, 209 A.2d 179, 180, (1965); Kozesnik v. Township of Montgomery, 24 N.J. 154, 165, 131 A.2d 1, 7-8 (1957); *see* Haar, *"In Accordance With a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1157 (1955); Larsen & Siemon, *supra* note 2, at 118-21.

[18] *See, e.g.,* Kozesnik v. Township of Montgomery, 24 N.J. 154, 165, 131 A.2d 1, 7-8 (1957); *infra* notes 33 & 36 and accompanying text.

[19] ADVISORY COMM'N ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928) [hereinafter cited as SPEA]. Although the SPEA was more specific than the SZEA insofar as it discussed the various planning devices that could be utilized by a municipality, it set forth neither the underlying plan policies nor the ways in which the various devices could be used in combination. *See* HANDBOOK, *supra* note 2, § 7.01, at 95-96; Mandelker, *supra* note 15, at 952.

[20] The SPEA authorized the municipality's adoption of a "master plan" designed to

SZEA's comprehensive plan.[21]

Notwithstanding this semantic quagmire, the comprehensive plan has been defined as "an independent, long-term plan for use and development of land . . . ."[22] It is to be distinguished from zoning, which is merely one of the tools by which the plan may be implemented.[23] One commentator has observed that "[t]ogether, zoning and planning work to provide a coordinated, adjusted and harmonious development of a community in accordance with a comprehensive plan."[24] Although comprehensive plans initially were designed to project an "end-state" for particular communities,[25] the more general "policy plan," which sets forth the community's goals and guiding principles,[26] has been employed on a larger scale since it permits greater flexibility in meeting the changing needs of the community and region.[27]

"contain a city planning Commission's recommendations for the development of the municipality." HANDBOOK, *supra* note 2, § 7.01, at 96 (citing SPEA, *supra* note 19, § 6). It is interesting to note that the SPEA has been characterized as a mere "shopping list of acceptable plan elements." Mandelker, *supra* note 15, at 952.

[21] *See* Bagne, *supra* note 8, at 280 n.47. The relationship between the SPEA's "master plan" and the SZEA's "comprehensive plan" was not indicated in the SPEA. *Id.* Consequently, there has been confusion as to whether the terms are, in fact, synonymous. *Compare* 5 P. ROHAN, ZONING AND LAND USE CONTROLS § 37.01[1], at 37-12 to -13 (1982) (comprehensive plan is not the equivalent of master plan) *with* HANDBOOK, *supra* note 2, § 7.01, at 96 (the term "master plan" is used, to avoid confusion, in place of "comprehensive plan," "general plan," and other various terms).

[22] HANDBOOK, *supra* note 2, § 7.01, at 96. In addition to being defined as "an independent, long-term plan for use and development of land," *id.*, the comprehensive plan has been described as "[t]he basic instrument for county or municipal land use planning . . . [and] a general plan to control and direct the use and development of property in a municipality," Fasano v. Board of County Comm'rs, 264 Or. 574, 583, 507 P.2d 23, 27 (1973) (citations omitted).

[23] *See* Haar, *supra* note 17, at 1154. Haar opined that zoning should be considered only one means of implementing a plan of broader scope. *Id.* The use of zoning as a plan implementation device, however, appears to present some practical problems. For example, since zoning maps place their emphasis upon present uses of the land, they may conflict with the future orientation of the comprehensive plan. T. PATTERSON, LAND USE PLANNING—TECHNIQUES OF IMPLEMENTATION 29-31 (1979). Nevertheless, zoning remains one of the most commonly used land use planning techniques. *See id.* at 31.

[24] 5 P. ROHAN, *supra* note 21, § 37.01[1], at 37-4 (footnotes omitted).

[25] Mandelker, *supra* note 15, at 918-19. The employment of a specific end-state plan necessarily entails the forecasting of long-range future uses and developments in the particular area. *See id.* Such plans have been criticized, however, on the ground that they encourage "sprawl and spotty development." *See* T. PATTERSON, *supra* note 23, at 30.

[26] Fasano v. Board of County Comm'rs, 264 Or. 574, 583, 507 P.2d 23, 27 (1973) ("plan embodies policy determinations and guiding principles . . . [while] zoning ordinances provide the detailed means of giving effect to those principles").

[27] *See* Mandelker, *supra* note 15, at 918-19. *But see* MODEL LAND DEV. CODE § 3-101, at 123 (1976) (expressly rejecting the position "that objectives should be stated solely in words,

The Role of the Comprehensive Plan in Land Use Planning

Legislative and judicial responses to the use of the comprehensive plan illustrate its current importance to land use planning in the United States.[28] To be sure, various state legislatures have recognized that the comprehensive plan should be akin to a "constitution" that governs local land use decisionmaking.[29] Consequently, these states have required that any ordinances passed by the local government be consistent with the local or state comprehensive plan then in effect.[30] Notably, Oregon not only mandates that new ordinances comply with the local and state plans, but also prohibits the enforcement of any existing city or county ordinance that conflicts with the plans.[31] In the absence of such legislative guidance, however, the resolution of land use disputes generally has been left to the judiciary.[32]

An examination of the case law on this subject indicates that

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and adopt[ing] the view that maps and diagrams may be the best media of communication in some circumstances"). *See generally* T. PATTERSON, *supra* note 23, at 30 (use of zoning map causes difficulties for future planning).

[28] *See* Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33, 33-34 (1975). The increased use of comprehensive plans may be attributed to several factors, including a growing concern for the environment, distrust of local decisionmakers who act without the aid of a plan, and expanding judicial and legislative participation in the planning area. *See id.* It has been noted that "[p]erhaps the [past] relegation of planning to the background reflected an over-all skepticism toward the unproven city planning profession, which faced an uphill struggle against deeply imbedded American resentment of centralized power." *Id.* at 37 (footnotes omitted). Moreover, although professional planners may, in fact, be objective, a risk exists that their decisions will be "arbitrary since [they] bear little responsibility for distribution of the costs or benefits of their activity." Tarlock, *supra* note 16, at 76. Thus, with the importance of comprehensive plans held in a delicate balance, distrust of local decisionmakers enhances the interest in such plans while suspiciousness of planners curtails their use. *See generally* Sullivan & Kressel, *supra*, at 33-37.

[29] *See* HANDBOOK, *supra* note 2, § 7.04-.05, at 104-09. Characterization of the comprehensive plan as a "constitution" is attributed to Professor Haar. *See* Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353, 376 (1955).

[30] *See, e.g.*, CAL. GOV'T CODE § 65860 (Deering Supp. 1982); FLA. STAT. ANN. § 163.3194 (West Supp. 1981). In California, the requisite consistency between zoning regulations and a comprehensive plan exists "when a city has officially adopted such a plan and the various land uses authorized by ordinance are compatible with the objectives, policies, general land uses and program specified in such a plan." PUBLIC POLICY AND PLANNING, UNIVERSITY EXTENSION, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIFORNIA PLANNING LAW AND LAND-USE REGULATIONS 9 (1981) [hereinafter cited as CALIFORNIA PLANNING LAW]; *see* Friends of "B" Street v. City of Hayward, 106 Cal. App. 3d 988, 998, 165 Cal. Rptr. 514, 520 (Ct. App. 1980) (general plan is a constitution for future development in the city).

[31] OR. REV. STAT. § 197.010 (1981); *see* HANDBOOK, *supra* note 2, § 7.04, at 104-05.

[32] *See generally* Mandelker, *supra* note 15, at 932, 937.

the courts have had differing views as to the significance of the comprehensive plan. Illustrative of one judicial approach is the case of *First Hartford Realty Corp. v. Planning & Zoning Commission*,[33] wherein the Connecticut Supreme Court, in upholding a rezoning[34] despite its apparent inconsistency with the town's comprehensive plan,[35] stated that "[t]he requirement of a comprehensive plan is generally satisfied when the zoning authority acts with the intention of promoting the best interests of the entire community."[36] Another judicial view of the comprehensive plan was expressed in *Cathcart-Maltby-Clearview Community Council v. Snohomish County*,[37] in which the Supreme Court of Washington observed that "[n]onconformance with a comprehensive plan does not necessarily render the [rezoning] action illegal. . . . The plan is only a general blueprint and thus only general conformance is necessary."[38] The court therefore permitted the controversial zon-

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[33] 165 Conn. 533, 338 A.2d 490 (1973).

[34] "Rezoning" refers to a zoning ordinance amendment that may involve either a major reworking of the ordinance to meet changing needs of the community or simply minor revisions designed to solve conflicts that have arisen. *See* T. PATTERSON, *supra* note 23, at 39. The specific rezoning measure may result in controversy and, ultimately, litigation, due to the possibility that local decisionmakers may be susceptible to special interests or parochial bias that would influence their position on the proposal. *See* HANDBOOK, *supra* note 2, § 6.05, at 88-89. Arguments against the practice of rezoning are based upon the fact that "standards for granting or denying rezonings consist only of 'mistake' or 'changed conditions' — standards which can be contrived to fit almost any situation and which are so broad as to provide virtually no guidance to the developers, to concerned citizens, or to the decision-makers." *Id.* at 88. A minority of jurisdictions, however, apply more stringent standards when considering whether rezonings should be upheld, viewing such determinations as "quasi-judicial" in nature. *Id.* § 6.06, at 89. Thus, since predetermined standards are applied to each particular proposal, much of the potential for legislative abuse is eliminated. *Id.*

[35] 165 Conn. at 541, 338 A.2d at 495.

[36] *Id.*; *see, e.g.*, Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 343, 307 A.2d 563, 567 (1973); Board of Supervisors v. Snell Constr. Corp., 214 Va. 655, 657-58, 202 S.E.2d 889, 892-93 (1974).

[37] 96 Wash. 2d 201, 634 P.2d 853 (1981) (en banc).

[38] *Id.* at 212, 634 P.2d at 860 (citations omitted). In *Cathcart*, the plaintiffs, residents of nearby communities, sought judicial review of Snohomish County's approval of the rezoning of two parcels of land. *Id.* at 204, 634 P.2d at 856. The plaintiffs claimed that the county, by approving a rezoning that was inconsistent with the existing land use plans, acted in an arbitrary manner and in effect, engaged in spot zoning. *Id.* at 211, 634 P.2d at 859-60. The court, however, did not view the inconsistency as fatal to the validity of the rezoning. *Id.* at 213, 634 P.2d at 860; *see, e.g.*, Town of Bedford v. Village of Mount Kisco, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973); *cf.* State v. City of Hailey, 102 Idaho 511, 515, 633 P.2d 576, 580 (1981) (very little weight accorded comprehensive plan in determining validity of annexation ordinance); Tarlock, *supra* note 16, at 109 (consistency with comprehensive plan is "some evidence of [the] reasonableness" of land use ordinances). In *Town of Bedford*, the New York Court of Appeals rejected the town's claim

ing change notwithstanding its deviance from two comprehensive plans.[39] Finally, an approach requiring strict consistency with the comprehensive plan was exemplified in *1000 Friends v. Board of County Commissioners*.[40] In that case, the Oregon Court of Appeals concluded that "[t]here is a recognized hierarchical relationship between comprehensive plan, zoning laws and subdivision ordinances."[41] Thus, after the decision is made to approve a tentative subdivision and the decisionmakers ensure that the approved subdivision complies with the local zoning ordinances, it is necessary to determine whether the zoning ordinance comports with the comprehensive plan.[42]

Often, the weight which various courts accord a comprehensive plan will depend upon their willingness to look beyond the plan itself and examine the underlying policy considerations and regional needs.[43] This analysis comports with several courts' adop-

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that the rezoning permitted by the defendant, an adjoining village, was invalid due to the rezoning's inconsistency with the village comprehensive plan. 33 N.Y.2d at 188-89, 306 N.E.2d at 159-60, 35 N.Y.S.2d at 137. Dissenting, Judge Breitel decried the majority's lack of sensitivity to the regional effects which the rezoning most surely would generate. *See id.* at 192, 306 N.E.2d at 162, 351 N.Y.S.2d at 139 (Breitel, J., dissenting).

[39] 96 Wash. 2d at 213, 634 P.2d at 860.

[40] 32 Or. App. 413, 575 P.2d 651 (Ct. App. 1978).

[41] *Id.* at 421, 575 P.2d at 656; *accord* Forestview Homeowner's Ass'n v. County of Cook, 18 Ill. App. 3d 230, 240-41, 309 N.E.2d 763, 771 (App. Ct. 1974); Daviess County v. Snyder, 556 S.W.2d 688, 690 (Ky. 1977).

[42] 32 Or. App. at 421, 575 P.2d at 656. The court in *1000 Friends* compared the comprehensive plan to a constitution with which all zoning regulations and ordinances must comply. *Id.*; *see supra* notes 29-31 and accompanying text.

[43] *See, e.g.*, Associated Homebuilders v. City of Livermore, 18 Cal. 3d 582, 601-02, 557 P.2d 473, 483-84, 135 Cal. Rptr. 41, 51-52 (1976); Southern Burlington NAACP v. Township of Mt. Laurel, 67 N.J. 151, 175, 336 A.2d 713, 725, *cert. denied*, 423 U.S. 808 (1975); Surrick v. Zoning Hearing Bd., 476 Pa. 182, 188-90, 382 A.2d 105, 108-09 (1977). In the landmark *Mt. Laurel* decision, the New Jersey Supreme Court struck down a township's zoning ordinances that were designed to restrict residency in the township to persons of medium and upper income. 78 N.J. at 185, 336 A.2d at 730-31. Moreover, the court imposed an affirmative duty on developing municipalities to plan in such a way as to offer housing opportunities to all classes of citizens, not solely to the fiscally desirable. *Id.* at 174, 336 A.2d at 724. The court imposed such a duty "at least to the extent of the municipality's fair share of the present and prospective regional need therefor." *Id.* Thus, the *Mt. Laurel* decision effectively extended the bounds of judicial review to include socio-economic issues in land use cases. *See* Freilich, *New and Significant Zoning Decisions—What Are the Courts Doing to Zoning*, 1979 INST. ON PLAN. ZONING & EMINENT DOMAIN 1, 31-34; Rohan, *Property Planning and the Search for a Comprehensive Housing Policy—The View from Mt. Laurel*, 49 ST. JOHN'S L. REV. 653, 667 (1975). *See generally* Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 48 (1980) (some courts recently have shown impatience with municipalities' attempts to take advantage of traditional judicial restraint in the planning area when the governmental

tion of the "regional general welfare" approach, which necessitates that a particular town's land use plan or zoning ordinance be scrutinized in light of its effect upon the welfare of both the town itself and its surrounding region.[44] For example, in *Berenson v. Town of New Castle*,[45] the New York Court of Appeals enunciated a two-pronged test to be used in determining the validity of a zoning ordinance, namely, whether the local government has promulgated a "balanced and well ordered" plan, and whether regional needs were taken into consideration.[46] Although the *Berenson* case dealt specifically with the validity of a zoning ordinance, it is nonetheless apparent that regional needs are increasingly being considered by the judiciary as a major factor in the determination of the weight to be afforded a comprehensive plan.[47]

It is clear, therefore, that while the comprehensive plan is typically not a binding instrument, it does represent an important and viable tool that may aid in the resolution of land use planning controversies.[48] Moreover, provided the plan and its subordinate regulations are not designed to further exclusionary, parochial interests,[49] and its underlying policies are implemented effectively, the

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entity enacts legislation that is more subtle in its exclusionary effects).

[44] *See infra notes* 181-83 and accompanying text.

[45] 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). In *Berenson*, the plaintiffs challenged the constitutionality of a New Castle zoning ordinance that restricted most of the town to 1 and 2 acre residential developments. *Id.* at 105, 341 N.E.2d at 238, 378 N.Y.S.2d at 676.

[46] *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81. The *Berenson* court indicated that it would look beyond the particular ordinance being challenged in order to determine its validity, stating that "[its] concern is not whether the zones, in themselves, are balanced communities, but whether the town itself, as provided for by its zoning ordinances, will be a balanced and integrated community." *Id.* at 109, 341 N.E.2d at 242, 378 N.Y.S.2d at 680. The regional general welfare approach adopted in New York varies, somewhat, from the regional welfare approach taken by New Jersey in *Mt. Laurel, see supra* note 43, insofar as the former does not mandate that the particular community provide its "fair share" of regional housing needs. Indeed, New York simply requires that regional considerations become part of the planning process. *See* R. FREILICH & E. STUHLER, *Introduction* to THE LAND USE AWAKENING 16 (1981). It is interesting that the New Jersey approach has been modified, to a degree, by recent case law manifesting the judiciary's discomfort with the task of determining a region's actual housing needs. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 546-47, 371 A.2d 1192, 1224 (1977); R. FREILICH & E. STUHLER, *supra*, at 15; Bagne, *supra*, note 8, at 300.

[47] *See* Freilich, *supra* note 43, at 38-41.

[48] *See Berenson*, 38 N.Y.2d at 109-10, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81.

[49] *See id.*, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. In *Berenson*, the court stated that "[t]here must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met." *Id.* Indeed, a court must examine all of the circumstances surrounding the adoption of a zoning ordinance prior to

planning goals envisioned by the community can be achieved.[50] Once a comprehensive plan has been developed and adopted by an area, the focus thus shifts to the implementation of its underlying policies. The authority of the local governmental entity to implement the plan is derived from the state's delegation of its police power, taxing power, power of eminent domain, and spending power.[51] Each of these powers is the source of a concomitant implementation device that enables the governmental entity to effectuate its land use programs. Zoning[52] and subdivision regulations,[53]

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upholding its validity. *See id.* at 109-10, 341 N.E.2d at 241-42, 378 N.Y.S.2d at 680-81.

[50] *See* Vestal, *supra* note 9, at 156-57. The development of the comprehensive plan is merely the first step toward effective land use planning. *Id.* at 157. A community may adopt a plan and subsequently disregard it, thereby continuing its ad hoc decisionmaking. *Id.* Hence, proper implementation of the plan's policies is imperative. *See id. See generally* C. RHYNE, *supra* note 10, § 26.97, at 922 ("there must be a direct and tangible link" between zoning and the comprehensive plan in order to avoid a piecemeal approach to land use planning).

[51] T. PATTERSON, *supra* note 23, at 21. The police power, the power of eminent domain, and the taxing and spending powers are considered the four basic powers of government. *Id.* The delegation of these powers by a state to its local governments provides the latter with the "legislative tools" for plan implementation. *Id.* It is through these legislative tools that the local government may utilize the "legal tools," that is, ordinances and regulations, to achieve its land use objectives. *Id.*

[52] Zoning "provides for the division of a local government unit into districts by categories of allowed and/or prohibited land uses. Within the districts, zoning regulates the height and bulk (cubage) of buildings and other structures . . . ; minimum lot sizes; [and] the amount of open space . . . ." T. PATTERSON, *supra* note 23, at 27. The particular zoning regulation must be a reasonable exercise of the local government's police power, or it may be challenged as an unconstitutional taking without due process and just compensation. *Id.* at 28. Furthermore, the zoning ordinance should not be used to "buttress exclusionary tendencies." Heyman, *Legal Assaults on Municipal Land Use Regulation,* in THE LAND USE AWAKENING 51-53 (1981).

In addition to the traditional forms of zoning, such as large lot zoning and conditional use permits, several innovative zoning methods have been used or proposed. Planned unit development (PUD), for example, clusters a variety of building structures and lot sizes together in one area. 5 P. ROHAN, *supra* note 21, § 37.05[2], at 37-82. Cluster zoning, on the other hand, permits a developer to group residential dwellings closer together than a district's conventional zoning would allow. *See Zoning, supra* note 2, at 1440. A "floating zone" is a technique that authorizes selected uses of property in areas of the community in which these uses ordinarily would not be permitted. *See* 1 E. YOKLEY, *supra* note 2, §§ 5-7, at 232-33. The "floating" aspect of the zone is that the specific site of the particular use usually is not designated on a zoning map. T. PATTERSON, *supra* note 23, at 40. Finally, impact zoning is based upon "the view that in a given place anything may be done which conforms to the physical, social, and economic impact requirements deemed acceptable by the relevant municipality." Freilich & Quinn, *Effectiveness of Flexible and Conditional Zoning Techniques—What They Can and What They Can Not Do For Our Cities,* 1979 INST. ON PLAN. ZONING & EMINENT DOMAIN 167, 171. Each of these methods attempts to make zoning regulations more responsive to the area's particular characteristics and needs. *See Zoning, supra* note 2, at 1440.

for example, are instituted under the aegis of the police power,[54] while the taxing power is used to create tax incentives to attract businesses and industries.[55] The power to spend and the expropriation power, on the other hand, permit the local government to condemn land for public use.[56]

A program of local timing and growth management, combining zoning, subdivision regulations, and other planning devices, is yet another plan implementation device that has been employed in recent years.[57] The validity of such a program was upheld in *Golden*

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[53] Subdivision regulations commonly serve as a plan implementation device. *See* T. PATTERSON, *supra* note 23, at 92; CALIFORNIA PLANNING LAW, *supra* note 30, at 296. The subdivision has been defined as "any division of land for the purpose of sale, lease, or finance . . . ." *Id.* Through subdivision regulations, local government officials have the opportunity to impose standards for the development of specific parcels of land. *See* T. PATTERSON, *supra* note 23, at 92-93. Thus, depending upon the restrictive scope of the regulations, the officials effectively may encourage or discourage a proposed development. *See id.* In any event, such regulations can ensure that the societal costs incident to a new development, such as increased demand for police protection, sewers, water, schools, and recreation, will be borne as equitably as possible by the developer and the affected community. *See id.* at 93-94.

[54] T. PATTERSON, *supra* note 23, at 21-22. The "police power" of a state has been described as "the power to impose regulations which have a reasonable tendency to serve the health, safety, morals or general welfare of the public." Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600, 602-03 (1965). The Supreme Court, in *Village of Euclid*, declared that all zoning ordinances and other land use regulations must "find their justification in some aspect of the police power, asserted for the public welfare." *Village of Euclid*, 272 U.S. at 388. The "public welfare" referred to in connection with the police power has been interpreted to extend beyond municipal borders. *See* Note, *supra*, at 602-07.

[55] T. PATTERSON, *supra* note 23, at 22. The taxing power of the state, as delegated to a local government, primarily is utilized to raise revenue for governmental expenditures. *Id.* Although the current use of the taxing power as a plan implementation device may be limited, it has formed the basis of a proposal for an alternative state land use control system. *See* Comment, *State Land Use Statutes: A Comparative Analysis*, 45 FORDHAM L. REV. 1154, 1177 (1977). This proposal "seeks to effect regulation through tax incentives. The administrative agency together with local governments classify land into tax categories according to most desirable use." *Id.* (footnote omitted). Consequently, through the use of these financial incentives, residents and developers are encouraged to comply with the system. *Id.*

[56] T. PATTERSON, *supra* note 23, at 22. Eminent domain, "the power to take land for public purposes with just compensation," and the spending power, "the right of government to spend public monies for public purposes," usually are exercised in conjunction with one another. *Id.* Under the guise of "public purpose," the government uses public monies to provide just compensation for land taken by eminent domain. *Id.*

[57] *See, e.g.*, Giuliano v. Town of Edgartown, 531 F. Supp. 1076, 1083 (D. Mass. 1982). Local growth management regulations have been adopted in response to increased urban sprawl and the attendant burden placed upon municipalities to provide adequate public services. *See* R. FREILICH & E. STUHLER, *supra* note 46, at 32. These regulations are designed to relate the community's growth to its ability to provide municipal services. *Id.* at 33. The reaction to this technique, however, has been mixed insofar as growth management has resulted in at least a four-way battle:

v. Planning Board[58] in which a town sought to tie its future development to its ability to provide adequate municipal services.[59] Recognizing that an attempt at circumvention of this program was inevitable, and that such an attempt might be in the form of a "defensive incorporation," the Town of Ramapo enacted a Village Incorporation Law to supplement the state's incorporation requirements.[60] In *Marcus v. Baron*,[61] a New York appellate court sus-

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> It is favored by environmentalists and by voters who want to keep tax rates down. In opposition are landowner/builders and advocates of low-to-moderate-income housing. Each of these groups has a legitimate point to make, and each has won a case here or there. Consequently, there is no national consensus, no sterotyped [sic] "liberal" or "conservative" position.

HANDBOOK, *supra* note 2, § 10.03, at 147.

[58] 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). In *Golden*, the plaintiffs were landowners who challenged the town's denial of approval of a subdivision plat, which denial was based upon the plaintiff's failure to obtain the requisite permit. 30 N.Y.2d at 364, 285 N.E.2d at 293, 334 N.Y.S.2d at 140-41. The issuance of this permit was contingent upon the availability to the proposed development of five municipal services. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44. In determining the validity of the town's program, the court observed that there was a need for some method of curbing the harmful effects of undirected growth, and, although conceding that statewide or regional planning would be ideal, concluded that Ramapo's regulations furthered this interest. *Id.* at 374-80, 285 N.E.2d at 299-303, 334 N.Y.S.2d at 149-54. Counsel for the Town of Ramapo, recognizing the significance of the court's decision, stated that "[w]hat we have fought for and won was the right of a community to chart its own destiny within [a] framework of reasonable planning." Freilich, Golden v. Town of Ramapo: *Establishing a New Dimension in American Planning Law*, in THE LAND USE AWAKENING 124 (1981).

[59] 30 N.Y.2d at 372-76, 285 N.E.2d at 298-301, 334 N.Y.S.2d at 147-50. The court, though noting that the enabling legislation did not sanction explicitly the use of phased growth methods, opined that "phased growth is well within the ambit of existing enabling legislation." *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150. Dissenting, Judge Breitel refused to imply such a grant of power in the enabling legislation, reasoning that, "for policy reasons, one should not strain the reading of the enabling acts . . . to distort them, beyond any meaning ever attributed to them, except by the ingenious draftsmen of the Ramapo ordinance." *Id.* at 386, 285 N.E.2d at 306, 334 N.Y.S.2d at 158-59 (Breitel, J., dissenting). For a criticism of the *Golden* decision, 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, 249-50 (1973).

[60] *See infra* note 62 and accompanying text. Under the state incorporation statute, the petition for incorporation must contain the following:

> (1) An allegation of the basis on which the petition is signed.
> (2) The name of the proposed village.
> (3) An allegation that such territory contains a population of at least five hundred regular inhabitants.
> (4) The manner in which the area requirements of section 2-200 . . . are satisfied.
> (5) A designation of at least one but no more than three persons, giving full names and addresses, on whom and at which addresses all papers required to be served in connection with the proceeding for incorporation, shall be served. A majority of such designees must reside in such territory.
> (6) Each page of the petition and all exhibits and certifications shall be securely fastened together.

tained the validity of a law which vested in the town supervisor the authority to determine whether a proposed incorporation would be, *inter alia,* in the overall public interest of the area in question, the remainder of the town, and any of the special districts in the area.[62] Rejecting the plaintiff's contention that the town exceeded its delegated authority by enacting the law, the court placed primary emphasis upon the town's comprehensive planning and the trends in state and national policies regarding land use.[63] To appreciate the controversy engendered by the use of an incorporation statute as a method of implementing a comprehensive plan, it is helpful to examine the reasons for a community's incorporation and the problems caused by extensive governmental fragmentation.

N.Y. VILLAGE LAW § 2-202 (McKinney 1973). It is submitted that, in light of the purely procedural emphasis in the New York State statute, the Town of Ramapo appropriately was concerned with its adequacy in preventing unnecessary and detrimental incorporations.

[61] 84 App. Div. 2d 118, 445 N.Y.S.2d 587 (2d Dep't 1981). The plaintiffs in *Marcus* were among 500 persons named on the incorporation petition for the Village of Wesley Hills. *Id.* at 119, 445 N.Y.S.2d at 590. The town supervisor declined to approve the petition on both procedural and substantive grounds, stating that the incorporation would not be in the overall public interest. *Id.* at 122-23, 445 N.Y.S.2d at 592. The supervisor reasoned that to decide otherwise, and thus permit the proposed incorporation, would increase tax burdens on the town, detrimentally affect its bonding ability, place strain on the town's sewer program, and possibly devastate the town's planning. *Id.* at 123, 445 N.Y.S.2d at 592.

[62] *See id.* at 132, 445 N.Y.S.2d at 597; Ramapo, N.Y., [1967] N.Y. Local Laws 1909 (No. 3). The Ramapo local law, after an initial explication of the town's adoption of its comprehensive plan, sets forth the reasons for the incorporation requirements that supplemented the state's procedural statute. *See* Ramapo, N.Y., [1967] N.Y. Local Laws 1909 (No. 3). The town feared that "[n]ew villages formed within the unincorporated area of the town of Ramapo may have a detrimental effect on the master plan, zoning ordinance, official map and capital budget of the town, by destroying the unity and cohesiveness of these carefully balanced programs and may be detrimental to the over-all comprehensive planning of the town." *Id.*

[63] 84 App. Div. 2d at 132-33, 445 N.Y.S.2d at 597-98. The plaintiffs challenged the town's local law on the grounds that it was preempted by the state statutes on incorporation and that it therefore violated the state constitution and the Municipal Home Rule law granting broad powers to the local government. *Id.* at 124-25, 445 N.Y.S.2d at 593. The court rejected both of these claims, however, concluding "that Local Law No. 3, rather than being inconsistent with article 2 of the Village Law, constitutes a complementary or a consistent extension of such law and is furthermore a refinement of overall State policy." *Id.* at 132, 445 N.Y.S.2d at 597 (citations omitted). Justice Hopkins, dissenting, argued that to allow the town to determine whether an independent governmental entity could be formed was to permit an encroachment upon the powers exercisable solely by the state legislature. *Id.* at 134-36, 445 N.Y.S.2d at 599 (Hopkins, J., dissenting).

COMMUNITY INCORPORATION

The municipal corporation,[64] with its attendant powers to tax, regulate land use, and establish community policies,[65] not only may be a desirable alternative for a particular area but may, in

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[64] The municipal corporation has been defined as "a body politic created by the incorporation of the people of a prescribed locality and invested with subordinate powers of legislation to assist in the civil government of the state and to regulate and administer local and internal affairs of the community." Tooke, *The Status of the Municipal Corporation in American Law*, 16 MINN. L. REV. 343, 343 (1932) (footnote omitted). These incorporated governments are to be distinguished from the unincorporated towns or counties that often are referred to as "quasi-municipal corporations." *Id.* at 359 n.54. Municipal corporations typically are areas within existing towns or counties that seek to incorporate in the interest of self-rule, *see* Vestal, *supra* note 9, at 155-57, while quasi-municipal corporations are entities formed by the state for governmental purposes, *see id.*; 39 N.Y. JUR. *Municipal Corporations* § 4 (1965). Generally, therefore, once a community incorporates it is not bound by the policies and regulations of the town or county. *See* Mandelker, *Standards for Municipal Incorporations on the Urban Fringe*, 36 TEX. L. REV. 271, 274-75 (1958); *cf.* City of South San Francisco v. Berry, 120 Cal. App. 2d 252, 252, 260 P.2d 1045, 1045 (Dist. Ct. App. 1953) (property annexed to a municipality no longer is subject to the county's zoning ordinances).

[65] In the majority of states, the source of power of municipal corporations is embodied in home rule provisions that provide local governments with the authority to govern matters within their own boundaries. 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 3.01, at 3-7 (1982); *see* Andersen, *Resolving State/Local Governmental Conflict—A Tale of Three Cities*, 18 URB. L. ANN. 129, 130 (1980). Typically, these provisions either are self-executing grants of power located directly in the state's constitution or legislation enacted pursuant to constitutional mandate. 1 C. ANTIEAU, *supra*, § 3.01, at 3-7; *see* Andersen, *supra*, at 130. New York is somewhat unique in that it has both constitutional and legislative home rule provisions. Comment, *Home Rule: Constitutionally Granted Planning and Zoning Powers vs. State Concern for Preservation of the Adirondacks*, 16 URB. L. ANN. 389, 394 (1979); *see* N.Y. CONST. art. IX, § 2[c](ii); N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1969). Generally, a state legislature may revoke or amend statutorily granted home rule powers, while constitutionally granted home rule powers "fix the authority of the state with respect to local self-government" and may only be revoked or amended in accordance with the requirements for amending the constitution. Comment, *supra*, at 393 (footnote omitted). The delegated powers set forth in home rule provisions eventually are reflected in the municipal charters of the corporation. 1 C. ANTIEAU, *supra*, § 3.01, at 3-7.

In addition to its legal function as a means of distributing power, home rule has acquired a second meaning, namely, local autonomy. *See* Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644-45 (1964). As a political symbol, home rule represents "the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of the state government." *Id.* at 644 (footnote omitted). Because the powers granted to a municipal government generally relate to the local "property, affairs or government," *e.g.*, N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1969), while the state retains plenary powers in matters of state or "general" concern, *see* Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1109 (1980), the actual extent of municipal power is often unclear, *see* Sandalow, *supra*, at 652. Thus, it largely has been left to the judiciary to form the municipal corporation as it exists today and to allow for its expansion or contraction to meet the changing needs of the community. *See* Tooke, *supra* note 64, at 360.

fact, be a necessity for its inhabitants.[66] Indeed, funds necessary to the provision of adequate public services may be more readily available to a municipal corporation than to an unincorporated entity.[67] Furthermore, a municipality, rather than a larger governmental entity, would have direct control over the distribution of such funds and, presumably, would be more "finely tuned" to the specific needs of the community.[68] The experience of the city of Pearl, Mississippi, poignantly illustrates that the attainment of municipal status may be indispensable to a particular community. Denying an adjoining city's challenge to Pearl's incorporation,[69] the Supreme Court of Mississippi, influenced by the conditions existing within Pearl, stated that "[t]here is a voluntary fire department, but it has not been able to save any house from burning down, although it has saved houses next door to the fire. . . . The area is plagued with problems concerning garbage, sewage, and septic tanks."[70] Clearly, the funds available to Pearl subsequent to incorporation would aid in correcting these problems.[71]

The desire for governmental independence also is a significant consideration in the decision to incorporate. Although this aspiration may be attributed in part to "the mythology of the grassroots ideal of small town government,"[72] it also may be prompted

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[66] *See, e.g.*, State *ex rel.* Northern Pump Co. v. So-Called Village of Fridley, 233 Minn. 442, 450, 47 N.W.2d 204, 210 (1951) (considerable development in the area presents need for greater governmental service); City of Jackson v. Petitioners for Incorporation, 318 So. 2d 843, 845 (Miss. 1975) ("public convenience and necessity" require incorporation).

[67] *See* City of Jackson v. Petitioners for Incorporation, 318 So. 2d 843, 846 (Miss. 1975). In *City of Jackson*, the court related the testimony of an agent of the State Board of Health in which the agent had stated that since an incorporated municipality would have first priority in determining the allocation of the board's funds, the area's desperate need for sanitary facilities probably would be met by incorporation. *Id.*

[68] *Cf.* C. WEAVER & R. BABCOCK, CITY ZONING: THE ONCE AND FUTURE FRONTIER 253 (1979) (with respect to cities, the "decisionmaking process ought to be kept as close as possible to the problem").

[69] Boling v. City of Jackson, 279 So. 2d 590, 593-94 (Miss. 1973). The Supreme Court of Mississippi disagreed with the lower court's finding that the proposed incorporation was unreasonable due to the prohibitive operating costs of the new municipality. *Id.* at 593. The adjoining city of Jackson had argued that it would be less costly to eventually permit Jackson to annex the area. *Id.* Rejecting this argument, the court stated that due to the area's needs, to affirm the lower court's denial of municipal status "would amount to assigning this large community to limbo . . . ." *Id.*

[70] *Id.* at 592-93.

[71] *See generally* C. RHYNE, *supra* note 10, § 4.6, at 62-63 (included among the governmental functions of a municipality are the operation of fire departments and the protection against disease and unsanitary conditions).

[72] Grant, *Trends in Urban Government and Administration*, 30 LAW & CONTEMP.

by exclusionary, parochial interests.[73] "Defensive incorporation," whereby a community attempts to avoid restrictive regulations or land use policies of a town or county, exemplifies this exclusionary attitude.[74] In *United States v. City of Black Jack*,[75] for instance, the defendant-city incorporated primarily in order to prevent the construction of a county-planned low to moderate income housing development in the community.[76] Shortly after its formation, the new municipality enacted a zoning ordinance that prohibited the construction of multiple-family dwellings within its boundaries.[77] This ordinance, however, subsequently was held invalid by the Eighth Circuit Court of Appeals.[78] Notably, defensive incorporations also have been used to avoid annexation to an existing municipality,[79] to prevent the construction of a sanitary landfill,[80] to

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PROBS. 38, 49 (1965) (footnote omitted).

[73] *See* Bagne, *supra* note 8, at 271. A municipality may be formed solely in order to acquire the benefits of local control and to avoid any responsibility for problems arising outside its borders. *Id.*

[74] *See generally* Mandelker, *supra* note 64, at 275 (there may be a "balkanization of zoning controls" as more communities incorporate and enact their own land use ordinances). When the defensive aspects of the incorporation are obvious, the incorporation petition typically will not be approved. *See* 1 E. YOKELY, MUNICIPAL CORPORATIONS § 15, at 17 (Supp. 1980).

[75] 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

[76] 508 F.2d at 1182. In 1965, St. Louis County adopted a master plan for the entire county, including 1,700 acres which later became the city of Black Jack. *Id.* The plan had designated 67 of the 1,700 acres as the site of a multifamily residential development. *Id.* Subsequently, a religious organization commenced plans to build a project which would have provided housing opportunities for low and moderate income persons. *Id.* When these plans became publicly known, the area residents commenced incorporation proceedings and, in 1970, the city of Black Jack was formed. *Id.*

[77] *Id.* at 1183. The city of Black Jack, barely 3 months old, enacted an ordinance that prevented the construction of any new multiple-family dwellings and characterized existing multifamily dwellings as "nonconforming uses." *Id.*

[78] *Id.* at 1188. The Eighth Circuit, disagreeing with the district court's conclusion that the ordinance was not discriminatory, stated that the ordinance effectively prevented 85 percent of the blacks in the St. Louis area from obtaining housing in Black Jack at the time when 40 percent of them had substandard and overcrowded accomodations. *Id.* at 1186. The court therefore held that the ordinance violated Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1976 & Supp. IV 1980). 508 F.2d at 1181.

[79] *See* Town of Ouita v. Heidgen, 247 Ark. 943, 948, 448 S.W.2d 631, 634 (1970). In *Heidgen*, the residents of the Town of Ouita wished to incorporate in order to avoid the proposed annexation of the town to the nearby city of Russellville. *Id.*, 448 S.W.2d at 634. The court affirmed the denial of the petition for incorporation, however, observing that it was obvious that the rural territory sought to be incorporated was not suitable for an effective municipal government and that the petitioners were attempting to avoid the possible corporate taxes and land ordinances resulting from annexation. *Id.* Hence, it was apparent that the residents attempted to incorporate so as to avoid the disadvantages associated with the existing municipality, rather than to obtain the benefits available to a new municipal

protect special land uses[81] and, as in *Marcus v. Baron,* to circumvent a comprehensive plan.[82] Typically, when a newly formed municipal corporation successfully enacts regulations that prohibit undesirable developments and land uses, the burden of accepting such projects and uses falls upon the surrounding area.[83] Hence, it appears that although the interests of the particular community may be furthered by its incorporation, the creation of an independent governmental entity may have more wide-ranging pernicious effects.[84]

The attractiveness of municipal status has contributed to increased governmental fragmentation in the United States.[85] Such widespread fragmentation has created several obstacles to the efficient operation of metropolitan governments, including financial inequities, inequality of services, illogical apportionment of func-

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corporation. *See id.*

[80] *See* Harang v. State *ex rel.* City of West Columbia, 466 S.W.2d 8, 10 (Tex. Civ. App. 1971). Following the purchase by two Texas cities of a tract of land for use as a landfill garbage disposal area, residents of the nearby area sought to incorporate as the Village of Wild Peach. *Id.* Subsequent to the incorporation, the village passed an ordinance that would have prevented the cities from dumping garbage in the area. *Id.* The incorporation was invalidated, however, based in part upon the inability of the village to perform municipal services adequately. *Id.* at 12-13. Indeed, the evidence established that the enactment of the landfill ordinance had been the only municipal function performed by the village. *Id.* at 13.

[81] *See* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 260-61 (1963).

[82] Marcus v. Baron, 84 App. Div. 2d 118, 126-30, 445 N.Y.S.2d 587, 594-96 (2d Dep't 1981); *see* Ramapo, N.Y., [1967] N.Y. Local Laws 1909 (No. 2); *supra* text accompanying note 60.

[83] *See* Delogu, *The Dilemma of Local Land Use Control: Power Without Responsibility,* 33 ME. L. REV. 15, 17 (1981); *Zoning, supra* note 2, at 1590-91.

[84] *See* Bagne, *supra* note 8, at 272; Mandelker, *supra* note 64, at 275; Vestal, *supra* note 9, at 155.

[85] *See* D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 11 (1976). As of 1977, there were 18,862 municipalities, 3,042 counties, 16,822 townships, and 25,962 special districts in this country. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, at 309 (101st ed. 1980). More than one-half of the municipalities had populations of fewer than 1,000 persons. *Id.* at 310. The increase in the number of independent governmental entities has engendered an increase in exclusionary zoning practices. D. MANDELKER, *supra,* at 11. It has been noted that "[s]mall local governments, even with the best intentions, simply do not control enough urban space to generate land development control programs that can take areawide needs into account." *Id.* Additionally, governmental fragmentation imposes upon the larger, preexisting governmental entity, the burden of providing a variety of municipal services to the residents of the new municipality. *See* R. LIEBERT, DISINTEGRATION AND POLITICAL ACTION—THE CHANGING FUNCTIONS OF CITY GOVERNMENTS IN AMERICA 6 (1976). For example, while the municipality's residents still may travel to the central city in order to work or take advantage of recreational and cultural activities, thereby utilizing the city's police protection and roads, they avoid the concomitant responsibilities of residency in the city. *See id.*

tions, and inefficient duplicity of governance.[86] Furthermore, the local officials of each municipal government within a particular area, elected by and responsible to their own citizens, presumably are motivated to zone and plan for land uses that are consistent with their narrow scope of interest.[87] In a similar vein, the revenues required to provide a community with adequate services necessarily increase the likelihood that its officials actively will seek the development of "good tax ratables,"[88] rather than encourage the construction of such essential facilities as multiple-family dwelling units, schools, or sewage treatment plants that provide little, if any, revenue to the municipality.[89] As a result, the burden of providing for less desirable tax ratables falls upon a few communities within a particular region. If the town or county in which these communities are located has enacted a comprehensive plan providing for the even distribution of less desirable tax ratables, extensive governmental fragmentation accompanied by parochial zoning ordinances effectively may render the comprehensive plan useless.[90]

Several methods of curbing future governmental fragmentation have been proposed, including annexation of the unincorporated territory to an existing municipality and consolidation of two or more local governments.[91] Another approach which, in fact, has

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[86] Grant, *supra* note 72, at 46.

[87] *See* Cunningham, *supra* note 15, at 405-06 (municipal zoning results in a random and uncoordinated pattern of land use); Delogu, *supra* note 83, at 19-20 (local governments "have . . . interpreted their power . . . as a right to keep out what they individually do not want"); Note, *supra* note 54, at 602 (local governments zone and plan for local gain).

[88] A "good ratable" has been defined as "a piece of real estate which yields to a governmental subdivision a substantially high real estate tax revenue in relation to the expenditures for services which must be provided for such property." Rohan, *supra* note 43, at 657 n.19 (citation omitted).

[89] *See* Note, *supra* note 54, at 602. Due to the increased pressure placed upon local governments to provide adequate municipal services, and, at the same time, to avoid local property tax increases, the local government's motivation in land use planning is often fiscal in nature. *See id.* A proposed development's tax base thus may be the determining factor in the locality's ultimate land use decision. *Id.* Indeed, "[w]hen 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." Delogu, *supra* note 83, at 25.

[90] *See generally* Vestal, *supra* note 9, at 155-56 (local governments frequently are motivated by parochial short-term interests, including the direction of growth and development that is most advantageous to its own residents).

[91] *See* Mandelker, *supra* note 64, at 296-97. If an attempt to incorporate truly is motivated by a desire to obtain the benefits of municipal services, it is suggested that rather than creating a separate entity, the combination of governments or the annexation approach

been implemented, permits voters of the county to vest the taxing, zoning, and land use authority in the towns.[92] Any village that is incorporated in the county after the enactment of the statute thus would be without the potential power to thwart any of the larger area's planning.[93] It is suggested, however, that a municipal incorporation statute that embodies a meaningful review of an incorporation's impact upon the immediate and surrounding areas is a more potent method of deterring extensive governmental fragmentation[94] and of maintaining the effectiveness of existing comprehensive plans.[95]

THE INCORPORATION STATUTE AS A PLAN IMPLEMENTATION DEVICE

The potential utility of the incorporation statute as a means of furthering the goals of a comprehensive plan depends upon the character of the incorporation requirements and the system provided for reviewing the incorporation petition.[96] While a majority of the states have enacted some form of incorporation statute,[97]

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may be a reasonable alternative to incorporaton. Either of these two methods, it is submitted, would achieve the desired goal yet limit further governmental fragmentation. Rather than having two separate and independent governmental units, each concerned only with its own interests, it appears that there would be one unified governmental authority that would manage the interests of the enlarged community.

[92] In 1936, the legislature of the State of New York enacted the Alternate County Government Law, and, 2 years later, Nassau County voters elected to adopt the statute. *See* County of Nassau v. Incorporated Village of Woodsburgh, 109 Misc. 2d 299, 299, 437 N.Y.S.2d 875, 876 (Sup. Ct. Nassau County 1981), *aff'd,* 86 App. Div. 2d 856, 447 N.Y.S.2d 326 (2d Dep't 1982). As judicially interpreted, the law basically provided:

> [E]xisting and future legislation which conferred on towns powers with respect to zoning matters were to remain in force and that powers then or thereafter conferred by law on any town, board or commission thereof shall be exercised within all portions of town unincorporated as a village on date on which act became effective irrespective of inclusion thereof in a village erected or incorporated after such date.

Incorporated Village of Atlantic Beach v. Town of Hempstead, 19 N.Y.2d 929, 930, 228 N.E.2d 395, 395, 281 N.Y.S.2d 337, 337-38 (1967); *see* Garnett v. Incorporated Village of Atlantic Beach, 84 Misc. 2d 460, 462, 376 N.Y.S.2d 802, 804 (Sup. Ct. Nassau County 1975).

[93] *See supra* note 92.

[94] *See generally* Mandelker, *supra* note 64, at 276-77 (the lack of meaningful standards for incorporation "may actually facilitate the cutting up of urban areas").

[95] *See supra* notes 60-63 and accompanying text.

[96] *See infra* notes 99-105 and accompanying text.

[97] M. HILL, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 4 (1978). The restrictions placed upon the ability to incorporate are more substantive in the South, West and Northcentral regions of the United States. *Id.* at 5. The more procedural requirements exist in the statutes of the Northeastern states "probably because the region is so well established that there is little need or desire for municipalities." *Id.* It is

most of these statutes contain few, if any, meaningful substantive requirements for incorporation.[98] The Arizona statute, for example, allows a "community" composed of more than 1,500 persons to incorporate if these individuals have certain "common interests" and they "are acquainted and mingle in business, social, educational and recreational activities."[99] It appears that such requirements provide virtually no protection against defensive incorporations that are designed to circumvent existent comprehensive plans.

In contrast to Arizona's rather vague requirements, the Indiana statute sets forth detailed prerequisites to incorporation.[100] For example, the petition for incorporation itself, in addition to the standard procedural matters, must state that the incorporation "is in the best interests of the citizens of the territory."[101] More importantly, the Indiana statute particularizes the conditions which must be satisfied before the county executive may approve the incorporation. Among such conditions are the incorporating community's ability to provide adequate municipal services[102] and

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suggested that although there may, in fact, be little *need* for more municipalities in the Northeast, there nevertheless may be the *desire* for defensive incorporation. Therefore, while a substantive incorporation statute may not be necessary to halt further governmental fragmentation in the Northeast, it still has the potential to eradicate the disruptive influence that defensive incorporations have on the effective implementation of comprehensive plans.

[98] *See* Mandelker, *supra* note 64, at 276-77. Most of the state incorporation statutes require only that certain procedural standards be met prior to approval of the incorporation petition. *Id.*

[99] ARIZ. REV. STAT. ANN. § 9-101 (West Supp. 1982-1983). Although the Arizona incorporation statute appears to contain more than mere procedural requirements, it is suggested that its standards are rather broad, and, thus, open to dispute. *See id.* For examples of statutes that do not set forth even minimum substantive standards for incorporation, see ALA. CODE § 11-41-1 (Supp. 1982); MD. ANN. CODE art. 23A, §§ 20-21 (1957); N.Y. VILLAGE LAW §§ 2-200 to -202 (McKinney 1973 & Supp. 1981-1982).

[100] *See* IND. CODE §§ 36-5-1-2, -8 (1981). The petition for incorporation in Indiana must state that:

(1) the territory is urban in character;
(2) the territory is reasonably compact and contiguous;
(3) there is enough undeveloped land in the territory to permit reasonable growth of the town; and
(4) incorporation is in the best interests of the citizens of the territory.

Id. § 36-5-1-2(a). In addition, the petitioners must provide a statement to the county executive setting forth the property valuations of the territory, the municipal services to be provided and their costs, and the proposed tax rate. *Id.* § 36-5-1-3(3)-(5). For other examples of substantive incorporation statutes, see IOWA CODE ANN. §§ 368.11, .17 (West 1976 & Supp. 1982-1983); WIS. STAT. ANN. §§ 66.014, .016 (West Supp. 1982-1983).

[101] IND. CODE § 36-5-1-2(a)(4) (1981).

[102] *Id.* § 36-5-1-8(1)-(6) (listing the conditions that must exist before the county executive may approve an incorporation).

a finding by the county executive, based upon an evaluation of specified criteria, that the incorporation is in the "best interests" of the territory.[103] Similarly, the statute enacted by the Town of Ramapo contains several substantive provisions which are designed to prevent municipal incorporations that might disrupt or destroy Ramapo's comprehensive plan.[104] It is submitted, however, that the town's "over-all public interest" requirement, with no attendant guidelines by which the town supervisor is to make his determination, renders its statute vulnerable to attack for arbitrariness. As in *Marcus v. Baron,* the supervisor's denial of an incorporation, though based upon legitimate concerns, might be viewed as an attempt by one governmental entity to preclude the creation of another for purely parochial reasons.[105] Therefore, while the Indiana and Ramapo statutes may serve to reduce the probability of defensive incorporation, it is suggested that a more stringent standard of review is necessary to eradicate the potential abuse of the municipal form of government.

PROPOSED MODEL INCORPORATION STATUTE

In this section of the Note a model incorporation statute is proffered. The statute combines the best elements of the existing statutes of several states and sets forth a series of procedural and substantive requirements that must be satisfied prior to approval

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[103] *Id.* As a prerequisite to the attainment of municipal status, the county executive must find that the proposed incorporation is in the "best interests" of the subject territory, based upon the following criteria:

> (A) the expected growth and governmental needs of the area surrounding the proposed town;
>
> (B) the extent to which another unit can more adequately and economically provide essential services and functions; and
>
> (C) the extent to which the incorporators are willing to enter into agreements . . . with the largest neighboring municipality.

Id.

[104] *See supra* note 62 and accompanying text.

[105] *See* Marcus v. Baron, 84 App. Div. 2d 118, 138-39, 445 N.Y.S.2d 587, 601 (2d Dep't 1981) (Hopkins, J., dissenting). In *Marcus,* the dissent urged that the question whether Ramapo's incorporation statute is valid should be left to the legislature, contending:

> [T]he legislature might well consider that to allow towns to adopt local laws raising a variety of conditions to the creation of villages in addition to those imposed by the Legislature, would unduly interfere with the desirable standard of uniformity of method for the creation of villages throughout the State, and would inaugurate a parochial resistance by towns to new villages through the formation of difficult or oppressive conditions.

Id. (Hopkins, J., dissenting).

of an incorporation petition. If the petitioning community fails to adhere to the statutory requirements, the reviewing government officials would be required to reject the proposed incorporation. The community thus would remain part of the larger governmental entity, thereby preventing further governmental fragmentation and mandating compliance with any existing comprehensive plan in the area.

§ 1. Petition For Municipal Incorporation

(a) Every petition for incorporation shall:

(1) bear a number of signatures equivalent to 30% of all votes cast from the unincorporated area proposed for municipal status at the last congressional election, or 3,000 signatures, whichever is less, except that there must be at least ten signatures from each of at least 50% of the voting districts within the area. Only the signatures of those registered voters who are residents of this territory are to be included for purposes of this section;[106]

(2) state the name of the proposed municipality.

(b) Every petition for incorporation shall be accompanied by the following:

(1) a general statement of the proposal,[107] including the petitioners' motives in seeking to incorporate;

(2) a report of an accurate and current census taken of the resident population of the territory which shall show the number of persons then belonging to every family in such territory;[108]

(3) a map of the territory;[109]

(4) a report of the assessed valuation of platted and unplatted land within the territory;[110]

(5) a report describing existing municipal services, including but not limited to sewage treatment and disposal, water supply, police and fire protection, and health services;[111]

(6) a statement of intent to comply with any town, county, state, or regional comprehensive plan then in existence and covering the subject territory;

(7) a report enumerating the present and potential

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[106] *See* UTAH CODE ANN. § 10-2-101 (Supp. 1981).

[107] *See* IOWA CODE ANN. § 368.11 (West 1976 & Supp. 1982-1983).

[108] *See* WYO. STAT. § 15-1-202(ii) (1977).

[109] *See* IOWA CODE ANN. § 368.11 (West 1976 & Supp. 1982-1983).

[110] *See id.*

[111] *See id.*; VA. CODE §§ 15.1-875 to -876, -881 (1981).

sources of tax revenue and the projected tax rate;[112]

(8) a copy of the notice required to be posted and an affidavit showing compliance with the posting requirements of section 4.[113]

§ 2. Dismissal of Petition

(a) If the petition for incorporation fails to meet the requirements of the preceding section, the board of commissioners [or similar governing body] shall:

(1) dismiss the petition; and

(2) file for inclusion in the record a statement relating the reasons for the dismissal; and

(3) give prompt notice to the parties of its decision.

(b) If the petition for incorporation is not dismissed, the board must within a reasonable time initiate proceedings to determine the merits of the proposed incorporation.[114]

§ 3. Formation of Committee

(a) Upon the board's decision to initiate proceedings toward the incorporation of a territory, the board shall designate local representatives to serve with board members as a committee to consider the proposal. Each local representative must be a qualified elector of the territory he or she represents. The board shall direct the appointment of one local representative from each town or county involved. Each local representative serving on the committee shall receive reimbursement for any actual and necessary expenses spent in performance of committee duties.[115]

(b) Two board members and at least one-half of the appointed local representatives are required for a quorum of the committee.[116]

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[112] *See* WIS. STAT. ANN. § 66.016(2)(a) (West 1965). It is submitted that full disclosure of present and potential sources of tax revenue will provide the reviewing body with the information necessary to determine whether the proposed municipality would be financially capable of supporting adequate governmental services. In addition, it is suggested that a report of the projected tax rate would enable the reviewers to surmise the type of residents or businesses that the incorporators are attempting to attract or exclude.

[113] *See* WYO. STAT. § 15-1-204 (1977).

[114] *See* IOWA CODE ANN. § 368.12 (West 1976 & Supp. 1982-1983).

[115] *See id.* § 368.14. It is suggested that the formation of a committee comprised of members of the local governing body and other designated local representatives will serve to maintain sufficient resident input into the determination of the merits of the proposed incorporation. The proffered statute, by mandating that local representatives receive reimbursement for their expenses, seemingly would encourage active participation in the incorporation proceedings and deter allegiance to special interest groups.

[116] *See id.*

§ 4. Notice and Public Hearing

(a) A copy of the petition for incorporation, the general statement of the proposal, and the map of the subject territory shall be filed in the office of the county clerk of the county in which the territory is located.[117]

(b) A public hearing shall be conducted by the committee as soon as reasonably practicable after the proceedings for incorporation are initiated.[118]

(c) Notice of the time and place of the public hearing shall be served upon any state or regional planning authority, and upon any town, village, or county board of commissioners whose area of responsibility may be affected by the proposed incorporation.[119] In addition, such notice shall be posted in three public places in the subject territory and shall be published for one week in a newspaper having a general circulation in the territory.[120] Such notice also shall include a statement of compliance with the filing requirements of subsection (a) of this section.

(d) In conducting the public hearing, the committee shall have the power to subpoena witnesses and documents relevant to the proposal and shall accept briefs and hear arguments of interested parties.[121]

§ 5. Committee Decision

Following the completion of a full and fair public hearing on the merits of the proposal, the committee shall decide whether or not the incorporation would be in the best interests of the subject territory, the town or county of which it forms a part, and the surrounding region.[122] Approval of the proposed incorporation is conditioned upon the committee's decision. A determination that an incorporation would be in the best interests of the aforemen-

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[117] *See generally* WYO. STAT. § 15-1-203 (1977) (copy of survey, map, and census shall be filed with the county clerk).

[118] *See* IOWA CODE ANN. § 368.15 (West 1976 & Supp. 1982-1983). It is submitted that a public hearing on the merits of the proposed incorporation is essential to ensure that all interested and affected persons are given an opportunity to be heard. Such a hearing thus promotes a responsive body politic, one of the desirous characteristics of local government. *See generally* Grant, *supra* note 72, at 47-50 (one of the primary reasons for a community's incorporation is the governmental independence that is obtained by incorporation).

[119] *See* IOWA CODE ANN. § 368.15 (West 1976 & Supp. 1982-1983). The requirement that notice of the public hearing be given to any interested planning or governing authorities apparently ensures that the residents of the surrounding areas of the territory will be represented at the public hearing. This, in turn, would avoid a strictly parochial approach to the determination of the merits of the proposed incorporation.

[120] *See id.*; WYO. STAT. § 15-1-203 (1977).

[121] *See* IOWA CODE ANN. § 368.15 (West 1976 & Supp. 1982-1983).

[122] *See* IND. CODE § 36-5-1-8(6) (1981); *supra* note 100.

tioned areas must be supported by the following:

(a) a favorable recommendation of the state or regional planning authority for the area, including a statement of compliance with any comprehensive land use plans then in existence in the area;[123]

(b) a finding that the level of governmental services needed or desired by the residents of the territory can be adequately provided by the proposed municipality,[124] such services including but not limited to the following:

(1) police and fire protection;
(2) street construction, maintenance, and lighting;
(3) sanitary and storm sewers and garbage disposal;
(4) health protection;
(5) parks and recreation;
(6) schools and education;
(7) planning, zoning, and subdivision control;
(8) utility services;[125]

(c) a finding that the services required by the residents of the subject territory cannot be provided by alternate means, such means including but not limited to annexation, the establishment of a sanitary district, or extension of existing services provided by the county in which the territory is located.[126]

(d) a finding that the proposed incorporation would not substantially hinder the solution of governmental problems, financial or otherwise, affecting the remainder of the town or county from which the territory is to be incorporated, as well as the surrounding region;[127]

(e) a finding that the present and potential sources of tax revenue would be sufficient to meet the anticipated cost of adequate municipal services at a local tax rate which compares favorably with the tax rate imposed in a similar area for the same level of services.[128]

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[123] *See* IOWA CODE ANN. § 368.16 (West 1976 & Supp. 1982-1983). It is submitted that the requirement of a statement of compliance with any existing comprehensive plans in the area ensures that defensive incorporations designed to circumvent such plan will be prevented. *See supra* note 62 and accompanying text.

[124] *See* WIS. STAT. ANN. § 66.016(2)(b) (West 1965).

[125] *See* IND. CODE § 36-5-1-8(4) (1981).

[126] *See* VA. CODE § 15.1-967 (1981).

[127] *See* WIS. STAT. ANN. § 66.016(2)(c)-(d) (West 1965). The committee should be required to examine the possibility that a proposed incorporation would aggravate existing problems in the larger area of which the territory is a part, as well as the possibility that such incorporation would thwart any efforts being made to alleviate these problems. *See generally* Marcus v. Baron, 84 App. Div. 2d 118, 128-30, 445 N.Y.S.2d 587, 595-96 (2d Dep't 1981); *supra* notes 61-63 and accompanying text.

[128] *See* WIS. STAT. ANN. § 66.016(2)(a) (West 1965).

§ 6. Appeal

A surrounding village, town, or county, or a resident or property owner in the territory involved, may appeal a decision of the board or committee to the court of a county which contains a portion of any territory involved. Appeal must be filed within thirty (30) days of the filing of the committee's decision. Appeal of a committee's approval of an incorporation does not stay the creation of the municipality.[129]

Assuming that a substantive incorporation scheme is drafted, the issue arises as to which level of the legislature is best suited to enact and enforce such a statute. The resolution of this question seemingly hinges upon the broader inquiry into whether land use planning itself should be handled on a local, state, or national level. Historically, land use decisions have been made at the local level, and such decisions have received strong deferential treatment by the courts.[130] The current political emphasis on decentralization and return to local control may serve to continue this practice.[131] It should be noted, however, that local autonomy in the land use area may result in the abuse of home rule powers.[132]

Demonstrative of a locality's abuse of power is the practice of exclusionary zoning.[133] Motivated by prejudice or its desire to maintain the status quo or increase its revenues, a local government often enacts ordinances that are designed to exclude, for example, unwanted public facilities or low-cost housing.[134] Such leg-

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[129] *See* IOWA CODE ANN. § 368.22 (West Supp. 1982-1983).

[130] *See supra* note 8.

[131] *See* Delogu, *supra* note 83, at 16. It has been argued that traditional local autonomy in the land use realm has, in fact, been strengthened by the nation's growing dissatisfaction with big government. *Id.* Nevertheless, the states recently have become more involved in land use planning. *See infra* note 142 and accompanying text.

[132] *See* 5 P. ROHAN, *supra* note 21, § 33.01[1], at 33-4, -5; Freilich & Larson, *Conflicts of Interest: A Model Statutory Proposal for the Regulation Of Municipal Transactions*, 38 UMKC L. REV. 373, 375 (1970); *Zoning, supra* note 2, at 1590-92. Most of the criticism of local autonomy in the land use area centers on the tendency of local governments to be concerned primarily with fiscal matters and only secondarily with environmental, housing, and other regional needs. *See Zoning, supra* note 2, at 1590-92.

[133] *See* Heyman, *supra* note 52, at 53-54. The utilization of local land use control as an exclusionary tool has been widespread. *Id.* at 54. One commentator, in attempting to explain the reasons for the desire to live in a "homogeneous" area, stated that "many whites want to live apart from blacks . . . ; many blacks want to live apart from whites; many middle- and upper-income people want to live apart from lower-income people; ethnic enclaves have a tendency to persist, for both inclusionary and exclusionary reasons." *Id.* at 53.

[134] *See* 5 P. ROHAN, *supra* note 21, § 33.01[1], at 33-5 n.5; *Zoning, supra* note 2, at 1590. While local ordinances frequently are designed to exclude undesirable uses or projects, they often make special exceptions for businesses and industries so as to increase tax revenues

islation either may ensure that a project will never reach fruition or, at the very least, transfer the responsibility for a needed development to another governmental entity.[135] To be sure, the range of activities and types of development that have been the targets of exclusionary zoning are expansive.[136]

Local control over land use decisions has been criticized on the additional ground that the local decisionmakers lack planning expertise.[137] Because their decisions seriously may affect environmental concerns of the region or state, as well as those of the particular locality, the officials' lack of expertise may disrupt or destroy future land use planning efforts.[138] Accordingly, it is suggested that, prior to enacting a comprehensive plan or making any significant land use decision, the local government should employ planning experts to draft a plan or ordinance that will protect local interests and minimize the adverse impact upon surrounding areas. Indeed, this approach to local land use planning was utilized by the Town of Ramapo,[139] which itself has become " 'renowned in planning circles throughout the United States for the consistency of its policies and the farsighted planning and development programs which it has initiated.' "[140]

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and jobs for the community. *See* 5 P. ROHAN, *supra* note 21, § 33.01[1], at 33-5 n.5; *Zoning, supra* note 2, at 1590.

[135] *See* Delogu, *supra* note 83, at 17.

[136] *See, e.g.*, Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 330-32 (5th Cir. 1981) (abortion clinic); Crow v. Brown, 457 F.2d 788, 789-90 (5th Cir. 1972) (low-income housing); Scherrer v. Board of County Comm'rs, 201 Kan. 424, 441 P.2d 901, 901 (1968) (mobile home park); Mayor v. State, 281 Md. 217, 222-24, 378 A.2d 1326, 1328-30 (1977) (prison); Fitchburg Hous. Auth. v. Board of Zoning Appeals, 380 Mass. 869, 406 N.E.2d 1006, 1010 (1980) (home for retarded persons); Town of Oronoco v. City of Rochester, 293 Minn. 468, 471-72, 197 N.W.2d 426, 429-30 (1972) (waste treatment plant).

[137] *See* Freilich & Larson, *supra* note 132, at 375. Usually, the majority of local officials are merely "part-time" leaders, and only about one-half of them receive a salary for their services. *Id.* As a result of the informality of the local officials' position, as well as their general lack of professional training, they frequently are subject to influence by private interests. *Id.*

[138] *See* Comment, *The Duty of a Municipality to Consider the Environmental Effect of its Land Use Planning Decisions Upon the Regional Welfare: Judicial Balancing in the Absence of Interjurisdictional Planning Legislation*, 25 WAYNE L. REV. 1253, 1271 (1979). The environmental effects of a particular land use decision may be felt beyond municipal borders and should, therefore, be considered by the decisionmakers. *Id.*

[139] *See* Freilich, *supra* note 58, at 123-24. In addition to hiring knowledgeable planners, the Town of Ramapo commissioned several studies to provide information on sewerage and drainage systems in order to provide for maximum development. *Id.* at 124.

[140] Marcus v. Baron, 84 App. Div. 2d 118, 127, 445 N.Y.S.2d 587, 594 (2d Dep't 1981) (quoting John P. McAlevey, former Town Supervisor of the Town of Ramapo).

The primary advantage of land use planning on the local level is that local officials, elected by the people who will be most directly affected by their decisions, have the power to legislate for the community's needs.[141] Nevertheless, the states increasingly have become involved in land use planning so as to curb ad hoc, local decisionmaking in this area.[142] Although state involvement may conflict with the concept of municipal home rule,[143] the states have the power to preempt local governments in matters of state or general concern.[144] Thus, land use decisions that have effects beyond municipal boundaries are properly within state control.[145] In fact, state preemption already has been successfully implemented in several areas involving environmental concerns, where "statewide treatment" was deemed necessary.[146]

Those states that have become involved in land use planning have taken divergent approaches.[147] For instance, California, by requiring the development of local comprehensive plans, is involved directly in local land use planning. Zoning ordinances and subdivision approvals must be consistent with the state-mandated general city or county comprehensive plan[148] and, in the housing area,

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[141] *See* Vestal, *supra* note 9, at 174. When a local government effects a particular measure, residents of the community are reassured that they retain some control over the affected aspect of their lives, and that at least one level of government is responsive to their needs. *See id.*

[142] *See* C. WEAVER & R. BABCOCK, *supra* note 68, at 246. It has been noted that recently there has been a shift from local control to state control in the area of land use regulation. *Id.*; *see* Comment, *supra* note 55, at 1154-55.

[143] *See supra* note 65 and accompanying text.

[144] *See, e.g.*, Mental Health Ass'n of Union County, Inc. v. City of Elizabeth, 180 N.J. Super. 304, 309, 434 A.2d 688, 690 (Super. Ct. Law Div. 1981) (New Jersey statute "has preempted the field of zoning for community residences for the developmentally disabled"); Township of Little Falls v. Bardin, 173 N.J. Super. 397, 412-13, 414 A.2d 559, 566-67 (Super. Ct. App. Div. 1979) (state law preempted local law regarding solid waste disposal because of the need for statewide treatment). *See generally* Andersen, *supra* note 65, at 147-48 (those matters that can be characterized as strictly "local" are decreasing).

[145] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) ("the general public interest [may] so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way"); Comment, *supra* note 138, at 1260. It is submitted that the limiting language of municipal home rule provisions and the enabling acts, together with the Supreme Court's recognition of a "general public interest," would aid in defeating any challenge to state action in the land use realm on the basis of a conflict with home rule powers.

[146] *See supra* note 144 and accompanying text.

[147] *See generally* 5 P. ROHAN, *supra* note 21, § 33.03, at 33-56; Sullivan & Kressel, *supra* note 28, at 66.

[148] *See* CALIFORNIA PLANNING LAW, *supra* note 30, at 3-4. California requires that mandatory comprehensive plans contain nine elements, with the inclusion of additional ele-

there is an affirmative duty to consider regional needs.[149] Several jurisdictions, moreover, have instituted land use planning on a statewide level, with administration and review conducted by a state agency.[150] Oregon's system of planning,[151] for example, includes mandatory local comprehensive plans that comply with statewide goals and are reviewed and enforced by a state agency comprised of seven governor-appointed citizens.[152] The Oregon scheme successfully has withstood challenges based upon alleged conflicts with home rule provisions, allegations of unconstitutional taking, and claims that it involved an unlawful delegation of authority.[153]

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ments at the locality's option. *See* CAL. GOV'T CODE §§ 65302-65303 (Deering 1979 & Supp. 1982); CALIFORNIA PLANNING LAW, *supra* note 30, at 5. The required elements deal with land use, circulation, housing, conservation, open space, seismic safety, noise, scenic highways, and safety. *See* CALIFORNIA PLANNING LAW, *supra* note 30, at 5. Among the optional elements are recreation, transit, and historical preservation. *Id.* at 6.

[149] CALIFORNIA PLANNING LAW, *supra* note 30, at 10-a. The housing element to be included in local comprehensive plans has been one of the most controversial in California's land use legislation. *Id.* As of 1981, the local government must assess the housing needs of all of the economic classes in the community and must develop a plan to meet these needs. *Id.* The community's "fair share" of the regional housing need, as determined by an independent council of governments, is a factor that must be considered in the evaluation of these housing needs. *Id.* The locality's program subsequently "is developed by identifying adequate sites for a variety of types of housing for all income levels, by addressing governmental constraints to the development of housing, by conserving and improving the condition of existing affordable housing stock and by promoting housing opportunities for all persons in the community." *Id.*

[150] *See* COLO. REV. STAT. §§ 24-65-101 to -104, 24-65.1-101 to -502 (1974 & Supp. 1981); HAWAII REV. STAT. §§ 205-1 to -37 (1968 & Supp. 1981); ME. REV. STAT. ANN. tit. 5, §§ 3310-3314 (1981); *id.* tit. 12, §§ 685-A to -C (1981 & West Supp.); OR. REV. STAT. §§ 197.005-.650 (1981); VT. STAT. ANN. tit. 10, §§ 6001-6092 (Supp. 1982). As of early 1981, state legislation mandating land use planning had been enacted by 18 states. Mandelker & Netter, *Comprehensive Plans and the Law,* in LAND USE LAW: ISSUES FOR THE EIGHTIES 55, 70 (E. Netter ed. 1981).

[151] *See* HANDBOOK, *supra* note 2, § 8.02, at 112. Local governments in Oregon retain their decisionmaking powers as to land use provided that their decisions comply with the goals set forth by the Land Conservation and Development Commission (LCDC). *See id.* The goals are not site-specific and are designed to be flexible. *Id.* § 8.06, at 117.

[152] *See id.* § 8.05, at 116. The state agency in Oregon that reviews and enforces the local comprehensive plans is the LCDC, and it consists of seven citizens. *Id.* The seven citizens are governor-appointed and, after senate confirmation, serve staggered 4-year terms. *Id.*

[153] *See* Fifth Ave. Corp. v. Washington County, 282 Or. 591, 613, 581 P.2d 50, 62-63 (1978) (Oregon scheme is not an unconstitutional "taking"); City of La Grande v. Public Employees Retirement Bd., 281 Or. 137, 156, 576 P.2d 1204, 1215 (1978) (two principles applicable to the determination whether state legislation encroaches upon municipal home rule powers); Meyer v. Lord, 37 Or. App. 59, 64-65, 586 P.2d 367, 371-73 (Ct. App. 1978) (authority of state agency to set planning goals upheld). It has been stated that as a result of Oregon's land use legislation, "[t]he state is a better place to live now and in the future

A less comprehensive alternative that a state may choose is selective land use control.[154] Florida's planning program, for example, is designed to protect "areas of critical state concern" and to govern those developments that have a "regional impact."[155] While the state provides a number of planning guidelines to be followed for such areas, land use decisions that do not affect either of these two concerns are made at the local level.[156]

Finally, a state may assert direct control over a particular region within the state which is deemed to be in need of special protection. In New York, for example, the Adirondack Park Agency was created[157] so as to obviate the uncontrolled growth and development of approximately six million acres of wilderness area which was under the jurisdiction of 119 separate governmental units.[158] In order to accomplish this goal, the state empowered the agency to "adopt and implement a comprehensive land use control system for the dual purpose of preserving and using the vast resources of the area."[159] This approach has been challenged unsuccessfully as an unconstitutional infringement of the local government's home

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because it [is] able to move beyond local politics and deal with the problems associated with growth and pollution in a rational and balanced way." HANDBOOK, *supra* note 2, § 8.15, at 125.

[154] *See generally* 5 P. ROHAN, *supra* note 21, § 33.05. The American Law Institute's Model Land Development Code would extend a state agency's land use authority to areas of "critical state concern" and "developments of regional impact." MODEL LAND DEV. CODE art. 7 commentary at 253 (1976). The draftsmen believed that such a restriction would balance the need for state participation in land use planning with the desire for local autonomy. *See id.* Although the Model Code has been adopted by several states, the omissions or modifications of its various sections have lessened the impact that it otherwise would have had on land use planning. *See* Comment, *supra* note 55, at 1174-75.

[155] *See* FLA. STAT. ANN. §§ 380.05-.06 (West Supp. 1982). A "critical area" has been described as "a geographical area possessing unique characteristics which make it of significant interest to inhabitants of the state or region beyond the boundaries of local governments within whose jurisdictions part of the area is located." Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URB. L. ANN. 3, 4 (1980) (footnotes omitted). Florida's land use legislation was enacted in reaction to a severe drought that extended to three populous counties and was caused by the drainage, dredging, and filling of area wetlands. *See* 5 P. ROHAN, *supra* note 21, § 33.05[2], at 33-110 (footnotes omitted). The legislature subsequently appointed a task force to devise a management system that would avoid similar problems in the future. *See id.*

[156] *See* 5 P. ROHAN, *supra* note 21, § 33.05[2], at 33-110; Pelham, *supra* note 155, at 4.

[157] *See* N.Y. EXEC. LAW § 801 (McKinney Supp. 1972-1978); *see also* 1977 Mass. Acts 1083-86 (creating the Martha's Vineyard Commission); N.J. STAT. ANN. § 13: 17-1 (West 1979) (creation of the Hackensack Meadowland District).

[158] *See* Pelham, *supra* note 155, at 6.

[159] *Id.* at 6-7. Any comprehensive land use system adopted and implemented by the governing agency is binding upon all affected local governments. *See id.* at 7.

rule powers.[160] Seemingly, therefore, the land use legislation adopted by the various states illustrates the heightened awareness of the need for some form of regulation or guidance at other than the local level.[161]

The recognition of the need for planning that considers the effects of land use decisions on areas beyond municipal borders also has brought about a call for involvement on the federal level.[162] In the early 1970's, national legislation that would have provided for considerable state involvement in planning and federal review of land use programs was introduced in the House of Representatives.[163] Because it was feared that every land use decision eventually would be subject to federal control, however, such legislation never was passed.[164] Notwithstanding the lack of comprehensive federal legislation, there are several national programs that indirectly require local planners to consider the ramifications of their land use decisions.[165] Mass transit as well as water and sewer projects, for example, are entitled to federal funding provided that a regional planning body for the particular area exists

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[160] *See* Wambat Realty Corp. v. State, 41 N.Y.2d 490, 497, 362 N.E.2d 581, 584, 393 N.Y.S.2d 949, 954 (1977); Comment, *supra* note 65, at 399.

[161] *See* Mandelker, *supra* note 15, at 952. It is generally agreed that *all* local autonomy in the land use area should not be forfeited. *Id.* Indeed, local officials should retain the authority to make general decisions that primarily will affect only the immediate community. *Id.* When matters of statewide or regional concern must be dealt with, however, local governments are seen as inappropriate entities to resolve the problems. *See id.* at 952-53; *Zoning, supra* note 2, at 1592 (1978).

[162] *See* C. WEAVER & R. BABCOCK, *supra* note 68, at 244-45. The increased state involvement in the land use area was accompanied by a movement to institute some form of federal land use program. *See id.* The mounting pressure for higher governmental participation caused "[s]uburban municipalities [to feel] about as comfortable as a capitalist in the waning days of Romanov Russia as the reports of their land use excesses and the news of the 'Quiet Revolution' spread at the same time." *Id.* at 245.

[163] *See* R. LINOWES & D. ALLENSWORTH, THE POLITICS OF LAND-USE LAW 1 (1976). The proposed national land use legislation was "to be exercised over 'critical areas' in the states or 'areas of more than local concern' . . . ." *Id.* at 2. Not so suprisingly, "[g]iven this 'definition,' there was in reality no way of knowing what a critical area was and therefore no hope of limiting the controls therein." *Id.*

[164] *See supra* note 163. It has been suggested that pervasive federal involvement in the land use area is undesirable because local resistance to such extensive intervention would be substantial. *See Zoning, supra* note 2, at 1592 ("the regulated landowners might feel that they have more of a voice in state, as compared to federal, decisionmaking, and as a result acceptance and compliance might be better assured by state control").

[165] *See, e.g.*, Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5320 (1976 & Supp. IV 1980). As of 1976, there were some 32 separate federal programs that sought to impose regional concerns on local planning. *See* Godschalk & Brower, *Beyond the City Limits: Regional Equity as an Emerging Issue*, 15 URB. L. ANN. 159, 161-63 (1978).

and reviews the applications for federal assistance.[166] Similarly, the United States Department of Housing and Urban Development (HUD) "701 program" provides federal assistance with respect to various state, local, and regional planning activities.[167]

In sum, it is clear that the relative advantages and disadvantages of each form of governmental control must be weighed prior to determining the most appropriate vehicle to effect and implement land use decisions. It has been suggested that although special interests are influential at the local level, such interests may be present at the state or national level as well.[168] It is submitted, nonetheless, that in order to diminish ad hoc, parochial land use decisionmaking and to promote rational, regional planning, state intervention, including a provision for mandatory local comprehensive planning with state agency reviews of the adopted plan and its implementation, is necessary.[169] This, it is suggested, permits the continuance of local control over matters having strictly local ramifications, yet guards against the usurpation of regional and state interests. It is submitted, moreover, that a state program for managing land use planning should include a substantive incorporation statute similar to the one proposed in this Note. As suggested earlier, such a statute would prevent defensive incorporations designed to circumvent the mandatory comprehensive plan, as well as curtail the further proliferation of governmental fragmentation.

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[166] Bagne, *supra* note 8, at 295.

[167] 40 U.S.C. § 461 (Supp. IV 1980); 5 P. ROHAN, *supra* note 21, § 33.01[1], at 33-11 n.21.

[168] *See* R. LINOWES & D. ALLENSWORTH, *supra* note 163, at 3. Special interest groups are influential at all levels of government. *Id.* It is interesting to note that members of the land development industry were among the proponents of national land use legislation. *Id.* at 6.

[169] *See* Mandelker, *supra* note 15, at 951-53. It appears that state participation in land use decisions that have an impact beyond local borders would not be without historical counterparts. One commentator has observed:

> One of the first examples of this was the state participation in highway construction and regulation. As soon as the motor vehicle became a significant factor, there was pressure for the formation of a state agency to take control of the highway system. Within recent years the same pressures have been felt in the area of public education. Matters which formerly were left to local units are now under the control of larger regional units. The same development has occurred in police work. . . . In matters of pollution control we are also moving from the local entities to broader statewide agencies.

Vestal, *supra* note 9, at 174 (footnotes omitted). It is submitted that the problem of ad hoc, parochial land use planning and government fragmentation similarly are deserving of state involvement.

THE ROLE OF THE JUDICIARY

Although substantial state involvement is the contemplated ideal, land use planning continues to be conducted at the local level in a majority of the states.[170] Additionally, most states lack the substantive incorporation statute necessary to stem governmental fragmentation and to promote effective comprehensive planning.[171] Hence, the burden of determining the validity of land use decisions often is placed upon the judiciary. Faced with this task, the Supreme Court, once hesitant to become involved in zoning and land use disputes at all,[172] has been reluctant to question the judgment of local officials in these areas.[173] In the recent case of *Agins v. City of Tiburon*,[174] for instance, the Court, confronted with the question whether certain zoning regulations amounted to an unconstitutional taking, stated that ordinances "are exercises of the city's police power to protect the residents . . . from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate."[175] By deferring to the judgment of the local officials and sustaining the validity of the zoning scheme, the Court clearly indicated its unwillingness to decide land use controversies.[176]

The inactive review policy espoused by the Supreme Court

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[170] *See* Vestal, *supra* note 9, at 161.

[171] *See supra* notes 97-99 and accompanying text.

[172] R. FREILICH & E. STUHLER, *supra* note 46, at 3.

[173] *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 52-53 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 396-97 (1926). In *Belle Terre*, the Court indicated that the state's police power, as delegated to its local governments, permits the enactments of zoning ordinances that are intended to preserve the aesthetic values of a community. 416 U.S. at 9. In upholding an ordinance that restricted all land use to one-family dwellings, the Court stated that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.*

[174] 447 U.S. 255 (1980).

[175] *Id.* at 261 (footnotes and citations omitted). The plaintiff in *Agins* purchased 5 acres of vacant land intending to use it for residential development. *Id.* at 257. Subsequent to the purchase, and pursuant to California's statutory mandate, the city of Tiburon prepared a general plan governing land use in the community. *Id.* Various local ordinances adopted in accordance with this plan effectively modified existing zoning regulations and restricted the plaintiff to the construction of five single-family dwellings on his property. *Id.* The Court, reasoning that the plaintiff had not been deprived of all reasonable use of his property, rejected the plaintiff's contention that there had been an unconstitutional taking of his land. *Id.* at 262.

[176] *See id.* at 260-61 (a court does not look beyond the issue of the proper exercise of the town's authority under its police power).

and a large majority of the state courts reflects the belief that the legislature is, perhaps, better suited to regulate the area of land use planning.[177] This view is shared even by the few courts which have played an active role in this area.[178] Both factions seemingly recognize that the legislature is not limited to the resolution of a narrow issue, but rather may develop a "broad multifaceted approach"[179] to land use problems. Additionally, the legislature typically has access to a "much broader range of informational sources and expertise" from which it can fashion a solution and is "often better equipped to handle politically sensitive issues."[180]

It is suggested, however, that in the absence of substantive state guidance, courts examining the validity of local land use enactments should look beyond the specific legislation in question to the policy reasons underlying its enactment and to the regional general welfare.[181] This judicial standard of review was exemplified in *Marcus v. Baron.* In that case, the court, upholding the validity of the Town of Ramapo's village incorporation statute, considered

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[177] *See, e.g.,* Copley Memorial Hosp., Inc. v. City of Aurora, 99 Ill. App. 3d 217, 221, 425 N.E.2d 493, 496-97 (App. Ct. 1981); Munch v. City of Mott, 311 N.W.2d 17, 22 (N.D. 1981). In *Copley,* the court defined the judicial role in land use regulation in the following manner:

> It is primarily the province of the municipal body to determine the use and purpose to which property may be devoted, and it is neither the province nor the duty of the courts to interfere with the discretion with which such bodies are vested unless the legislative action of the municipality is shown to be arbitrary, capricious or unrelated to public health, safety and morals.

99 Ill. App. 3d at 221, 425 N.E.2d at 497 (citation omitted).

[178] Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 505 n.10, 371 A.2d 1192, 1237 n.10 (1977) (Pashman, J., concurring in part and dissenting in part) (in the absence of remedial legislative action, courts must act to end exclusionary land use policies).

[179] *See infra* note 181 and accompanying text.

[180] Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 505 n.10, 371 A.2d 1192, 1237 n.10 (1977) (Pashman, J., concurring in part and dissenting in part).

[181] *See, e.g.,* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 179-80, 336 A.2d 713, 727-28 (zoning ordinance invalidated because it failed to provide for regional general welfare and regional needs), *cert. denied,* 423 U.S. 808 (1975); Marcus v. Baron, 84 App. Div. 2d 118, 131-32, 445 N.Y.S.2d 587, 597 (2d Dep't 1981) (town incorporation statute upheld as a legitimate planning measure that took regional needs into account). Regional general welfare has evolved into an aspect of substantive due process. R. FREILICH & E. STUHLER, *supra* note 46, at 13. The regional needs approach requires that "an exercise of zoning authority must be in accordance with the needs and welfare of the state as a whole rather than limited to the territorial confines of the jurisdiction itself." *Id.* at 13-14. Such needs must be considered by the local government "[s]ince the state has delegated its power to the municipality . . . ." *Id.* Several cases illustrate the application of the regional general welfare approach. *See, e.g.,* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 531-36, 371 A.2d 1192, 1216-19 (1977); Borough of Allendale v. Township Comm., 177 N.J. Super. 230, 233, 426 A.2d 73, 75 (Super. Ct. App. Div. 1981); Berenson v. Town of New Castle, 38 N.Y.2d 102, 109-10, 341 N.E.2d 236, 241-42, 378 N.Y.S.2d 672, 680 (1975).

the substantial policy reasons behind the enactment of the statute, including the desire to prevent defensive incorporations that might disrupt the planning efforts embodied in Ramapo's comprehensive plan.[182] Furthermore, noted the court, the effects of the incorporation statute on the entire community, not merely the unincorporated areas, must be evaluated.[183] It is submitted that the courts' employment of this two-pronged approach ensures that, while legislation that merely promotes parochial interests will be struck down, the rational and regionally responsive planning schemes of local communities will not be invalidated unnecessarily.

While a court may invalidate a local enactment as exclusionary or contrary to the regional welfare, there nevertheless remains the possibility that such a determination will provide little relief to the challenging party. Indeed, this situation might result from the municipality's ability to delay or prevent the proposed development or project.[184] To remedy this injustice, several courts have transgressed their traditional role in land use disputes and granted these plaintiffs affirmative relief,[185] thereby preventing further

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[182] 84 App. Div. 2d at 118, 445 N.Y.S.2d at 594-97.

[183] *See id.*

[184] *See* Hartman, *Beyond Invalidation: The Judicial Power to Zone*, 9 URB. L. ANN. 159, 161-62 (1975). The Pennsylvania case of Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), illustrates the ordeal that a "successful" plaintiff must endure once the challenged ordinance has been invalidated. In *Girsh*, the plaintiff wanted to erect an apartment building on his property, but was prevented from doing so by the township's zoning ordinances. *Id.* at 240, 263 A.2d at 396. The court's invalidation of the ordinance was followed by a chaotic series of events. The town rezoned the area for apartments, but excluded the plaintiff's property. *See* Hartman, *supra*, at 161-62. The plaintiff then sought unsuccessfully to get a writ of mandamus to compel the issuance of a permit. *Id.* The town subsequently attempted to condemn the plaintiff's property for public purposes. *Id.* The plaintiff thereafter commenced a suit to prevent the condemnation and to challenge the town's various actions. *Id.* The Pennsylvania Supreme Court finally ordered the issuance of building permits, *id.*, but unfortunately, after 5 years of litigation, the development of the plaintiff's property was rendered economically unfeasible, *id.* at 162.

[185] *See, e.g.*, City of Birmingham v. Morris, 396 So. 2d 53, 58 (Ala. 1981); Kruvant v. Mayor, 82 N.J. 435, 445, 414 A.2d 9, 14 (1980). In *Morris*, the plaintiffs were owners of two adjoining lots that were zoned for multiple dwelling residential use. 396 So. 2d at 54. The plaintiffs' application for a change of the zoning classification to "neighborhood business" was denied by both the planning and zoning commission and the city council, notwithstanding that several years earlier, the city council had approved a similar change for the premises located immediately west of the subject property. *Id.* at 55-56. The court affirmed the trial court's order, thereby enjoining the city from enforcing the zoning ordinances as they affected the plaintiffs' property and ordering the approval of the plaintiffs' application. *Id.* at 54, 58.

In *Kruvant*, the plaintiff desired to build 61 garden apartment units in a tract zoned only for one-family homes. 82 N.J. at 436, 414 A.2d at 9. Although the board of adjustment

abuse of municipal powers.[186] Although such an active judicial role is somewhat problematic,[187] it appears to be the sole remaining weapon of a "successful" challenger in his battle against parochialism. It is suggested, therefore, that when a municipality uses its zoning powers in such a manner as to circumvent an unpopular invalidation of its ordinance, the judiciary must fashion affirmative relief that thoughtfully considers the needs of the particular plaintiff, as well as those of the surrounding region.

CONCLUSION

Home rule provisions have been enacted so as to enable local governments to act pursuant to the powers delegated to them by their respective states. This Note has suggested that in the area of land use planning, a particular locality's exercise of such powers must further the "regional general welfare" of the state from which the powers emanate. Ideally, this standard would be imposed through statewide land use legislation that mandates the adoption of local comprehensive plans and provides for a substantive incorporation statute. In the absence of meaningful state legislation, however, a local government that has developed a comprehensive plan should not be forced to observe idly the undermining of its rational and thorough planning through an attempt at defensive incorporation by a number of its inhabitants. Thus, when a local government utilizes a substantive incorporation statute to implement its comprehensive plan, a reviewing court should uphold

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recommended that the necessary variance be issued, the township council rejected the plaintiff's application. *Id.* Subsequent to the plaintiff's successful challenge of this denial, the township amended the ordinance three times, thereby preventing the issuance of the variance and forcing the plaintiff to endure four trials involving 7 years of litigation. *Id.* at 443, 414 A.2d at 13. The court, noting that the township "had more than enough opportunity to amend its ordinance," granted the plaintiff affirmative relief in the form of an order that a variance be issued. *Id.* at 445, 414 A.2d at 14.

[186] *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. at 552-53, 371 A.2d at 1228 (court recognized that zoning action, rather than continued theorizing, was necessary to avoid abuse of municipal authority).

[187] *Compare* Rose, *Conflict Between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decisions*, 31 RUTGERS L. REV. 1, 19-20 (1977) (appropriate forum for deciding conflicts between regionalism and local autonomy is the legislature) *and* Sandalow, *supra* note 65, at 683 (courts have little competence to deal with governmental fragmentation and parochialism in land use planning) *with* Delogu, *supra* note 43, at 73-77 (courts must assess reasonableness of local ordinances if exclusionary practices are to be prevented) *and* Hartman, *supra* note 184, at 177 ("the judiciary must carry the remedial burden" unless or until the legislature acts).

its validity as a necessary endeavor to promote regional interests and curb both governmental fragmentation and parochial, ad hoc planning.

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