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Zoning—Judicial Enforcement of the Duty to Serve the Regional Welfare in Zoning Decisions—SAVE v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978)

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ZONING—JUDICIAL ENFORCEMENT OF THE DUTY TO SERVE THE REGIONAL WELFARE IN ZONING DECISIONS—*SAVE v. City of Bothell*, 89 Wn. 2d 862, 576 P.2d 401 (1978).

In 1975 the city of Bothell rezoned a 141-acre parcel of farmland to permit construction of a major regional shopping center.[1] The rezone ordinance was passed after extensive public hearings before the Bothell planning commission and city council and after a majority of Bothell's voters had supported the proposal on an advisory ballot proposition.[2] The ordinance conditioned the rezone upon the execution of a concomitant zoning agreement between the city and property owners, designed to protect against adverse economic and enviromental impacts of the development.[3]

Save a Valuable Environment (SAVE), a Washington nonprofit corporation made up of residents of King and Snohomish Counties, petitioned the King County Superior Court for a writ of certiorari[4] to review the action of the planning commission and city council in adopting the rezone.[5] The trial court invalidated the ordinance,[6] and the property owners appealed the decision to the Washington Supreme Court.

The court affirmed, holding that when a zoning action may cause serious environmental or economic impacts beyond jurisdictional borders,[7]

1. SAVE v. City of Bothell, 89 Wn. 2d 862, 864, 576 P.2d 401, 403 (1978).

2. The planning commission considered the rezone application at thirteen public meetings and held ten public hearings before voting unanimously for approval. The city council conducted twenty-four meetings and study sessions. After placing the proposal before the voters on the advisory ballot proposition, the city council held two more public hearings to take further testimony before finally approving the rezone by a vote of 4-3. Brief for Appellants at 9–12, SAVE v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978).

3. Bothell, Wash., Ordinance 754 (Feb. 18, 1975).

4. R.C.W. § 7.16.040 (1979) provides that a writ of certiorari shall be granted by any court where an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction, or to correct an erroneous or void proceeding when there is no appeal, or any plain, speedy, and adequate remedy at law.

5. SAVE's standing to challenge the ordinance on environmental grounds was upheld by both the trial court and the supreme court. The supreme court expressly adopted the position stated by the federal courts in such cases as Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970), and Warth v. Seldin, 422 U.S. 490 (1975), requiring allegation of a direct and specific injury to a member of the suing organization. 89 Wn. 2d at 868, 576 P.2d at 404–05.

6. The trial court found that Bothell's action was not arbitrary and capricious since the rezone could benefit the health, safety, and general welfare of Bothell's citizens. Conclusion of Law No. 6, Finding of Fact No. 33, Save a Valuable Environment v. City of Bothell, No. 799395 (Wash. Super. Ct., King County, Sept. 30, 1976). However, the court set aside the ordinance on the ground that it would not serve the welfare of the entire affected community and thus constituted illegal spot zoning. In addition to the city of Bothell, the affected community included portions of King and Snohomish Counties. Conclusion of Law No. 7, Finding of Fact No. 33.

7. In this case the rezoned land lay within Bothell's city limits, bordered on the north by land in Snohomish County zoned for low density residential use, and on the east and portions of the south by

the zoning body must serve the welfare of the entire affected community.[8] Since Bothell had "completely disregarded" impacts beyond the city limits,[9] passage of the rezone ordinance constituted arbitrary and capricious conduct.[10]

After briefly noting the background of relevant Washington law, Part I of this note analyzes the *SAVE* court's reasoning to reveal indications of an underlying interventionism in its review of the rezone. Part II assesses the problems of such judicial intervention, first in the exclusionary zoning cases relied upon by the *SAVE* court for its regional welfare standard, and then in the context of zoning actions with the kind of extralocal environmental impacts presented by *SAVE*. Finally, arguments favoring increased judicial intervention are presented. The note concludes that there are both practical and doctrinal justifications for heightened judicial scrutiny of environmental impacts in the multijurisdictional setting in cases like *SAVE*. However, an awareness of the social costs of an overly interventionist judiciary is likely to moderate the intensity of judicial review. From this perspective, the court's result and its opinion in *SAVE* are approved.

I. THE REGIONAL WELFARE DUTY

A. *The Law Prior to* SAVE

Washington courts have long upheld the validity of local zoning ordinances on the basis of the police power of the municipality.[11] The exercise of this power must exhibit "a substantial relation to the public health, safety, morals, or general welfare."[12] In *SAVE*, the Washington

land in unincorporated King County zoned for agricultural use. 89 Wn. 2d at 864, 576 P.2d at 403.

8. 89 Wn. 2d at 869, 576 P.2d at 406.

9. *Id.* at 870, 576 P.2d at 405–06. The court singled out four specific types of impacts that would result from the rezone: (1) pressures for secondary business growth, necessitating substantial investments in highways, sewers, and other services and utilities, and leading to the loss of desirable agricultural land; (2) the need for millions of dollars in additional highway funds and the corresponding possibility of serious air pollution from increased traffic; (3) the possibility of flooding caused by the realignment of a creek to accomodate the development; and (4) the unstable peat soil upon which the development was to take place may settle unevenly, with unknown consequences. *Id.* at 868–69, 576 P.2d at 405.

10. *Id.* at 869, 576 P.2d at 405. The court also found the rezone procedure violated the appearance of fairness doctrine because two members of the planning commission were also members of the Bothell Chamber of Commerce Board of Directors which had voted to actively support the shopping center proposal. 89 Wn. 2d at 872, 576 P.2d at 407. Discussion of the appearance of fairness issue is beyond the scope of this note.

11. *See, e.g.*, McNaughton v. Boeing, 68 Wn. 2d 659, 662, 414 P.2d 778, 780 (1966) (zoning ordinances constitutional in principle as valid exercise of the police power).

12. *Id.*

Supreme Court for the first time defined the general welfare as that of the "entire affected community," determined without regard to jurisdictional borders.[13]

Prior to *SAVE* no Washington court had specifically identified whose interests must be considered in defining the general welfare. This fact is largely attributable to the traditional reluctance with which the judiciary has approached the review of local zoning actions involving the exercise of legislative judgment or discretion.[14] In one prior case, *Bishop v. Town of Houghton,* [15] the court had an opportunity to define the general welfare as multijurisdictional, [16] but merely sustained the town's decision on traditional grounds.[17] While the court implied that the welfare to be served was not determined by the town's boundaries, [18] its deferential review under the arbitrary and capricious standard prevented identification of the extralocal components of the general welfare concept. In an earlier case,

13. 89 Wn. 2d at 869, 576 P.2d at 405.

14. In State *ex rel.* Myhre v. City of Spokane, 70 Wn. 2d 207, 422 P.2d 790 (1967) the court stated what has become its standard language concerning the judicial review of such actions:

> Zoning is a discretionary exercise of police power by a legislative authority. Courts will not review, except for manifest abuse, the exercise of legislative discretion. Manifest abuse of discretion involves arbitrary and capricious conduct. Such conduct is defined to be without consideration and in disregard of the facts. One who asserts that a public authority has abused its discretion and is guilty of arbitrary, capricious, and unreasoning conduct has the burden of proof. If the validity of the legislative authority's classification for zoning purposes is fairly debatable, it will be sustained.

Id. at 210, 422 P.2d at 792 (citations ommitted). *See also* Farrell v. City of Seattle, 75 Wn. 2d 540, 543, 452 P.2d 965, 967 (1969); Carlson v. City of Bellevue, 73 Wn. 2d 41, 45, 435 P.2d 957, 959 (1968).

15. 69 Wn. 2d 786, 420 P.2d 368 (1966).

16. In *Bishop* residents of Bellevue and Clyde Hill brought suit to review the Town of Houghton's refusal to grant a rezone. The existing ordinance permitted construction of high rise apartment buildings on land immediately adjacent to residential property owned by petitioners in the neighboring municipalities. When construction of a state highway severed the affected strip of land from the rest of Houghton, access could only be had through Bellevue and Clyde Hill. On these facts the court could have identified a duty requiring the Town of Houghton to serve the welfare of the affected nonresidents.

17. In upholding Houghton's decision not to rezone the parcel, the court reasoned that on the basis of the record before the town's decisionmakers there was room for an "honest difference of opinion" concerning the necessity of a rezone. *Id.* at 794, 420 P.2d at 373.

18. The court assumed without comment that the nonresident petitioners had standing to contest the decision. The court indicated in dicta that it did not distinguish between residents and nonresidents in identifying the public interest to be served. For a discussion of this aspect of *Bishop*, see Clement & Krogh, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593, 614–17 (1970).

Other jurisidictions have explicitly focused upon the scope of the general welfare in similar factual settings. *See* Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954). Those courts have recognized the right of affected nonresidents to be heard and receive equal consideration along with residents' interests.

State ex rel. Pruzan v. Redman,[19] the court also appeared to recognize a regional standard for land use regulation, but in its deferential review inquired only whether the decisionmaking body had "considered" the planning of the neighboring jurisdiction.[20] Thus while there had been some indication that the general welfare was not to be defined on the basis of jurisdictional boundary lines, no prior Washington decision had turned upon that ground. The court twice upheld zoning decisions of greater than local impact, exercising in both cases a deferential review under the arbitrary and capricious standard.

B. *The Court's Reasoning in* SAVE

The "crux of the problem," according to the *SAVE* court, was that construction of a major regional shopping center in Bothell would have serious detrimental effects on areas outside the city.[21] Because of these impacts, the court imposed upon the zoning body a duty to serve the welfare of the entire community that was seriously and directly[22] affected by the zoning decision. The court found that Bothell had "completely disregarded" adverse environmental and economic impacts outside the city[23]

19. 60 Wn. 2d 521, 374 P.2d 1002 (1962).

20. *Id.* at 531–32, 374 P.2d at 1009.

21. 89 Wn. 2d at 868, 576 P.2d at 405. To support this statement, the court referred to letters received by the city from planning officials outside Bothell in response to a draft environmental impact statement (EIS). These letters indicated that the EIS "failed to address serious problems created by the shopping center proposal." *Id.* The court then detailed four of the anticipated problems, including increased traffic congestion and pressures for secondary business growth, without specifying whether it also found that the EIS failed to address these problems, and if so, how it reached this conclusion. The court said only that "[u]nder these circumstances, Bothell may not act in disregard of the effects outside its boundaries." *Id.* at 869, 576 P.2d at 405. Later in its opinion, however, in apparent reference to these same impacts, the court concluded that "adverse environmental effects and potentially severe financial burdens . . . have been completely disregarded." *Id.* at 870, 576 P.2d at 405–06.

22. The court broadly defined "directly affected" to include not only areas which would suffer adverse environmental impacts such as flooding or air pollution, but also "areas which would experience pressure to alter the land uses contemplated by their own comprehensive plans." *Id.* at 869, 576 P.2d at 405.

The Washington court has subsequently stated that the tendency of a zoning decision to create pressure for change in surrounding land uses is an appropriate consideration even outside the multijurisdictional setting of *SAVE*. *See* Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 578 P.2d 1309 (1978) (holding it proper to consider a strictly local development's potential for creating pressure to alter surrounding land uses in evaluating a building permit application, citing *SAVE*).

23. 89 Wn. 2d at 870, 576 P.2d at 405–06. The court's use of the term "affected community" in identifying the location of the disregarded impacts does not preclude the possibility that impacts within Bothell were also found to be disregarded. Indeed, some of the impacts mentioned by the court, such as air pollution, could hardly have been considered in relation to the city and at the same time have been disregarded in relation to areas outside the city. Nevertheless, the "crux of the problem" focused upon by the court throughout its opinion was the detrimental effects of the rezone on areas outside Bothell. *Id.* at 868, 576 P.2 at 405.

in approving the rezone, and concluded the rezone could not be sustained.[24] The court cited recent exclusionary zoning cases from other jurisdictions which imposed a duty on local zoning bodies to serve the regional welfare in decisions affecting the availability of adequate housing,[25] and found an analogous duty where zoning decisions could have extralocal effects on environmental quality. The court placed special emphasis upon the policy, stated in Washington's State Environmental Policy Act[26] (SEPA), that "each person has a fundamental and inalienable right to a healthful environment."[27] The court found that the environmental consequences of Bothell's decision threatened that right in the surrounding community.

C. *Analysis*

The court's recognition of the regional welfare principle in *SAVE* and its finding that Bothell disregarded the extralocal impacts of its decision appeared to lead directly and logically to invalidation of the rezone. However, in reaching its conclusion that Bothell disregarded these impacts, the court exhibited none of the deference toward legislative decisions which is inherent in the arbitrary and capricious standard of review. While on the facts of *SAVE* it might be possible to reconcile invalidation of the ordinance with the traditional level of review, the court in its brief and conclusory opinion makes no effort to do so, raising significant questions about the court's future role in the enforcement of the regional welfare duty in Washington.

Traditionally, Washington courts would overturn a zoning decision only upon a finding of arbitrary and capricious conduct, defined as conduct "without consideration and in disregard of the facts."[28] If the valid-

24. *Id.* at 870, 576 P.2d at 406.

25. The court quoted from Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976), and cited generally to Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied,* 423 U.S. 808 (1975), and Berenson v. Town of New Castle 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.2d 672 (1975). For a discussion of these cases, see notes 47–66 and accompanying text *infra.*

The typical exclusionary zoning case involves the validity of a municipality's attempt to preserve the status quo within its borders by the enactment of zoning ordinances which tend to exclude certain types of undersirable land uses. These ordinances often obstruct growth, impose restrictive minimum lot size requirements, and prohibit the construction of low income or multifamily housing. *See generally* Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls,* 22 SYRACUSE L. REV. 509 (1971); Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy,* 6 U. MICH. J.L. REF. 625 (1973).

26. WASH. REV. CODE ch. 43.21C (1979).

27. *Id.* § 43.21C.020(3) (1979).

28. State *ex rel.* Myhre v. Spokane, 70 Wn. 2d 207, 210, 422 P.2d 790, 792 (1967). *See* note 14 *supra.*

ity of the zoning ordinance was "fairly debatable," the zoning would be sustained. Under this standard of review a court will not substitute its judgment for that of local decisionmakers if there is room for two opinions and the zoning decision resulted from due consideration of all relevant facts.[29]

By all appearances Bothell's decision was made after due consideration of all relevant facts. The city never denied its obligation to consider the impacts of the rezone on areas outside its borders.[30] Rather, it argued it had fulfilled its duty to serve the regional welfare by consulting with King and Snohomish County officials,[31] considering their positions, and reflecting their concerns in the requirements of the concomitant zoning agreement.[32]

Given Bothell's strong showing of consideration of extralocal interests, one might reasonably expect the court to have deferred to the city council's decision under the arbitrary and capricious standard of review. Indeed, in *State ex rel. Pruzan v. Redman,*[33] relied upon by Bothell in its brief,[34] the court refused to inquire beyond whether the decisionmaking body had *considered* the planning of a neighboring jurisdiction.[35]

In concluding that Bothell had failed to serve the regional welfare, the *SAVE* court clearly adopted a deeper level of judicial review than that employed in *Pruzan.* Rather than limiting its inquiry to whether Bothell "considered" extralocal impacts, the court went on to measure the sufficiency of that consideration. The court mischaracterized Bothell's argument as being that under *Pruzan,* "inviting and receiving comment from neighboring jurisdicitions is sufficient consideration of their interests." [36]

29. Bishop v. Town of Houghton, 69 Wn. 2d 786, 794, 420 P.2d 386, 373 (1966).

30. Reply Brief for Appellants at 6–7, SAVE v. City of Bothell 89 Wn. 2d 682, 576 P.2d 401 (1978).

31. The city of Bothell sent copies of its draft environmental impact statement to, among others, the planning departments of both King and Snohomish Counties, the Washington Department of Highways, and the Puget Sound Governmental Conference.

32. Brief for Appellants at 28, 35; Reply Brief for Appellants at 6–9, SAVE v. City of Bothell 89 Wn. 2d 862, 576 P.2d 401 (1978).

33. 60 Wn. 2d 521, 374 P.2d 1002 (1962). *See* notes 19–20 and accompanying text *supra.*

34. Brief for Appellants at 34–35; Reply Brief for Appellants at 8, SAVE v. City of Bothell 89 Wn. 2d 862, 576 P.2d 401 (1978).

35. In *Pruzan* the plaintiff challenged a conditional use permit issued by King County for property adjoining the city of Bellevue, contending in part that the county's action was arbitrary and capricious because it ignored the planning of the city of Bellevue. The court responded that it need only decide whether the county board considered the planning of the city of Bellevue. 60 Wn. 2d at 531, 374 P.2d at 1009.

36. 89 Wn. 2d at 870, 576 P.2d at 406. Examination of the city's brief reveals that the *SAVE* court was unfair in so characterizing Bothell's argument. The city was appealing from the trial court's finding of a spot zone. Thus, it argued that *Pruzan* required consideration of the planning of other jurisdictions but not absolute consistency with that planning. The city contended that it had considered the concerns of the affected jurisdictions to a degree far beyond that required by *Pruzan.* Brief

So characterized, Bothell's position was summarily rejected.[37] The court then considered the concomitant zoning agreement, which the city argued reflected its consideration of extralocal interests. The court noted that the agreement did not provide for any specific measures to protect areas outside Bothell and concluded that " '[t]he main concern evidenced is to 'mitigate impacts which are adverse to the environment or the economy of the City of Bothell.' "[38]

While it is thus clear that the court stepped beyond *Pruzan's* limited, procedural review[39] to examine the sufficiency of the city's consideration of extralocal interests, it is unclear what level of review was in fact used in *SAVE*. Under the arbitrary and capricious standard of review, which the court purported to use, Bothell's decision must have been grossly one-sided on the merits to explain the court's decision,[40] especially given the city's clearly documented consideration of extralocal interests.

Other indications suggest that the court employed a deeper level of judicial review. First, the facts of *SAVE* would only arguably support invalidation of the rezone under the arbitrary and capricious standard of review.[41] Second, the court made no effort to reconcile its decision with a

for Appellants at 35, SAVE v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978). While it is apparent that the court did not find Bothell's consideration of extralocal impact adequate, its misstatement of the city's position allowed it to invalidate the rezone without shedding any light upon how it intends to measure the sufficiency of consideration of such impacts in the future. *See* notes 39–43 and accompanying text *infra*.

37. 89 Wn. 2d at 870, 576 P.2d at 406. While the *SAVE* court overruled *Pruzan* "to the extent that it conflicts with the duty we here impose," *id.*, the court also indicated that *Pruzan* might be distinguishable from *SAVE*. "*State ex rel. Pruzan* did not involve environmental effects as substantial and pervasive as those which will be felt in the North Creek Valley." *Id.* As a result, it is not entirely clear that the court will look beyond a showing that extralocal interests were considered in a future case involving less substantial and pervasive environmental impacts than those involved in *SAVE*. *See* notes 88–89 and accompanying text *infra*.

38. 89 Wn. 2d at 871–72, 576 P.2d at 406.

39. For purposes of this note a strictly procedural review is one which inquires only into the form of the proceedings by which a decision is made. Such a review seeks to identify the multitude of factors *considered* by the decisionmaking body but does not attempt to assess the relative weights assigned the various factors by that body. While the *Pruzan* court limited itself to a procedural review under the arbitrary and capricious standard, the *SAVE* court did not.

40. Under the traditional statement of the arbitrary and capricious standard of review, quoted at note 14 *supra*, if the zoning decision so clearly fails to serve the general welfare that there is not room for two opinions, it will be overturned as an abuse of legislative discretion, regardless of the decisionmaker's consideration of all relevant facts. *See* notes 28–29 and accompanying text *supra*. In *SAVE*, therefore, the adverse impacts of the shopping center must have so clearly outweighed its benefits that the court could not find the validity of the rezone even fairly debatable.

41. Had the court followed *Pruzan's* interpretation of the arbitrary and capricious standard of review, it would have refused to look beyond Bothell's showing of considerations of extralocal interests. See notes 33–35 and accompanying text *supra*. Moreover, Bothell's concomitant zoning agreement militates against invalidation of the rezone under the arbitrary and capricious standard. While the main concern evidenced by the agreement may have been to mitigate impacts adverse to the city of Bothell, *see* note 38 and accompanying text *supra*, the agreement was not wholly one-sided. Its

deferential standard of review: nowhere in its opinion does it manifest concern over Bothell's claimed consideration of extralocal interests, nor does it acknowledge any limits upon the intensity of appropriate judicial review.[42] Finally, in dictum sounding most inconsistent with the arbitrary and capricious standard, the court said that for the rezone to be upheld Bothell would have to take all possible steps to mitigate or avoid adverse environmental impacts; only then, in the court's enigmatic phrase, might "responsible planning for the shopping center . . . be reasonable."[43]

As a result of these uncertain signals in *SAVE*, it is unclear what standard of review the court will use in future cases in examining zoning decisions which have extralocal impacts. Cases following *SAVE* are certain to focus on this issue, since effective judicial enforcement of the regional welfare duty will require a higher level of scrutiny than is embodied in the traditional arbitrary and capricious standard. If the court employs a more probing level of review, judging the sufficiency of the consideration given to extralocal interests and the adequacy of measures taken to mitigate environmental impacts, the role of the court in land use planning will be significantly increased, inviting charges of unwarranted judicial intervention. The following section analyzes the arguments for and against heightened judicial scrutiny in the regional welfare setting.

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introductory recitations recognized that the development could have significant impacts on the northeastern Lake Washington region, as well as on the city of Bothell, "which impacts should be mitigated, within reasonable limits." Concomitant Agreement at 3. The agreement specifically mentioned the possibility that uncontrolled development could have an adverse effect upon the health, safety and welfare of the residents of the North Creek Valley "and its surrounding environs." *Id.* Further, most of the measures taken by the agreement were designed to mitigate environmental and aesthetic impacts and would have benefited residents and nonresidents equally.

The court's decision ultimately must rest upon a finding that the economic and environmental costs of the development outweighed the benefits. Whether there is room for two opinions about the validity of the rezone appears debatable, at least where a balancing of intangible environmental costs and benefits is involved.

42. The court frequently made the unqualified statement that the regional welfare must be served, and used conclusory, result-oriented language condemning Bothell's failure to do so. While the court stated that the mere receipt of comment from other jurisdictions is not sufficient consideration of their interests, the court made no effort to delineate what would be sufficient. The court expressly disclaimed any intention of requiring interjurisdictional planning, but immediately thereafter emphasized the desirability of such coordinated planning and noted that the result in *SAVE* might thereby have been avoided. 89 Wn. 2d at 870, 576 P.2d at 406. The opinion thus suggests that local zoning officials risk being held not to have adequately considered the extralocal impacts of their decisions unless they actively engage in interjurisdictional planning.

43. 89 Wn. 2d at 870, 576 P.2d at 406. "If it is possible to substantially mitigate or avoid potential adverse environmental effects, and if Bothell takes the necessary steps to do so, responsible planning for the shopping center may be reasonable. It has not acted to avoid these consequences, however, and the rezone cannot be sustained." *Id.*

In demanding that Bothell take the necessary steps to avoid adverse environmental effects the court has clearly imposed significant restraints upon the discretion of the legislative decisionmaker. The enforcement of this requirement, moreover, appears to entail a judicial determination of the range of possible mitigating measures as well as what constitutes an environmentally acceptable result.

II. JUDICIAL INTERVENTION AND ENFORCEMENT OF THE REGIONAL WELFARE DUTY

A. *Problems of Increased Judicial Intervention*

The court's proper role in the review of local zoning decisions has recently received much attention in the exclusionary zoning field.[44] In exclusionary zoning cases, as in *SAVE*, some courts have defined the general welfare from a regional perspective.[45] More importantly, they have recognized a conflict between the tradition of judicial deference to legislative decisionmaking and the type of review necessary for judicial enforcement of the regional welfare duty.[46] An examination of these cases reveals that the problem of judicial intervention is the single most troubling aspect of the regional welfare doctrine.

Three recent exclusionary zoning cases decided by the New Jersey Supreme Court illustrate the judicial struggle with the problem. In *Southern Burlington County NAACP v. Township of Mount Laurel*,[47] the court held exclusionary zoning legislation invalid on the basis of the regional welfare doctrine and imposed a requirement that each municipality satisfy its fair share of the region's low income housing needs.[48] In *Oakwood at Madison, Inc. v. Township of Madison,* [49] the court again invalidated an exclusionary ordinance, following *Mount Laurel,* but expressed its discomfort with the judicialization of regional housing problems.[50] Finally,

44. *See generally* Bagne, *The Parochial Attitudes of Metropolitan Governments: An Argument to a Regional Approach to Urban Planning and Development,* 22 ST. LOUIS U.L.J. 271 (1978); Haar, *Regionalism and Realism in Land-Use Planning,* 105 U. PA. L. REV. 515 (1957); Rose, *Conflict Between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decisions,* 31 RUTGERS L. REV. 1 (1978).

45. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied,* 423 U.S. 808 (1975), where Justice Hall of the New Jersey Supreme Court concisely stated the regional welfare principle and explained its doctrinal basis:

> [I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.

336 A.2d at 726.

46. *See* notes 47–58 and accompanying text *infra*.

47. 67 N.J. 151, 336 A.2d 713, *cert. denied,* 423 U.S. 808 (1975).

48. 336 A.2d at 730–34.

49. 72 N.J. 481, 371 A.2d 1192 (1977).

50. "[T]he governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administrative function than a judicial function to be exercised in the disposition of isolated cases." 371 A.2d at 1218.

in *Pascack Association, Ltd. v. Mayor of Washington*,[51] the court upheld an exclusionary zoning ordinance against the challenge that it was defective in not providing for multifamily housing. While the decision rested in part upon the court's conclusion that *Mount Laurel* applied only to developing municipalities,[52] the court's "overriding point" concerned the proper scope of judicial review.[53] The court cited a pre-*Mount Laurel* decision[54] holding that the legislative nature of zoning decisions puts them "beyond the purview of interference by the courts,"[55] and then emphasized the broad range of discretion to be accorded local decisionmakers vested by statute with the zoning power.[56]

Thus, within two years of its pioneering decision to review the merits of local zoning actions to ensure protection of the regional welfare, the New Jersey Supreme Court reaffirmed the traditional limitation on the scope of judicial review because of that court's unwillingness to intrude upon legislative discretion in zoning. At least from the standpoint of judicial enforceability, it may be that little remains of the regional welfare doctrine in New Jersey.[57]

Two other courts which followed New Jersey's lead in recognizing the regional welfare duty have similarly struggled with the conflict between traditional restraints on judicial review and protection of the regional welfare. In *Berenson v. Town of New Castle*, [58] the New York Court of Appeals adopted the regional welfare principle and set forth a two-part test for determining the validity of an ordinance excluding multifamily housing. Under the test, the ordinance will be upheld if (1) it provided an appropriately balanced, well-ordered plan within the community itself, and (2) the town or board also considered regional needs and requirements in adopting the ordinance.[59] While noting the decision in *Mount Laurel*, the *Berenson* court declined to require that every municipality

51. 74 N.J. 470, 379 A.2d 6 (1977).

52. 379 A.2d at 11.

53. *Id.* at 13.

54. Bow and Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 307 A.2d 563 (1973).

55. Pascack Ass'n v. Mayor of Washington, 379 A.2d at 11 (quoting Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 343, 307 A.2d 563, 567 (1973)).

56. 379 A.2d at 11, 13.

57. This line of New Jersey cases has led one prominent commentator to the following conclusion: "The post-*Mount Laurel* experience in New Jersey . . . seems to indicate that although the judiciary may threaten, entreat, cajole, educate, and appeal to a sense of morality, it is an inappropriate branch of government to resolve the underlying conflict between regionalism and home rule." Rose, *Conflict Between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decisions*, 31 RUTGERS L. REV. 1, 21 (1978).

58. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

59. *Id.* at 109–10, 341 N.E.2d at 242–43, 378 N.Y.S.2d at 680–81.

satisfy its fair share of regional housing needs. It saw the judicial role as that of assessing the "reasonableness" of the locality's decision.[60]

In *Associated Home Builders v. City of Livermore*,[61] the California Supreme Court also adopted the regional welfare doctrine and spelled out a "reasonableness" test of its own: The reviewing court must determine whether the ordinance, in light of its probable impact, represents a reasonable accomodation of the competing interests at stake—typically the community's desire to maintain the status quo against the housing needs of the surrounding region.[62] The *Livermore* court was far more explicit than the *Berenson* court in acknowledging the traditional non-interventionist posture of its judicial review:

> We do not hold that a court in inquiring whether an ordiance reasonably relates to the regional welfare, cannot defer to the judgment of the municipality's legislative body. But judicial deference is not judicial abdication. The ordinance must have a *real and substantial* relation to the public welfare. . . . Although in many cases it will be "fairly debatable" . . . that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can *never* be invalidated as an enactment in excess of the police power.[63]

Thus the California court recognized the regional welfare principle, and, like the New York court, did so in terms suggesting an unwillingness to intrude upon legislative discretion. Both courts acknowledged limitations on judicial review quite similar to those recognized by the New Jersey court in *Pascack*. While all three courts adopted the regional welfare doctrine, each significantly limited its practical effect by observing the traditional restraints upon judicial intervention.

The experience of these courts in the exclusionary zoning field is of particular significance to an evaluation of *SAVE*. The Washington court relied upon the *Mount Laurel, Berenson,* and *Livermore* cases in adopting the regional welfare doctrine,[64] but apparently ignored the issue they raise concerning judicial review. These cases suggest that the judiciary is not the appropriate institution to protect regional interests from the abuses of

60. *Id.* at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682. Under this test, so long as local and regional housing needs were fulfilled either locally or in other accessible areas within the region, "it cannot be said, as a matter of law, that such an ordinance had no substantial relation to the public health, safety, morals or general welfare." *Id.* at 111, 241 N.E.2d at 243, 378 N.Y.S.2d at 681–82.

61. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

62. *Id.* at 609, 557 P.2d at 488–89, 135 Cal. Rptr. at 56–57.

63. *Id.* (footnote and citations omitted) (emphasis in original).

64. 89 Wn. 2d at 871, 576 P.2d at 406. *See* note 25 and accompanying text *supra*.

local zoning.[65] Emphasizing the legislative nature of zoning, the courts deciding these cases have restricted their inquiry to a review for arbitrary and capricious conduct and have been reluctant to substitute their judgment for that of local decisionmakers. As a result, the presumption favoring validity of zoning ordinances is likely to be overcome only in extreme cases.[66]

There are strong arguments in favor of the judicial restraint exercised by these three courts. It has generally been acknowledged that courts are not well equipped to resolve problems associated with land use planning on a regional scale.[67] They have neither the expertise nor the resources required to make informed land use planning decisions, and the adversarial nature of the judicial process is poorly suited to the planning task.

To the extent that the *SAVE* court's enforcement of the regional welfare duty will entail reviewing the sufficiency of the zoning body's consideration of extralocal interests or the adequacy of measures taken to mitigate environmental impacts, certainty and finality within this area of the law will be impaired. Opponents of the zoning decision will be encouraged to challenge the action taken in the hope that the court will agree with their view of the merits rather than with that of the legislative decisonmakers. Even if the local legislative judgment is ultimately upheld, the expense and delay resulting from such litigation can have a devastating effect upon private land developers. Similarly, the comprehensive planning ef-

65. For a decision recognizing this principle but *refusing* to adopt the regional welfare doctrine, see Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). There the Ninth Circuit Court of Appeals ruled that if an exclusionary ordinance furthers a legitimate state interest, the court must "defer to the legislative act" and uphold the ordinance. *Id.* at 906. While recognizing the interdependence of municipalities and their land use decisions, the court held that it was up to state legislatures to adjust zoning systems and that the federal courts "should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interest." *Id.* at 908.

66. Unlike the court in *SAVE*, neither the *Berenson* court nor the *Livermore* court was willing to apply their regional welfare tests to the facts before them. Both courts remanded the cases to the trial court for review under the regional welfare standards announced.

67. As early as 1957 Professor Charles M. Haar noted:

> The limitations of the adversary process and the specialization of courts evoke serious doubts as to judicial competence in deciding the proper regional allocation of land resources . . . .
>
> . . . .
>
> Unless the courts are far more adept and skillful than claimed, or the adversary system lends itself to such analysis, or regionalism is not a job that requires scientific, planning and engineering techniques, there is a patent need for further state legislation as to who should be the ultimate resolver of regional disputes . . . . The court lacks the staff, the time or the ability to prepare a rational regional plan. This kind of decision making seems eminently suited for the administrative process. If, however, the other governmental agencies default, certainty as well as the need to come to a final decision may be as important as the merits of the particular decision.

Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 530–31 (1957).

forts of local governments will be jeopardized by the ad hoc determinations of an interventionist court.

Moreover, it is not clear that heightened scrutiny will result in better land use planning or enhanced protection of regional environmental values. Courts are limited to an essentially negative role in land use planning; they can only invalidate or uphold decisions made by others. While the court may prevent a specific shopping center from being built, there is no assurance that the eventual use to which the land is put will better serve the regional welfare. The cumulative effect of the resulting piecemeal development may well be more injurious to the environment than the original proposal, which at least was the product of an overall plan.

Another problem with judicial enforcement of the regional welfare duty is the absence of clear standards to guide local decisionmakers in the fulfillment of that duty. While the *SAVE* court suggested interjurisdictional planning as a means of avoiding judicial invalidation of zoning decisions,[68] it failed to respond to the city's argument that absent comprehensive legislation mandating intergovernmental decisionmaking, local decisionmakers have no means of compelling other governmental units to hold hearings or engage in interjurisdictional planning.[69] The city argued that the absence of statutorily defined standards and procedural protections would invite abuse, giving a handful of administrators from other jurisdictions a veto power over Bothell's zoning decisions.[70]

While these contentions may underestimate the ability of local jurisdictions to plan cooperatively,[71] there are certain to be occasions when, despite a locality's best efforts at cooperative planning, a given zoning decision will be opposed by neighboring jurisdictions. In such a situation the local decisionmakers can do little but make the zoning decision and hope the reviewing court finds its consideration of extralocal interests sufficient, despite the extralocal opposition.

The courts face the same lack of guidelines in resolving disputes be-

68. *See* note 42 *supra*.

69. Brief for Appellants at 28, 32–33, SAVE v. City of Bothell 89 Wn. 2d 862, 576 P.2d 401 (1978).

70. *Id.* at 30. The city also contended that conditioning the validity of Bothell's rezone decisions on the planning of other jurisdictions would result in ad hoc decisionmaking by local governments. Moreover, the imposition of such conditions would amount to an impermissible delegation of Bothell's zoning power to other jurisdictions. *Id.* at 30–33.

One other possible problem is noted in Alkire, *Washinton's Super-Zoning Commission,* 14 GONZ. L. REV. 559 (1979). The author points out that *SAVE*'s command that a municipality must substantially mitigate or avoid potential adverse effects outside its borders appears to conflict with the court's decision in Brown v. City of Cle Elum, 145 Wash. 588, 261 P. 112 (1927), which held that the extraterritorial exercise of municipal police power was prohibited under article XI, section 11 of the state constitution (requiring exercise of police power by a local unit within its limits).

71. The spectre of an interventionist court itself provides impetus toward cooperative planning, since neighboring municipalities face the same threat.

tween municipalities over zoning decisions of greater than local impact. In *SAVE* the court found Bothell's decision particularly unsatisfactory in light of two other shopping centers already planned by neighboring jurisdictions.[72] A conflict between two or more municipalities' comprehensive plans is equally possible, where one plan envisioned agricultural land immediately adjoining the other's planned residential development. When competing jurisdictions are unable informally to resolve such a conflict, a court has the unenviable task of deciding whose shopping center or comprehensive plan will prevail. And while the *SAVE* court appeared to base its decision on the opposition to the rezone voiced by various governmental agencies outside Bothell, clearly such opposition will not always accurately reflect the regional welfare. The opposition of one municipality to another's proposed development could stem from a variety of political or economic motives unrelated to the regional welfare. The court will thus be drawing itself into social and political disputes unsuited to judicial resolution.

B. *Arguments in Favor of Increased Judicial Intervention*

While the preceding problems of judicial intervention militate against heightened scrutiny of zoning decisions to enforce the regional welfare duty, there are also countervailing considerations which support more rigorous judicial review. Only after striking a balance between these arguments can one evaluate the substantive result in *SAVE* and develop guidelines for approaching like cases in the future.

First, the problem of parochialism in land use decisionmaking is likely to be addressed, if at all, only by the courts and not the legislature. Such parochialism is generally acknowledged to be a product of institutional fragmentation of the decisionmaking process and the increasing metropolitanization of society.[73] There is a consensus among commentators and courts that the problem can be adequately solved only through state legislative reform of the zoning process.[74] The reality with which the courts must contend, however, is that most state legislatures, including Washington's, appear to be politically unable to address the problem.[75]

72. 89 Wn. 2d at 870, 576 P.2d at 406.

73. *See generally* Feiler, *Metropolitanization and Land Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971); Vestal, *Government Fragmentation in Urban Areas*, 43 U. COLO. L. REV. 155 (1971).

74. *See, e.g.*, Berenson v. Town of New Castle, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975); Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 535 (1957).

75. *See* Rose, *Conflict Between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decisions*, 31 RUTGERS L. REV. 1, 21 (1978).

Second, regional interests cannot be effectively protected under the traditional concept of limited judicial review of zoning.[76] In most cases, even a *pro forma* consideration of extrajurisdictional interests by the zoning board would satisfy the arbitrary and capricious standard of review.

The likelihood that local decisionmakers may discriminate against nonresident interests not only points to the need for protection of those interests, but also provides a rationale for closer judicial review as an appropriate form of protection. To a large exent the tradition of judicial restraint in the review of legislative decisionmaking reflects a fundamental notion of the proper relation between the judicial and legislative branches under the constitutional separation of powers doctrine.[77] This basis for judicial deference is lacking, however, in the multijurisidictional setting of *SAVE*. Where a legislative decision threatens to affect adversely individuals who have no say in the makeup of the decisionmaking body, there is little basis in fact for presuming that the decision is reasonable as to the nonresidents, or for trusting the political process to protect those unrepresented individuals.[78] Due process considerations militate strongly against any such presumption.[79]

In 1973 the Washington legislature had before it the proposed Washington Land Use Act which would have required regional land use planning, intergovernmental cooperation, and special development permits for a "development of greater than local impact." Wash. H.B. 791, §§ 1–101 to 9–201 43d Legis. Regular Sess. (1973). *See* Hillis & Wilson, *Land Use Planning in Washington: Overdue for Improvement,* 10 WILLAMETTE L.J. 320, 331 (1974). *See generally,* Sylvester, *Phoenix Rising? The Washington Land Use Act,* in 11 URB. L. ANN. 131 (1976). In both 1973 and 1974 the bill passed the House but died in committee in the Senate. Sylvester, *supra,* at 143–44.

76. The traditional statement by Washington courts of the arbitrary and capricious standard of review is reproduced in note 14 *supra*.

77. A court's statement that zoning is a "legislative task" reflects a concession that the courts lack the resources or expertise to perform properly the zoning job through the disposition of isolated cases. A more fundamental objection is that the substantive review of local zoning decisions is inconsistent with the doctrine of separation of powers. Ullock v. City of Bremerton, 17 Wn. App. 573, 565 P.2d 1179 (1977). *See also* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906 (9th Cir. 1975) ("[b]eing neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation").

78. Nonresident individuals are, of course, represented in the state legislature which delegated the zoning power to local decisionmakers in the first place. It would be unrealistic, however, to assume that such state representation provides meaningful protection, given the strong tradition of local autonomy in zoning and the relatively small number of nonresidents affected. *Cf.* Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development,* 26 STAN. L. REV. 585, 608–09 n.96 (1974) (impact of land use regulation on nonrepresented individuals provides weak basis for judicial intervention in view of individuals' representation at state government level from which local municipalities derive their zoning power).

79. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938). In the majority opinion's famous footnote 4, Justice Stone suggested that a "more exacting judicial scrutiny" than the traditional presumption of constitutionality might be appropriate in reviewing "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.* at 152 n.4. He further suggested that similar considerations might warrant closer scrutiny

Shortly before its decision in *SAVE*, the Washington court drew a distinction between types of zoning actions, and the scope of judicial review applicable to each, which supports the proposition that less deference should be accorded legislative decisions in the multijurisdictional setting. In *Parkridge v. City of Seattle*,[80] the court characterized zoning actions as either legislative or adjudicative in nature, and accorded the traditional presumption of validity only to the legislative decisions.[81] The court differentiated the legislative policymaking involved in the enactment of a comprehensive plan from the adjudicative activity involved in deciding between the readily identifiable rights and interests of proponents and opponents of a zoning change. The court emphasized that the far greater impact of a rezone on one group than on the public generally justified more rigorous judicial review.

While the *Parkridge* analysis was not mentioned by the *SAVE* court,[82]

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of statutes directed at particular religious, ethnic, racial, or otherwise "discrete and insular minorities" when prejudice threatens "to curtail the operation of those political processes ordinarily to be relied upon to protect [them]." *Id.* at 153 n.4.

While a zoning regulation which affects individuals residing outside the enacting jurisdiction does not fall precisely within either of Justice Stone's classifications, it does present an analogous problem requiring a similar judicial solution. Because nonresident individuals adversely affected by a zoning ordinance cannot vote in the election of the decisionmakers involved, the political processes "ordinarily relied upon" to protect their interests are not of much use. Indeed, this "minority" of affected nonresidents is arguably in greater need of judicial protection than those "discrete and insular minorities" which have only prejudice to fight. The nonresidents do not even get to vote. *But see* note 78 *supra*.

80. 89 Wn. 2d 454, 573 P.2d 359 (1978).

81. *Id.* at 460, 573 P.2d at 365. In refusing to presume the validity of a rezone ordinance passed by the city of Seattle, the court said that the rezone was adjudicative in nature and therefore required a showing of substantial credible evidence to support the city's decision. The court quoted from Fleming v. City of Tacoma, 81 Wn. 2d 292, 502 P.2d 327 (1972), for its distinction between legislative and adjudicative zoning functions:

> Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

89 Wn. 2d at 463, 573 P.2d at 365 (quoting Fleming v. City of Tacoma, 81 Wn. 2d at 299, 502 P.2d at 331). For a discussion of the *Parkridge* rezone standards, see Note, *Zoning—Rezones: New Standards for Governing Bodies*—Parkridge v. City of Seattle, 55 WASH. L. REV. 255 (1979).

82. Because the ordinance challenged in *SAVE* was a rezone, the question arises whether *SAVE's* deeper judicial review was only an unarticulated, but consistent, application of the *Parkridge* rationale. Although some indirect support for deeper judicial review in the multijurisdictional setting of *SAVE* can be derived from *Parkridge*, *see* note 83 and accompanying text *infra*, it would be wrong to view the latter case as controlling in *SAVE*. The *SAVE* court did not mention *Parkridge* or its distinction between legislative and adjudicative acts and made no reference to the requirement of substantial credible evidence, the essence of the *Parkridge* ruling. More important, it would weaken the *Parkridge* rationale to have classified Bothell's action as adjudicative merely on the basis of its technical

the line it draws between policymaking and adjudication lends support to a more probing judicial review in the mulitjurisdictional setting of *SAVE*. If because of its extralocal impacts a municipality's proposed action threatens to place local and regional interests in opposition, the action could be seen as "an adjudication between the rights sought by the proponents [the municipality] and those claimed by the opponents [the nonresidents] of the zoning change."[83]

A final factor which may support more rigorous judicial review, and which was of particular importance in *SAVE*, is the "fundamental and inalienable right to a healthful environment" guaranteed Washington's citizens by SEPA.[84] While the *SAVE* court used this strong environmental policy only as support for its imposition of the regional welfare duty, the policy may also explain the court's interventionist tone. The court found the SEPA right of such importance that it required Bothell's decisionmakers not only to consider environmental impacts but also to take the steps necessary to avoid them.[85] Because effective enforcement of this requirement is impossible under the arbitrary and capricious standard,[86] the court may implicitly have found that the importance of the SEPA right justified a higher level of review.

This conclusion is reinforced by the *SAVE* court's treatment of *State ex rel. Pruzan v. Redman*.[87] Although the *Pruzan* court declined to look be-

status as a rezone. Bothell's original comprehensive plan, adopted in 1971, specifically envisioned the eventual transition to commercial and other more intensive uses at the location in question. It would strain the logic of *Parkridge* to woodenly characterize as adjudicative a rezone so intimately related to the original legislative act. *But see* Leonard v. City of Bothell, 87 Wn. 2d 847, 557 P.2d 1306 (1976) (same rezone as that invalidated in *SAVE* held to be "administrative" or "quasi-judicial" action and therefore not subject to referendum election).

83. Fleming v. City of Tacoma, 81 Wn. 2d at 299, 502 P.2d at 331. As in *Fleming*, the parties whose interests are affected would be readily identifiable. This would be true even where the decision is legislative under *Fleming* and *Parkridge;* its multijurisdictional impact necessarily divides the general public into two groups, one on each side of the municipal boundary.

84. WASH. REV. CODE § 43.21C.020(3) (1979). The court's reliance upon this SEPA provision may be the single most important aspect of the case. The high value accorded environmental protection by SEPA appears directly related to the court's willingness to intervene with its nondeferential review, and was a consideration entirely separate from the multijurisdictional setting of the case. *See* notes 85–92 and accompanying text *infra*. Moreover, this factor distinguishes the regional welfare duty imposed in *SAVE* from that of the exclusionary zoning cases which focus upon the duty to consider regional housing needs. After citing the exclusionary zoning cases, the *SAVE* court found its regional welfare duty to exist "when the interest at stake is the quality of the environment." 89 Wn. 2d at 871, 576 P.2d at 406.

85. *See note* 43 and accompanying text *supra*. Prior to *SAVE* the Washington court had not determined the substantive impact of SEPA upon decisionmaking made subject to that Act. *But see* Eastlake Community Council v. Roanoke Assocs., 82 Wn. 2d 475, 497 n.6, 513 P.2d 36, 49 n.6 (1973) (where adverse environmental impacts are indicated, project approval may be an abuse of discretion if mitigation or avoidance of impacts was possible.)

86. *See* note 41 and accompanying text *supra*.

87. 60 Wn. 2d 521, 374 P.2d 1002 (1962).

yond the formal indicia of a city's consideration of extralocal interests, the *SAVE* court distinguished *Pruzan* as not having involved environmental effects as substantial and pervasive as those involved in *SAVE*,[88] and overruled *Pruzan* only to "the extent that it conflicts with the [regional welfare] duty we here impose."[89] As a result, absent such substantial and pervasive environmental impacts, *Pruzan's* limited judicial review would arguably still apply.

In *Polygon Corp. v. City of Seattle*,[90] decided after *SAVE*, the Washington court explicitly identified the importance of Washington's strong environmental policy as a justification for heightened judicial review. The court there ruled that judicial review of administrative land use decisions which are based upon environmental impact statements under SEPA must be conducted under the "clearly erroneous," as opposed to the arbitrary and capricious, standard.[91] The court adopted the higher degree of scrutiny in part "to ensure that an appropriate balance between economic, social, and environmental values is struck."[92] This same concern might explain the court's heightened scrutiny of the zoning ordinance in *SAVE*.

C. *Balancing the Arguments Against and in Favor of Heightened Judicial Review*

The arguments of the preceding section present a plausible, if not compelling, rationale for heightened judicial scrutiny of zoning decisions which have significant environmental effects in other jurisdictions. The protection of affected but unrepresented interests is a persuasive doctrinal justification for stepping beyond the arbitrary and capricious standard of review.[93] The court's solicitude for SEPA-based environmental values, already reflected in heightened judicial scrutiny of purely local land use decisions, pushes even more strongly for nondeferential review when the impacts extend beyond local boundaries.[94]

88. 89 Wn. 2d at 870, 576 P.2d at 406.

89. *Id. See* note 37 *supra*.

90. 90 Wn. 2d 59, 578 P.2d 1309 (1978).

91. *Id.* at 69, 578 P.2d at 1315.

92. *Id.* Though the *Polygon* holding concerned a decision of an administrative official denying a development proposal, in both that case and *SAVE* the court closely scrutinized the consideration given the environment by the decisionmaker. *Cf.* Note, *Environmental Law—A Standard for Judicial Review of Administrative Decisionmaking Under SEPA*—Polygon Corp. v. City of Seattle, 54 WASH. L. REV. 693 (1979) (arguing that *Polygon* supports judicial policy of greater environmental protection through closer judicial review and suggests the decision will govern the review of legislative as well as administrative decisionmaking under SEPA).

93. *See* notes 77–79 and accompanying text *supra*.

94. *See* notes 83–92 and accompanying text *supra*.

The force of these arguments nevertheless fails to wholly overcome the problems generated by a more active judicial role. The field of land use law demands a degree of certainty and finality which is threatened by an interventionist judiciary. Inherent institutional limitations upon the courts also counsel against too great a judicial involvement in zoning matters.[95]

An awareness of the social costs of judicial intervention is likely to constrain a court's willingness to override the local, legislative judgment in a fairly debatable case. Only if faced with major environmental impacts on areas outside of the enacting jurisdiction, or clear indications of local discrimination against extralocal interests, should the court consider displacing the judgment of the local legislative decisionmaker. Conversely, if a zoning decision does not significantly threaten extralocal environmental interests, or clearly discriminate between the local and the regional welfare, a court should be most reluctant to intervene.

Given the impossiblity of fashioning an adequate judicial solution to the inherent conflict between local and regional interests in land use decisionmaking, the court's decision in *SAVE* is justified. The court firmly established the duty to serve the welfare of the entire community affected by a zoning change, and forcefully condemned the idea that one locality may advance its own ends with a blind eye toward the consequences of its actions for its neighbors. The court's summary rejection of Bothell's claimed consideration of extralocal interests serves as a warning to localities throughout the state that the court will look beyond surface appearances when regional environmental interests are at stake. And if Bothell's rezone was not as clear an embodiment of parochial decisionmaking as the court's opinion would suggest, the court thereby created a strong impetus to cooperative, interjurisdictional planning.[96]

At the same time, whether by design or not, the *SAVE* opinion leaves ample room for the operation of the polices which militate against judicial intervention. The court's conclusory language closely ties its inteventionist result to the specific facts of *SAVE*. The arbitrary and capricious standard of review is retained in name if not in substance. The court may thus freely avoid the result of *SAVE* in a future case where the costs of judicial intervention appear to outweigh the need to protect the regional welfare. Thus, the intimidating example set by the court's decision in *SAVE* may win some measure of protection for regional environmental interests while not committing the court to an overly interventionist level of judicial review.

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95. *See* note 67 and accompanying text *supra*.

96. *See* notes 42 and 71 *supra*.