Municipal Affairs—Impact of Regional Facilities on Local Variance Decisions: National Merritt, Inc. v. Weist

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IMPACT OF REGIONAL FACILITIES ON LOCAL VARIANCE DECISIONS:
National Merritt, Inc. v. Weist

Local governments consider various factors when making zoning decisions, seeking a balance between the general welfare of the community and a landowner's right to use his property as he chooses. Some of these same factors are reviewed when a landowner seeks relief from burdensome zoning ordinances by obtaining a variance. In determining the reasonableness of local zoning ordinances, courts will often consider conditions outside the physical boundaries of the municipality. A tension arises, however, because municipalities would often prefer to exclude unpleasant or burdensome land uses if

1. Zoning regulations are designed to encourage land uses that promote the public health, safety, morals and general welfare of the local community. Factors considered include traffic patterns, schools, and "other public requirements." 1 R. ANDERSON, AMERICAN LAW OF ZONING, §§ 2.22, 2.24 (2d ed. 1976) [hereinafter cited as R. ANDERSON]. See also Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252, 252 N.Y.S. 178, 180, aff'd mem., 261 N.Y. 506, 185 N.E. 714 (1931) (a locality "may adopt plans suitable to its own peculiar location and needs, acting reasonably"); Note, Regional Development and the Courts, 16 SYRACUSE L. REV. 600, 608 (1965).

2. Zoning regulations attempt to balance public needs against private burdens. See, e.g., 1 R. ANDERSON, supra note 1, at § 5.10. However, "[n]o zoning plan can possibly provide for the general good and at the same time so accommodate the private interest that everyone is satisfied." Shepard v. Village of Skaneateles, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949). See note 8 infra.

3. To be individually exempted from applicable zoning ordinances the landowner must obtain a variance. This allows him to have a non-conforming use on his land without attacking the actual validity of the zoning ordinance. See notes 18-20 and accompanying text infra.


Courts usually consider three extra-territorial factors in determining the validity of a zoning ordinance: external zoning or development, external facilities, and regional needs. Note, Zoning: Looking Beyond Municipal Borders, 1965 WASH. U.L.Q. 107, 107-08. See also note 34 and accompanying text infra.

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they can satisfy their citizens' needs by utilizing facilities of neighboring communities. The problem is that, in the modern world of economics, "[t]here is no such thing as a free lunch": a gain acquired by one entity can only be obtained at the cost of another. Recently, in *National Merritt, Inc. v. Weist*, a New York court denied a variance for a more intensive use partly because of the availability of similar facilities nearby. Courts usually consider the municipality's zoning impact on surrounding regions; the *National Merritt* decision represents a trend to consider regional impact on local needs.

In *National Merritt*, plaintiff sought a variance to build a large shopping center on land limited by area restrictions to light retail development benefiting the local residents of Briarcliff Manor. The New York Court of Appeals affirmed the zoning board's denial of plaintiff's variance, noting the board's reliance upon the negative regional impact of the proposed shopping center. The court also

5. The parties affected by this type of zoning decision can be categorized as follows: the landowner, concerned with the uses to which his land may be put; the neighborhood, concerned with maintaining its character; the municipality, concerned with maintaining a balance of different neighborhoods to serve the community as a whole; and the region, a much broader area, concerned with efficient allocation of land uses.


9. The zoning ordinance as applied to plaintiff's property allowed a maximum floor area of 15,000 square feet per individual retail establishment, and a maximum length of 180 feet per individual structure. Plaintiff's proposed shopping center would cover 180,500 square feet, comprised mainly of three large retail stores, and would be 965 feet in length. 41 N.Y.2d at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 381-82.

10. Plaintiff's 19 3/4-acre parcel was zoned "General Business B-2," the most liberal in the village ordinance. Permissible uses other than retail development included professional or business office, bank, restaurant, motion picture theatre, gasoline station, motor vehicle salesroom, and laundry. *Id.* at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 381.

11. The village's policy was to limit retailing services "primarily for the convenience of the inhabitants of the Village and the immediate locality." *Id.*

12. 41 N.Y.2d at 443, 361 N.E.2d at 1032, 393 N.Y.S.2d at 384.

13. "Negative regional impact" in this context refers to the availability of shop-
cited the shopping center’s potential adverse impact on the village’s residential character and the likelihood of increased traffic congestion and flood control problems.\textsuperscript{15}

States generally delegate land use regulation power to local governments\textsuperscript{16} who in turn enact zoning ordinances.\textsuperscript{17} A landowner may be granted a variance from a burdensome zoning ordinance if he can show that he will not realize a reasonable return from his property as zoned, that the conditions which prevent reasonable use of his land are unique to that land and are not generally present in the neighborhood, and that the variance will not alter the essential character of the zoned locality.\textsuperscript{18} Through a variance, a municipality may relieve ping center facilities in the surrounding region, making construction of local facilities unnecessary.

\begin{itemize}
\item 14. 41 N.Y.2d at 445, 361 N.E.2d at 1033, 393 N.Y.S.2d at 385.
\item 15. 41 N.Y.2d at 444, 361 N.E.2d at 1033, 393 N.Y.S.2d at 384. \textit{See} note 38 infra.
\item 16. 1 R. ANDERSON, \textit{supra} note 1, at § 5.01.
\item 17. Protection of the health, safety, morals and general welfare of the community through land use regulation has been recognized as a valid exercise of the police power. \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926); Sax, \textit{Takings and the Police Power}, 74 \textit{Yale L.J.} 36, 36 (1964) [hereinafter cited as Sax].
\end{itemize}

When seeking relief from a zoning ordinance, the landowner has the initial burden of proof to show unreasonable economic injury from the classification. \textit{Salamar Builders Corp. v. Tuttle}, 29 N.Y.2d 221, 226, 275 N.E.2d 585, 588, 325 N.Y.S.2d 933, 938 (1971); \textit{Fulling v. Palumbo}, 21 N.Y.2d 30, 33, 233 N.E.2d 272, 274, 286 N.Y.S.2d 249, 252 (1967). It was not disputed in \textit{National Merritt} that plaintiff would suffer severe financial hardship in developing his property as a shopping center under the existing zoning ordinances. 41 N.Y.2d at 440, 361 N.E.2d at 1030, 393 N.Y.S.2d at 382.

When a hardship is self-created or self-imposed, the hardship by itself is not enough to entitle the landowner to a variance. \textit{See} \textit{Overhill Bldg. Co. v. Delany}, 28
a landowner of undue hardships and authorize a different use of the property, yet still preserve the integrity of the zoning scheme for other property.

Every zoning decision must weigh the needs of the various parties...
affected\textsuperscript{21} by balancing the individual landowner's needs against the town's overall land use objectives\textsuperscript{22} and the impact on the local

\textsuperscript{21} There is a continuum along which each case must fall. At one end the zoning ordinance is valid as to all property to which it applies, and at the other end the ordinance creates an unconstitutional taking of private property without compensation. A variance is needed where the ordinance reasonably applies as to some, but not all, of the property it regulates. If a landowner is at the end of the continuum where his burden greatly exceeds the social value of the ordinance, he may sue for inverse condemnation, bring a declaratory judgment action to declare the ordinance invalid, or request a variance. The particular facts of each case will determine whether the landowner is entitled to relief. \textit{See, e.g.}, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), \textit{cert. denied}, 425 U.S. 904 (1976) (diminution in market value from $400,000 to $75,000 not sufficient showing of hardship to obtain relief); McGowan v. Cohalan, 41 N.Y.2d 434, 361 N.E.2d 1025, 393 N.Y.S.2d 376 (1977) (diminution in value not sufficient by itself to show improper exercise of police power, given reasonable goal of maintaining neighborhood character); Grimpel Assocs. v. Cohalan, 41 N.Y.2d 431, 361 N.E.2d 1022, 393 N.Y.S.2d 373 (1977) (rezoning from business to residential use held invalid since no reasonable use for property remained); Conley v. Town of Brookhaven, 40 N.Y.2d 309, 315, 353 N.E.2d 594, 598, 386 N.Y.S.2d 681, 684 (1976) (financial hardship is a factor to be considered, though not determinative by itself); Stevens v. Town of Huntington, 20 N.Y.2d 352, 357, 229 N.E.2d 591, 594, 283 N.Y.S.2d 16, 19 (1967) (diminution in value does not automatically render restrictive zoning unconstitutional, but a significant loss in value may be an indication of lack of reasonable return); Crossroads Recreation, Inc. v. Broz, 4 N.Y.2d 39, 46, 149 N.E.2d 65, 68, 172 N.Y.S.2d 129, 133-34 (1958) ("[T]he only pertinent inquiry is whether the present allowed use is yielding a reasonable return. That it may not be the most profitable use is immaterial."). \textit{But see} DuPage County v. Halkier, 1 Ill. 2d 491, 115 N.E.2d 635 (1953) (large reduction in property value sufficient to invalidate zoning ordinance); Phipps v. City of Chicago, 339 Ill. 315, 171 N.E. 289 (1930) (rezoning to residential use held invalid because "best use" was for commercial and industrial purposes).

\textsuperscript{22} Land use objectives are often expressed through a comprehensive plan, defined as "a general plan to control and direct the use and development of property in a municipality or a large part thereof by dividing it into districts according to the present and potential use of the properties." Miller v. Town Planning Comm'n, 142 Conn. 265, 269, 113 A.2d 504, 505-06 (1955). A municipality may use a comprehensive plan to develop a "balanced, cohesive community," and efficiently allocate available land. Berenson, v. Town of New Castle, 38 N.Y.2d 102, 109, 341 N.E.2d 236, 241, 378 N.Y.S.2d 672, 680 (1975).

The \textsc{standard state zoning enabling act} \S 3 (U.S. Dep't of Commerce rev. ed. 1926), in effect in 47 states with various modifications, provides that zoning should be accomplished "in accordance with a comprehensive plan." However, the \textsc{standad city planning enabling act} \S 2 (U.S. Dep't of Commerce 1928) made local planning optional. Construing the two Acts in conjunction with each other, the State Act has been interpreted to mean that zoning need only be based on a comprehensive review of local conditions, rather than a comprehensive plan per se. Mandelker, \textit{The Role of the Local Comprehensive Plan in Land Use Regulation}, 74 Mich. L. Rev. 899, 901-02 (1976). The \textit{National Merritt} court illustrates this comprehensive review by considering residential neighborhood characteristics, flood and
neighborhood. Although courts frequently contemplate the impact of local zoning regulation on areas outside the community, few cases consider the question of whether facilities outside of the municipality should influence local land use decisions.

A New Jersey court addressed this problem in *Duffcon Concrete Products, Inc. v. Borough of Cresskill*, sustaining a municipality's exclusion of heavy industry on the basis that such industrial uses may be relegated to the neighboring region. However, the court implied that the town should also allow ample business uses to satisfy its residents' needs. Similarly, the Sixth Circuit, in *Valley View Village, Inc. v. Proffett*, upheld an ordinance restricting the entire village to residential use. The court sustained preservation of the village's resi-

In determining whether the statutory requirement for a comprehensive review of local conditions has been met, courts will consider whether the community's land use problems have been fully weighed. *Udell v. Haas*, 21 N.Y.2d 463, 470, 235 N.E.2d 897, 900-01, 288 N.Y.S.2d 888, 894 (1968). *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

23. The main limitation on the municipality's zoning power is that it may not restrict the use of the land so as to amount to an unconstitutional taking without compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Unfortunately, "[t]here is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). *See* notes 2, 8, and 17 and accompanying text *supra*.

24. *See* note 4 and accompanying text *supra*; note 34 and accompanying text *infra*.

25. 1 N.J. 509, 64 A.2d 347 (1949).

26. The court found it necessary to look beyond conditions prevailing within the municipality, to the "nature of the entire region" and the most advantageous use for the land in that region. The court noted that the "effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries." *Id.* at 513, 64 A.2d at 349-50.

27. The court was vague as to the exact standard to be applied to determine which uses were required to be permitted:

Where there exists a small residential municipality the physical location and circumstances of which are such that it is best suited for continuing residential development and, separated therefrom but in the same geographical region, there is present a concentration of industry in an area peculiarly adapted to industrial development and sufficiently large to accommodate such development for years to come, the power of the municipality to restrict its territory to residential purposes with ample provision for such small businesses, trades and light industries as are needed to serve the residents, is clear. *Id.* at 515, 64 A.2d at 351.

28. 221 F.2d 412 (6th Cir. 1955).
dential character as a valid zoning goal, "so long as the business and industrial needs of [the village's] inhabitants are supplied by other accessible areas in the community at large." 29 Other jurisdictions subsequently upheld citywide single-use zoning where residents' needs could be satisfied by nearby extra-municipal facilities. 30

In a Missouri case, *McDermott v. Village of Calverton Park*, an entire village was zoned for single-family dwelling use. Plaintiff desired to build a shopping center, but the court found that nearby commercial facilities adequately met the village's needs. In upholding the single-family zoning ordinance, the court noted that multiple-use zoning would benefit only the plaintiff and would thus ultimately reach beyond the village's police power authority. 32

Prior to *National Merritt*, the New York court considered the problem of regional impact on local needs in *Berenson v. Town of New Castle*. 33 The New York Court of Appeals refused to grant summary judgment on the question of whether a town could validly exclude multiple-family residences. The court emphasized that "consideration must be given to regional needs and requirements," 34 although it

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29. *Id.* at 418. The court noted that Valley View was "on the periphery of a large metropolitan center," and was not a "self-contained community," but only a part of "the economic and social whole." *Id.*

30. *See, e.g.,* Cadoux v. Planning and Zoning Comm'n, 162 Conn. 425, 294 A.2d 582, *cert. denied*, 408 U.S. 924 (1972) (zoning ordinance which zoned entire town residential upheld); Connor v. Township of Chanhassen, 249 Minn. 205, 211, 81 N.W.2d 789, 795 (1957) ("a municipality on the periphery of a large metropolitan center may constitutionally pass a one-use ordinance in order to retain its residential character"); Village of Old Westbury v. Foster, 193 Misc. 47, 48, 83 N.Y.S.2d 148, 150 (1948) (village authorities may keep the village free from business, as long as not unreasonable or arbitrary). *See also* Guacules v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (1951) (re zoning of most of borough to single-family residential upheld).

31. 454 S.W.2d 577 (Mo. 1970).

32. *Id.* at 582.

Similarly, an entire Connecticut town was zoned residential. Plaintiff's request for establishment of a town shopping center district was denied because adequate facilities to fulfill the needs of the town's citizens already existed in a neighboring community. Cadoux v. Planning and Zoning Comm'n, 162 Conn. 425, 294 A.2d 582, *cert. denied*, 408 U.S. 924 (1972).


34. *Id.* at 110-11, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. The court's rationale in *Berenson* indicates the general nature of the New York law concerning local zoning's regional effect before *National Merritt*.

There must be a balancing of the local desire to maintain the status quo [sic] within the community and the greater public interest that regional needs be met.
noted that a totally undeveloped community might not be able to entirely prohibit construction of multiple-family residences.\textsuperscript{35} The Court of Appeals remanded the case to determine whether the town had adequately considered regional needs in promulgating its single-use ordinance.\textsuperscript{36}

Although Briarcliff Manor did not adopt single-use zoning, its zoning ordinance similarly excluded certain land uses.\textsuperscript{37} The \textit{National Merritt} court considered the existence of large shopping centers in nearby communities\textsuperscript{38} in reaching its conclusion that a variance was not warranted, even though this effectuated exclusion of such facili-
ties from the village. The court concluded that, since two large regional shopping centers existed in neighboring communities, the village could justifiably prevent random proliferation of shopping areas to efficiently allocate its available land resources “in light of both local and regional needs.”

While Berenson laid down a moderate inclusionary rule, National Merritt gives a municipality more power to exclude certain land uses when regional demand for the facilities is absent. By recognizing the validity of such regional review, National Merritt will thus allow a municipality wider latitude in denying zoning variances for developments that could adversely affect the town’s character.

Although there was an efficient allocation of land uses in National Merritt, the implications of the decision are apparent: the acceptance of some exclusionary zoning creates a danger that municipalities will use this decision to maintain neighborhood virtues while depending on other communities’ commercial facilities. When municipalities exclude “undesirable” commercial uses and force their neighbors to carry the burden, an inequitable allocation of land uses may result.

The need for efficient use of our dwindling land resources compels implementation of regional planning and regulation. Some states have established extra-municipal agencies to regulate land uses.

39. 41 N.Y.2d at 445, 361 N.E.2d at 1033, 393 N.Y.S.2d at 385.
40. Berenson’s moderate inclusionary rule required that the town adequately provide for multiple-family residence. See notes 33-35 and accompanying text supra.
41. If municipalities take advantage of this power, inefficient and disorderly allocation of land uses will result. “To some extent then, the regionalism doctrine . . . might be branded localism—not an evaluation of the interests of the broader region as a whole. It might even be regarded as an ‘isolationist’ view used in the guise of ‘regionalism.’” Haar, Regionalism and Realism in Land-Use Planning, 105 U. Pa. L. Rev. 513, 526 (1957). See text accompanying notes 42 & 43 infra. See also Mandelker, The Role of the Local Comprehensive Plan in Land Use Regulation, 74 Mich. L. Rev. 899, 915-20 (1976); Note, Regional Development and the Courts, 16 Syracuse L. Rev. 600, 606-11 (1965).
42. These unwanted uses include large shopping centers and industrial uses. The specific uses undesirable to any particular community will depend upon the existing uses accepted by the community.
43. The federal government encourages regional planning by making it a prerequisite to receiving certain federal funds. This often leads, however, to ad hoc creation of regional planning agencies, underscoring the need for comprehensive legislation establishing regional planning. Mandelker, The Role of the Local Comprehensive Plan in Land Use Regulation, 74 Mich. L. Rev. 899, 916 (1976).
44. Hawaii divided the state into four zones (urban, rural, agricultural, and conservation), and placed statewide power in its State Land Use Commission. Haw. Rev. Stat. § 205 (1976 & Supp. 1978). Counties may designate permitted uses within
Until regional planning for land use regulation gains more widespread acceptance, uncertainty will continue in zoning decisions. Further effectuation of regional planning could help to relieve the courts from being forced to produce quasi-legislative zoning decisions. Only then will the competing interests of neighboring municipalities be resolved satisfactorily.

Ruth M. Zimmerman

the zones, subject to the commission's general regulation. However, the counties, rather than the commission, are responsible for enforcement.

Wisconsin adopted a Navigable Waters Protection Law to maintain the quality of the state's waterways and shorelands. Wis. Stat. Ann. § 144.26 (1974 & Supp. 1978). The Law is administered by the Department of Natural Resources, which may supervise counties' use of the shoreland. See Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972).


See also the ALI Model Land Development Code (adopted May 21, 1975), which proposed the creation of a State Land Planning Agency with authority to exercise powers granted by the Code. The Agency would not only consider the benefits and detriments within the local jurisdiction, "but shall consider all relevant and material evidence offered to show the impact of the development on surrounding areas. . . . [T]he Agency may consider, with other relevant factors, whether or not the absence of such development denies adequate facilities to the surrounding areas." Id. at § 7-402. See generally F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1971), in which the authors appropriately stated that

[This country is in the midst of a revolution in the way we regulate the use of our land. . . . The ancient regime being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments. . . . The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme—the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.

Id. at 1.

45. The difficulty has been noted that while zoning problems are regional in scope, zoning regulations are determined locally. See 5 N. Williams, American Land Planning Law §§ 160.01 & 163.22 (1975).

46. "State-wide or regional control of planning would insure that interests