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Regional Planning-Zoning-Minimum Lot Size and the General Welfare

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RECENT DEVELOPMENTS

Regional Planning—ZONING—MINIMUM LOT SIZE AND THE GENERAL WELFARE

Steel Hill Development, Inc. v. Town of Sanbornton
469 F.2d 956 (1st Cir. 1972)

The town of Sanbornton is located among the rolling hills of southern New Hampshire within easy access of both Lake Winnipesaukee's summer vacation area and the major New Hampshire ski resorts. It is also only one hundred expressway miles from Boston. To exploit the demand of urban dwellers for second homes in such an attractive and accessible area,[1] Steel Hill Development, Inc. purchased 510 acres of land with the intention of developing it into approximately 500 family units. Because the projected lot sizes were not within the minimum limits established by the local zoning ordinance,[2] Steel Hill negotiated with the town planning board to secure approval for its proposals. Although initially receptive to the cluster plan of development,[3] the

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1 Duriug the 1960's southern New Hampshire was one of the fastest growing areas in the country. Over 350,000 people now own vacation homes in New Hampshire, a figure equal to almost half the total permanent population of the state. Kovach, *New Hampshire, a Booming Vacationland, Fights To Preserve Its Natural Beauty*, N.Y. Times, Feb. 1, 1971, § 1, at 17, col. 1. *See generally* Note, *Protection of Environmental Quality in Nonmetropolitan Regions By Limiting Development*, 57 IOWA L. REV. 126 (1971).

2 Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 958 (1st Cir. 1972), *aff'g*, 338 F. Supp. 301 (D.N.H. 1972). The town zoning ordinance, enacted pursuant to N.H. REV. STAT. ANN. §§ 31:60-89 (1970), divided the town into several districts with minimum lot requirements as follows:

General Residential and Agricultural	35,000 square feet
Commercial	.....
Recreational	15,000 square feet
Highway Commercial	35,000 square feet
Historical Preservation	.....
Forest Conservation	6 acres (261,360 square feet)

469 F.2d at 959 n.4.

Plaintiff's land, the contours of which were described as varying from "sloping to hilly to steep hilly to clifflike with most of it ranging from hilly to steep hilly," was in the General Residential and Agricultural District and thus was subject to a .75 acre minimum lot requirement. Steel Hill Development, Inc. v. Town of Sanbornton, 338 F. Supp. 301, 302, 305 (D.N.H. 1972).

3 The cluster zoning plan proposed by Steel Hill would have combined individual homesites on lots of 25,000 square feet or more with homesites grouped in clusters of three to fifteen sites on lots of approximately 12,000

town planning board began to reconsider in light of mounting opposition from the townspeople, who were concerned with both the population growth[4] and environmental damage[5] that might result from such a

square feet. The cluster sites were to have common land to equal or exceed 35,000 square feet.

Id. at 303.

According to Steel Hill, such a plan would be the "best use of the area and preserve as much of the woodland as possible." *Id.* For a general discussion of cluster zoning, see 1 E. YOKLEY, ZONING LAW & PRACTICE § 4-25, at 182-83 (3d ed. 1965).

At the initial planning board meeting, Steel Hill also presented two alternative plans of development: a conventional plan which apparently was a last resort in case the cluster plan was not approved, and a plan for development of the area as a trailer park, which was evidently introduced as a scare tactic to accentuate the desirability of their cluster concept. 338 F. Supp. at 304.

Steel Hill's plan for cluster development brings into sharp focus the conflict between the rising demand for seasonal and permanent homes and the desire of communities to stem the tide of development. Recognizing that even the most secluded or picturesque towns will inevitably have to accommodate the increasing population, many commentators have advocated the cluster concept of zoning as a practical solution to this problem. *See generally* Goldston & Scheuer, *Zoning of Planned Residential Development*, 73 HARV. L. REV. 241 (1959); *Symposium: Planned Unit Development*, 114 U. PA. L. REV. 3 (1965). For communities wishing to preserve open spaces, this method may provide a more feasible alternative to minimum lot size ordinances than a patchwork pattern of relatively isolated homes dotting an area. The use of a cluster plan would mean that whole areas would be free from development, with the concentration of homes confined to a smaller portion of the zoning area. *See* National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 531, 215 A.2d 597, 611-12 (1965) (court discounted benefit of large lot zoning as means of preserving open spaces, noting that four-acre minimum lot size ordinance in question would have left area so zoned "simply dotted with larger homes on larger lots"). *See also* M. WEHRLY, CLUSTER SUBDIVISIONS AND ZONING, THE YEARBOOK OF AGRICULTURE, A PLACE TO LIVE 469 (1963) (stating that "[a]creage zoning, mistakenly applied to create 'open development' . . . has absorbed land at accelerated rates without producing increased amenity, desirable living, economy of layout, convenience of access, or preservation of rapidly diminishing open space.") *But see* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 797 (1969) (arguing that minimum lot zoning allows more "rational and systematic absorption of new residents," and ensures controlled change of growth. The control of density and population growth in an orderly manner has generally been held a permissible zoning objective. *See, e.g.*, J.D. Constr. Corp. v. Board of Adjustments of the Township of Freehold, 119 N.J. Super. 140, 290 A.2d 452 (Law Div. 1972); Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (amendment to zoning ordinance restricting development until municipal services available held constitutional). For a discussion of the *Ramapo* decision, see 47 N.Y.U.L. REV. 723 (1972).

The few cases dealing with planned development have accorded it generally favorable treatment. In Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970), the court held that a cluster plan was in conformity with the applicable zoning statute even though there was no uniformity among the individual units within the development. In Chrinko v. South Brunswick Township Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (Law Div. 1963), a cluster zoning ordinance permitting waiver of minimum lot size requirements when the developer deeded areas of the zoned land for public purposes was upheld. *See generally* Annot., 43 A.L.R.3d 888 (1972).

4 At the time the suit was brought, Sanbornton had a stable population of ap-

development. Consequently, an amendment to the zoning ordinance was passed establishing new zoning districts and raising the minimum lot requirements on existing districts.[6] Seventy percent of the proposed development now had a six-acre minimum lot requirement, while the remaining thirty percent was rezoned for a three-acre minimum lot size.[7]

Steel Hill then instituted a suit attacking the validity of the amended ordinance, alleging claims of uncompensated taking of property, denial of equal protection, and violation of due process. The district court's rejection of all counts[8] resulted in an appeal to the United States Court of Appeals for the First Circuit. The circuit court upheld both the three-acre and the six-acre minimum lot requirements in a paradoxical decision that integrated current social considerations into municipal zoning law, yet retreated to the narrow parochialism of uncritical acceptance of local autonomy.[9] The court recognized that the

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proximately 1,000 people living in 330 homes. The summer influx swelled the number to 2,000, who resided in the 400 seasonal homes in the area. The Steel Hill development would expand the housing market by an additional 500 to 515 family units. Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 958 (1st Cir. 1972).

5 *See* notes 30-36 and accompanying text *infra*.

6 The new districts and lot sizes were as follows:

General Residential	1.5 acres (65,340 sq. ft.)
Agricultural	3 acres (130,680 sq. ft.)
Commercial	.....
Recreational	1.5 acres (65,340 sq. ft.)
Highway Commercial	.75 acre (35,000 sq. ft.)
Historical Preservation	1.5 acres (65,340 sq. ft.)
Forest Conservation	6 acres (261,360 sq. ft.)

Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 959 n.4. (1st Cir. 1972). The Forest Conservation District, as a result of the amendment, now covers approximately half the town and encompasses the only area under development. *Id.* at 961.

7 *Id.* at 959.

8 Steel Hill Development, Inc. v. Town of Sanbornton, 338 F. Supp. 301 (D.N.H. 1972). Steel Hill's primary contention was that the amended zoning ordinance resulted in a confiscation of its property without just compensation. The district court emphasized that large lot zoning had been upheld in many previous cases and was becoming the trend in New Hampshire. *Id.* at 307. For a collection of cases upholding large lot zoning, see Annot., 95 A.L.R.2d 716 (1964).

Employing a balancing test between the public interest of the Sanbornton townspeople served by the zoning ordinance and the "economic burden" placed on the developer, the court found the ordinance valid. 338 F. Supp. at 307. Although Steel Hill certainly suffered economic detriment by the rezoning, that has never been a controlling factor in zoning review, absent a total prohibition of profitable use. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (alleged 93% loss in property value did not invalidate zoning ordinance). The court pointed out that Steel Hill's property can still be used for vacation residences or farming. 338 F. Supp. at 307.

9 Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972). Current social considerations in zoning cases, as evidenced by decisions in Pennsylvania and New Jersey, involve the definition of the emerging legal right to a decent home. *See* notes

case before it involved the "environmental revolution,"[10] the impact of which has yet to be determined in the state and federal courts.[11] Noting that "[d]ifficult and novel legal and factual questions are posed which require the resolution of conflicting economic, environmental, and human values . . . ." and which "may never be solvable with any degree of certitude,"[12] the court nevertheless limited its review of the Sanbornton zoning ordinance to the traditionally restricted scope of judicial examination of local legislative enactments.[13]

42-56 and accompanying text *infra*. *Steel Hill* goes a step further and considers the right to a decent environment in which to build that home. The paradox results from the court's subservience to traditional rules of zoning evaluations, rules whose perspective is limited solely to an examination of property rights versus police power on the local level, without regard to broader social objectives or regional impact.

10 The court accepted the district court's framing of the issue:

> This case reflects the current clash between those interested in opening up new and hitherto undeveloped land for sale and profit and those wishing to preserve the rural character of Northern New England and shield it from the relentless pressure of an affluent segment of our society seeking new areas for rest, recreation, and year round living.

338 F. Supp. at 302. *See* Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965). *See also* authorities cited in note 1 *supra*.

11 The court suggested that since the federal government has recognized the significance of environmental concerns in the National Environmental Policy Act (42 U.S.C. §§ 4321-37 (1970)), so also may local communities in their zoning ordinances. The federal statute is not explicit, nor have courts yet decided exactly what types of environmental dangers are within the Act's coverage. Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), construed the Act as encompassing more than just air and water pollution. Noise, traffic, congestion, and overburdened transportation systems are also apparently within its purview.

12 469 F.2d at 959.

13 The police power of a state, and the subsequent delegation of such power to local communities, serves as the basis for all zoning laws. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See also* Louis K. Ligget Co. v. Baldridge, 278 U.S. 105 (1928); Jacobson v. Massachusetts, 197 U.S. 11 (1905). The validity of an ordinance depends upon the extent to which its goals are permissible objectives within the framework of the police power. The means by which such goals are sought may not be arbitrary, discriminatory, or unreasonable. Village of Euclid v. Ambler Realty Co., *supra* at 395. The permissible objectives, as conferred by most state statutes and accepted by the Supreme Court in *Euclid*, are the furtherance of the "public health, safety, morals, or general welfare." *Id*. *See also* N.H. REV. STAT. ANN. § 31:60 (1970) (zoning allowed "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community"). In reviewing local ordinances, courts indulge in a strong presumption of validity. Village of Euclid v. Ambler Realty Co., *supra*. This presumption is based in part on a desire to avoid an investigation into social conditions felt to be beyond a court's competence, and in part on a desire to preserve local autonomy by upholding local legislative determinations. *See* Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 16 (1971). Such a basis for judicial review has come under recent criticism for being too restrictive in scope. *See, e.g.*, National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965). However, the court of appeals in *Steel Hill* was unwilling to depart from established precedents. 469 F.2d at 959-60.

Although supported by a firm line of precedent,[14] such a narrow review runs counter to an emerging trend in other jurisdictions of a broader and more forceful evaluation of local zoning ordinances.[15] The court's approach also avoided the troublesome, and perhaps impossible, task of delineating the precise extent to which environmental factors may be considered in enacting zoning laws and the interplay of such concerns with the equally unsettled area of local responsibility for regional housing needs.[16]

I

THE JUSTIFICATION OF SANBORNTON'S ORDINANCE

A. *"General Welfare" as a Criterion for Zoning Review*

Much of the argument and discussion over the scope of judicial review and the standard of evaluation to be applied to zoning ordinances has involved an attempt to satisfactorily define the parameters of permissible zoning objectives. While almost all states allow zoning only for the purposes of health, safety, or the general welfare, case authority is split on a comprehensive definition of each element and the interrelation among them.[17] As a rule, zoning for health and safety purposes alone has been upheld by the courts, but zoning for the purpose of general welfare, independent of any significant demonstrable health or

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14 *See, e.g.*, Gorieb v. Fox, 274 U.S. 603 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); City of St. Paul v. Chicago, St. P., M. & O. Ry., 413 F.2d 762 (8th Cir. 1969); Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971); Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958). *See generally* Note, *The General Public Interest vs. The Presumption of Zoning Ordinance Validity: A Debatable Question*, 50 J. URBAN L. 129 (1972).

15 This expansion of the scope of judicial review usually is based upon an examination of both the regional and broader social impact of a given ordinance, areas into which earlier courts were reluctant to step. *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971); Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

16 *See* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971) (regional housing needs within general welfare and necessary consideration for town zoning ordinance).

17 Two early Supreme Court decisions validated use of the police power under differing rationales. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), seems to have been decided solely on the basis of health and safety considerations, while a prior decision upheld an exercise of police power based solely on the general welfare. Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Comm'rs, 200 U.S. 561 (1906); *see* Roberts, *supra* note 13, at 11-12.

safety concerns, has not received such favorable treatment.[18] Much of the confusion in this area is due to the lack of an adequate definition of general welfare. For example, some courts have ruled that aesthetic considerations are permissible zoning concerns under the general welfare guise,[19] as is the preservation of a town's rural character,[20]

18 In National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 530, 215 A.2d 597, 611 (1965), the court indicated that general welfare should not be used as a test because of the conceptual difficulty in formnlating an adequate definition. *See also* Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970). *But see* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971). In *Oakwood at Madison*, the court held that the general welfare must be considered in all zoning cases and implied that it was a justifying criterion, independent of health and safety considerations.

A comprehensive definition of general welfare has escaped the courts for many years. The few cases that single out general welfare for consideration invariably define it in vague, general terms. For example, in Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 172, 89 A.2d 693, 697 (1952), the court stated: "[s]o long as the zoning ordinance was reasonably designed, by whatever means, to further the advancement of a community as a social, economic, and political unit, it is in the general welfare." *See also* Cunningham, *Land-Use Control—State and Local Programs*, 50 IOWA L. REV. 367, 385 (1965) (noting that after 50 years of judicial review term "general welfare" remains intensely undefined as it relates to zoning").

19 Perhaps the leading case in this area is Berman v. Parker, 348 U.S. 26 (1954), which upheld the constitutionality of a plan to renovate blighted areas of the nation's capital. In rather expansive language, Mr. Justice Douglas, writing for the majority, expressed this view of general welfare:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33. *See also* Stone v. City of Maitland, 446 F.2d 83 (5th Cir. 1971) (enhancement of aesthetic nature of area by regulation of distance between service stations permissible zoning objective).

Zoning for aesthetic purposes has followed an erratic course during the last half century. While zoning primarily for aesthetic reasons was rejected almost uniformly by the courts in the early part of the century (*see, e.g.*, Romar Realty Co. v. Board of Comm'rs, 96 N.J.L. 117, 114 A. 248 (1921); *see generally* Annot., 21 A.L.R.3d 1222, 1226-35 (1968)), a few recent decisions have reversed this trend. Several New York cases indicate that aesthetic concerns alone may justify a zoning ordinance. *See* Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963); People v. Berlin, 62 Misc. 2d 272, 307 N.Y.S.2d 96 (Snp. Ct. 1970). *See also* Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970); Senior v. Zoning Comm'n of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959). *But see* DeMaria v. Enfield Planning & Zoning Comm'n, 159 Conn. 534, 271 A.2d 105 (1970) (aesthetics not proper consideration). The general rule, however, remains that aesthetic improvement is a complementary purpose of zoning, bnt may not be a dominant factor. *See* Confederacion de la Raza Unida v. Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971); Piscitelli v. Township Comm. of Scotch Plains, 103 N.J. Super. 589, 248 A.2d 274 (Law Div. 1968). For a general discussion of aesthetics and zoning see, Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 29 LAW & CONTEMP. PROB. 218 (1955); Roda, *The Accomplishment of Aesthetic*

or the stabilization of property values.[21] Other courts, however, have held that "general welfare" is merely a "catch-all" phrase embodying only health and safety factors, and is not, therefore, an independent justification for zoning.[22] One court even suggested that general welfare is incapable of judicial definition and consequently constitutes "an exceedingly difficult standard against which to test the validity of legislation."[23]

In *Steel Hill*, the court of appeals, in affirming the district court, agreed that the three-acre minimum lot requirement was a reasonable means of legislating for the public health since it was based upon drainage and sewerage needs.[24] In so doing the court reaffirmed the notion of earlier decisions that a zoning ordinance may be used as a means to avoid an overuse of municipal services, a rationale rejected by many

Purposes Under the Police Power, 27 S. CAL. L. REV. 149 (1954). *See also* Masotti & Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URBAN L. 773 (1969); Note, *The Aesthetic Factor in Zoning*, 11 DUQUESNE L. REV. 204 (1972).

While the debate concerning the role of aesthetics has centered primarily around *visual* aesthetics, the question of zoning to prevent environmental harm, although traditionally not considered an aesthetic purpose, is certainly relevant to the discussion. The desire to alleviate water pollution, curb traffic congestion, and limit uncontrolled population expansion is as much related to the eyesores such conditions create as to their undesirable physical effects. Thus, in jurisdictions such as New York, which is willing to recognize aesthetics as a permissible zoning objective, legislation to prevent environmental damage through land use control may not encounter severe judicial roadblocks. Although the Supreme Court has not addressed itself to this issue, the language of Mr. Justice Douglas in *Berman*, quoted above, is entirely consonant with an approach that legitimizes aesthetic and environmental zoning objectives.

[20] *See* Senior v. Zoning Comm'n of Town of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959); Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969); County Comm'rs of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967); Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952). *See also* Greater Bloomfield Real Estate Co. v. Bloomfield Township, 35 Mich. App. 437, 192 N.W.2d 513 (1971). *But see* Kavanewsky v. Zoning Bd. of Appeals of Town of Warren, 160 Conn. 397, 279 A.2d 567 (1971) (desire to maintain town's rural character held impermissible zoning objective). In many cases the preservation of a town's natural state will be directly connected with a desire to protect against ecological harm. *See, e.g.*, Golden v. Board of Selectmen of Falmouth, 358 Mass. 519, 265 N.E.2d 573 (1970) (zoning bylaw having as purpose protection of town's coastal resources upheld).

[21] *See* Citizens Nat'l Bank of Downers Grove v. Village of Downers Grove, 265 N.E.2d 171 (Ill. App. 1970); Hartigan Oldsmobile Cadillac, Inc. v. City of Park Ridge, 130 Ill. App. 2d 156, 264 N.E.2d 386 (1970); People v. Stover, 12 N.Y.2d 462, 466, 191 N.E.2d 272, 274, 240 N.Y.S.2d 734, 737 (1963); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955). For a discussion of the interrelation of property values and aesthetics in zoning, see Note, *supra* note 19, at 222-23.

[22] *See* Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970).

[23] National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 530, 215 A.2d 597, 611 (1965).

[24] 469 F.2d at 960.

recent cases.[25] The three-acre requirement was not based directly on the environmental claims, nor was it supported by considerations of the general welfare.[26]

The six-acre requirement, however, required more extensive treatment by the court. It was found to be unsupportable as a reasonable means of protecting public health or safety, since there was insufficient evidence to establish a rational basis between the six-acre minimum and the feared consequences of development.[27] It was held to be justifiable, however, under the general welfare provision of the state enabling statute.[28] Thus, the court ruled that zoning legislation directed solely toward the general welfare may be valid, independent of any justifiable health or safety considerations.

B. *Environmental Damage as a Permissible Concern Within "General Welfare"*

The evidence presented in *Steel Hill* suggests that the amended Sanbornton zoning ordinance had multiple purposes. Although the preamble stated that one of the objectives of the ordinance was the preservation of the town's rural charm,[29] it was clear to the court that the planning board was also deeply concerned with the "orderly growth" of the town.[30] In addition, the planning board and town residents expressed concern over the problems of slope drainage, soil erosion, sewage disposal, and traffic congestion that were expected to accompany the contemplated development.[31] None of these considerations, however, was unique; they had been accepted as permissible considerations by some jurisdictions, and rejected by others, for over forty years.[32]

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25 Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Mignatti Constr. Co. Zoning Application, 3 Pa. Comm. 242, 281 A.2d 355 (1971).

26 The district court supported the validity of the three-acre requirement on grounds of health and safety. 338 F. Supp. at 305.

27 *Id.*

28 *Id.* at 305-06. *See* N.H. REV. STAT. ANN. §§ 31:61-89 (1970).

29 338 F. Supp. at 304 n.3.

30 *Id.* at 304.

31 *Id.*

32 *See generally* Annot., 95 A.L.R.2d 716 (1964). The rationale that the avoidance of a possible present or future burden on municipal services was a permissible zoning objective was perhaps most convincingly dismissed in National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1964), in which the court said: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid." *Id.* at 532, 215 A.2d at 610. *See also* Mignatti Constr. Co. Zoning Application, 3 Pa. Comm. 242, 281 A.2d 355 (1971).

The primary significance of this case involves the claims of environmental damage that would result from the construction and utilization of the proposed 500 residential units. Although no substantial evidence was presented by the town,[33] it was nevertheless alleged that the amendment was prompted by fears of air pollution from the anticipated increase in automobile traffic, water pollution in Lake Winnesquam resulting from an increased burden upon sewage disposal facilities, and possible destruction of smelt spawning grounds which were an important natural resource of the area because they attracted sport fishermen and were a necessary link in the ecosystem of Lake Winnesquam's famous trout.[34] In upholding these minimum lot requirements, the decision recognizes that environmental concerns are permissible zoning objectives to be furthered within the framework of assuring the general welfare, although apparently not, at least with respect to the amount of environmental damage alleged here, within the purview of the more limited safety and health police power of the states.[35]

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33 There was conflicting evidence on the alleged environmental impact of the proposed development. The lower court chose to side with the town, in part because of a belief that developers are less than diligent in their adherence to efforts to preserve the areas they develop. 338 F. Supp. at 305. While affirming the district court's conclusion, the court of appeals was "disturbed . . . that there was never any professional or scientific study made as to why six, rather than four or eight, acres was reasonable to protect the values cherished by the people of Sanbornton." 469 F.2d at 962.

This lack of convincing concrete evidence of the development's environmental impact raises doubts about the precise holding of the case. Rather than setting forth environmental concerns as a new factor to be considered in reviewing zoning ordinance (*see* Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971) (increasing minimum lot size upheld when concern was to avoid underground water pollution by limiting number of septic tanks); Golden v. Board of Selectmen of Falmouth, 358 Mass. 519, 265 N.E.2d 573 (1970) (zoning to protect coastal natural resources upheld), it may be that the court was merely recognizing the validity of the ordinance on the basis of preserving the town's essentially rural nature. On the other hand, the court may have decided that neither ground standing alone was sufficient to support the ordinance, but that the combination of the two goals constituted a permissible zoning objective.

34 469 F.2d at 960. The holding that air pollution from traffic congestion is a permissible consideration seems to revive this objective from its rejection in National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 527-28, 215 A.2d 597, 610 (1965). The district court in *Steel Hill* suggested that since the dangers of increased traffic, primarily air pollution, are no longer met merely by building new roads, the failure to find an effective solution to this problem permits a town to contain uninhibited traffic growth through zoning. 338 F. Supp. at 306. *But see* Alsenas v. City of Brecksville, 29 Ohio App. 2d 255, 281 N.E.2d 21 (1972).

35 This aspect of the decision would be important only in those jurisdictions which, like New Hampshire, recognize the conceptual distinction between health and safety on the one hand and general welfare on the other. This, however, leaves open the question

C. *The Determination of General Welfare*

Steel Hill is significant in that while establishing a new factor to be considered by courts in reviewing local zoning legislation, the scope of that review is narrowly drawn. In ascertaining that Sanbornton's legislative efforts in dealing with possible pollution were in furtherance of the general welfare, the court considered only the effects on residents of Sanbornton. The extraterritorial implications of the decision were virtually ignored.[36] Such myopic treatment, although in accord with traditional judicial review of zoning cases, is currently being abandoned in many jurisdictions.[37] While here the decision may have no harsh extraterritorial consequences,[38] the result may not always be so inconsequential. For example, in the future a similar ordinance may be struck down for failure to prove environmental detriment within the

of what amount, if any, of asserted environmental damage would be sufficient to enable a community to legislate against it through zoning under its health and safety power.

[36] The court did, however, suggest that if a greater demand for land in the area were shown it would reconsider its decision: "Were we to adjudicate this as a restriction for all time, and were the evidence of pressure from land-deprived and land-seeking outsiders more real, we might well come to a different conclnsion." 469 F.2d at 962.

This presents a new factual twist to the traditional exclusionary zoning problem, which typically involves the exclusion of low income groups from a locality. Recent decisions have suggested that this practice is illegal. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (Law Div. 1972) (town cannot zone against poor people). *Steel Hill* involves the exclusion of those presumably in the upper and upper-middle income brackets. No case has yet invalidated a zoning ordinance on such grounds.

[37] Recently, many courts have defined general welfare in terms of its effect on a regional basis, considering the impact of an ordinance not merely within the boundaries of a given town, but also on the surrounding area. This is primarily evident in instances where suburban zoning laws have noticeably curtailed outward urban expansion. In Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 20-21, 283 A.2d 353, 358 (Law Div. 1971), the court stated:

> The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned . . . into such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside.

See also Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954).

When the examination is thus broadened, further complications arise in determining how extensive a region should be considered in analyzing a given zoning ordinance. Courts have not faced much of a problem in this counection as yet, since most of the cases arising have involved suburban communities adjacent to large metropolitan areas. *Steel Hill* represents the more difficult situation which courts taking a regional approach will have to consider. Does a rural town such as Sanbornton situated in a relatively undeveloped area, have to evaluate its zoning ordinance in the context of its impact on Boston, 100 miles away?

[38] The town's character is preserved, the development is halted, at least in its present form, and those seeking vacation homes still have the opportunity to purchase elsewhere.

town's borders. However, subsequent development thereby permitted may have profound ecological impact on the surrounding area because of peculiar topographic or climatic features. While *Steel Hill* nowhere explicitly states a definite rule against regional considerations, the decision lacks the formulation of a definite geographic framework within which the impact and consequences of an ordinance should be considered.[39]

II

THE EMERGING TREND IN ZONING REVIEW

Steel Hill represents a sharp contrast to recent cases which have taken a markedly dissimilar approach to judicial review of zoning ordinances. While large lot zoning has been upheld in various areas for many years,[40] the current approach, as exemplified by cases in Pennsylvania and New Jersey, has been to treat such zoning with great suspicion.

A. *The Development of a Regional Approach to Minimum Lot Zoning*

In *National Land & Investment Co. v. Easttown Township Bd. of Adjustment*,[41] the Pennsylvania court struck down a four-acre minimum lot requirement in Easttown, a suburb of Philadelphia. Recognizing the growing demand for suburban housing,[42] the court imposed an obligation upon Easttown to act responsibly with respect to this increased population pressure, although the extent of this responsibility was never clearly defined.[43] In response to the town's assertions of theretofore permissible zoning objectives, the court indicated that preservation of rural character, fear of increased burdens on municipal services, and aesthetic considerations were no longer sufficient to justify such an exclusionary zoning ordinance in light of the pressing demand for homes

39 469 F.2d 956.

40 *See* Annot., 95 A.L.R.2d 71 (1964).

41 419 Pa. 504, 215 A.2d 597 (1965).

42 *See* M. BROOKS, EXCLUSIONARY ZONING 1-4 (1970).

43 "The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not." National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 532, 215 A.2d 597, 610 (1965). *See also* Kavanewsky v. Zoning Bd. of Appeals of the Town of Warren, 160 Conn. 397, 279 A.2d 567 (1971); note 34 *supra*.

in the area.[44] In effect, the court shifted the focus of judicial review from one that viewed zoning ordinances as primarily affecting the physical use of land within a specific town, to one that viewed zoning ordinances as affecting the social structure of an entire region.

Subsequent Pennsylvania cases have placed an even greater burden on towns seeking to enact minimum lot size ordinances. In *Girsh Appeal*,[45] the Supreme Court of Pennsylvania reaffirmed the responsibility of a town to accommodate those wishing to live there. The court suggested that if there is a regional demand for a particular land use, the town has an affirmative duty to allow such use through zoning.[46] In *Concord Township Appeal*,[47] also known as the *Kit-Mar Builders* case, the same court struck down a local zoning ordinance imposing minimum lot requirements of two to three acres in a suburban area. In addition to reasserting the rationale of *National Land*, that avoiding a future drain on municipal services was an insufficient zoning objective,[48] the *Kit-Mar* court questioned the validity of almost all minimum lot zoning, saying that "[a]bsent some *extraordinary* justification, a zoning ordinance with minimum lot sizes such as those in this case is *completely* unreasonable."[49]

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44 National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 525-28, 215 A.2d 597, 608-10 (1965).

45 437 Pa. 237, 263 A.2d 395 (1970).

46 *Id.* at 244-45, 263 A.2d at 398-99. In reviewing the zoning ordinance of Nether Providence, a small suburb of Philadelphia, the court stated:

> [I]f Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden.
>
> . . . If Nether Providence is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth; it cannot be allowed to close its doors to others seeking a "comfortable place to live."

Id. at 245-46, 263 A.2d at 398-99 (footnotes omitted). The court qualified this affirmative duty by distinguishing between residential land uses and commercial land use, but made no distinction among the various residential land uses, leaving it unclear whether a town has a duty to affirmatively zone for vacation homes and trailer parks if there is a demand for them. *Id.*, 263 A.2d at 399.

This case suggests that towns have a duty to assess the regional implication of a zoning ordinance before enacting it. However, depending upon the size of a given region, many small communities are probably incapable, both because of inadequate finances and unavailable manpower, to undertake such a study. Assuming a town's capability, it is not clear what stance a reviewing court would take when examining such an ordinance. It may be that once a regional survey is completed and a zoning ordinance is enacted pursuant thereto, the presumption of validity of legislative determinations will again become a strong factor, and the ordinance will be difficult to attack. For a discussion that suggests *Girsh* does not mandate regional considerations see, Comment, *Exclusionary Zoning from a Regional Perspective*, 1972 URBAN L. ANN. 239.

47 439 Pa. 466, 268 A.2d 765 (1970).

48 *Id.* at 471-74, 268 A.2d at 767-68.

49 *Id.* at 471, 268 A.2d at 767 (emphasis added). The court also reiterated a town's

New Jersey joined the growing trend toward closer judicial scrutiny of local enactments in *Oakwood at Madison, Inc. v. Township of Madison.*[50] There the New Jersey Supreme Court invalidated a zoning ordinance setting forth minimum floor space and lot requirements.[51] The court emphasized that Madison had the obligation of justifying every zoning ordinance not merely on the basis of health and safety but also on the basis of the general welfare.[52] Recognizing the severe housing shortage in the area and the exclusionary impact of the ordinance,[53] the general welfare was deemed to encompass the housing needs of the entire region, not just those of Madison.[54]

This new approach differs significantly from the traditional bases of examination. It represents a definite trend toward judicial consideration of regional interests in assessing a local zoning ordinance. This trend is especially true in a suburban setting where the courts are more likely to impose an obligation on the localities to deal with acute housing demands.

The extent of this obligation remains unclear. *Girsh* suggests an absolute responsibility to accommodate the various land uses desired by a region, while recent California decisions have suggested local environmental and aesthetic considerations may still be of some importance.[55] Traditional concepts of permissible objectives within the police power are changing rapidly. No longer are traffic congestion, depreciated property values, preservation of rural areas, or inadequate municipal

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obligation to consider the regional housing needs of the area: "It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area." *Id.* at 474, 268 A.2d at 768-69. The court further emphasized that aesthetics, and perhaps even privacy, are little justification for zoning, expressing the view that houses can be built quite comfortably on lots of considerably less than one acre. *Id.* at 470-71, 268 A.2d at 766-67.

50 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971).

51 *Id.*

52 *Id.* at 15-16, 283 A.2d at 355.

53 According to the court, the probable price of the lots so zoned would be so expensive as to preclude 90% of the population from purchasing there. *Id.* at 16-17, 283 A.2d at 356.

54 *Id.* at 20-21, 283 A.2d at 358; *see* note 39 *supra.*

55 In Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971), a zoning ordinance designed " 'to preserve and enhance the natural amenities which form the environment of the City of Morgan Hill' " (*id.* at 896) was upheld against asserted claims of equal protection violations by the prohibition of construction of a low income housing unit there. In Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970), the court ruled it permissible to take into account aesthetic and environmental factors even though the ordinance may have an exclusionary effect on low income housing. *But see* Kavanewsky v. Zoning Bd. of Appeals of the Town of Warren, 160 Conn. 397, 279 A.2d 567 (1971).

services sufficient justifications for zoning.[56] Comprehensive planned growth and regional housing needs have replaced them in part. The net effect is that the strong presumption of validity of local zoning ordinances has been greatly weakened by an awakened judiciary willing to examine the laws in their broader social context.

B. Steel Hill *Distinguished*

In light of this radical departure from previous norms of judicial review, it is important to determine whether *Steel Hill* is in harmony with this developing trend or merely a reaffirmation of traditionally limited judicial examination of zoning ordinances.

On its face, *Steel Hill* is difficult to reconcile with the modern approach. Little attention is paid to the regional impact of the Sanbornton ordinance either in terms of its environmental impact on surrounding communities or its effect on those denied access to vacation homes in Sanbornton. The general welfare is viewed by the court solely from the perspective of local citizens. More importantly, the court appears to accept the *town's* determination of general welfare without deeper examination.[57] The inconclusive nature of the evidence presented by the town indicates that a strong presumption of validity is still given to local legislative determinations.

There is a major element of *Steel Hill,* however, that is consistent with the Pennsylvania approach. The court's concern for environmental preservation[58] parallels the emerging recognition by other courts that zoning laws can be instruments of social change and are not mere accommodations of traditional police power and private property rights. Thus, although not fully considering all the social implications of the Sanbornton ordinance, the court at least recognized that such broad implications exist.

The *Steel Hill* court itself sought to distinguish the two approaches. The court interpreted the language in the Pennsylvania

56 *See* notes 20-22 and accompanying text *supra.*

57 Two of the more recent decisions have indicated that maintenance of open spaces and preservation of a town's rural flavor are not legitimate public interests, but only private concerns of the individuals involved. In National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 530-31, 215 A.2d 597, 610 (1965), the court emphasized:

> There is no doubt that many of the residents of this area are highly desirous of keeping [the historic setting of Easttown] the way it is, preferring, quite naturally, to look out upon the land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulation may not be employed to effectuate.

See also Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 197 S.E.2d 390 (1959).

58 469 F.2d at 961.

cases indicating a local obligation to deal with regional demands for housing only as broad generalities that were inapplicable to the instant case:

> This proposition, invulnerable in its cloak of generality, does not quite suit the present case. All these cases refer to an unnatural limiting of suburban expansion into towns in the path of population growth where a too restrictive view of the general welfare was taken. . . . Instead, appellant here does not seek to satisfy an already existing demand for suburban expansion, but rather seeks to create a demand in Sanbornton on behalf of wealthy residents of Megalopolis who might be willing to invest heavily in time and money to gain their own haven in bucolic surroundings.[59]

Such a statement, however, is not particularly helpful. It is difficult to understand what an "unnatural limiting" of population is. If the court meant to say that any zoning ordinance designed to exclude a use for which there is a pressing demand would be invalid, then the Sanbornton ordinance would seem to fit that definition.[60] Moreover, the unduly restrictive view of general welfare, criticized by the court in *Steel Hill*,[61] involved the same concerns of orderly planned growth, maintenance of the local rural or historical character, and detrimental impact on municipal facilities that were asserted by the residents of Sanbornton. Finally it is not unreasonable to assume, contrary to the court's implication, that there is an already existing demand for housing in the area[62] and that the developer, far from creating such a demand, is only responding to the clearly evident desire to acquire vacation homes away from suburbia. While the demand may not be as great as that existing in the Pennsylvania cases, the difference is one of degree and not of kind.[63]

A more valid distinction, as recognized by the court,[64] involves the nature of the use which is being restricted. While the Pennsylvania and New Jersey courts were concerned with limitations on the availability of land for permanent residences, the court in Sanbornton was confronted with a development designed primarily for

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59 *Id.* at 960-61 (citations omitted).

60 *See* note 1 *supra.*

61 469 F.2d at 961.

62 *See* note 1 *supra.*

63 Such a difference in the level of demand for suburban residences, as opposed to rural vacation homes, may, however, constitute a valid distinction since the crush of urban expansion has been graphically catalogued and constituted the primary basis of the rationale in *National Land, Girsh,* and *Oakwood at Madison. See also* M. BROOKS, *supra* note 42. Arguably, however, it is probably only a matter of time until the increase in demand for leisure facilities in New Hampshire will approach the current level of demand for suburban homes.

64 469 F.2d at 961.

seasonal living as a second home.[65] It may well be that the right of a citizen to obtain a decent home is paramount to the traditional local prerogative in legislating the extent of municipal land use, but the right to own a ski chalet or summer camp in New Hampshire is presumably not great enough to warrant interference with a town's right to protect itself against wholesale intrusion by outsiders and the undesirable ecological side effects which such an invasion might bring.

Perhaps the most distinguishing feature of this case involves the nature of the alleged environmental claims. In rejecting the contention that zoning ordinances could be validly enacted to prevent traffic congestion, drainage and sewer problems, and destruction of local beauty, the Pennsylvania courts have assumed that these problems could be adequately dealt with by other means.[66] However, as the district court in *Steel Hill* recognized, the claims of air and water pollution made by the town cannot be dismissed on the same grounds.[67] As long as such problems remain incapable of easy solution, a court may be quite reluctant to deny a town the power to protect against what is fast becoming one of the nation's gravest problems. If, however, new methods for combating pollution become available, the argument that zoning may be used to reduce environmental damage may become as unpersuasive to the courts as the municipal services argument.[68]

III

The Significance of *Steel Hill*

The primary significance of *Steel Hill* lies in its recognition of environmental concerns as permissible zoning objectives. By so holding

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[65] *See id.*

[66] Implicit in the rationale of National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965), was the assumption that traffic congestion could be corrected by an expansion of the highway system, while sewage and drainage problems could be met by increased municipal services which the town was obligated to finance. The desire to preserve open spaces, provide a greenbelt, or maintain historic sites, to the extent such goals were elevated to public concerns, could best be met by city purchase, condemnation, eminent domain, or restrictive covenants. To the extent aesthetics were a concern, such considerations could be met by appropriate provisions in the building codes, or set-back, light and air, and other zoning provisions. *See generally* Note, *supra* note 1, at 131-45.

[67] 338 F. Supp. at 306.

[68] Towns would thus be faced with the financial burden of dealing with air and water pollution, a burden which may not be so easily met as providing increased municipal services for new residents. Pollution control at the town, village, or city level, however, would lack the coordination necessary to ensure effective environmental preservation on a regional basis.

the court has broadened the scope within which towns may validly exercise their police power to zone. However, numerous important, and potentially troublesome, questions are raised by the decision.

As a result of Sanbornton's amended zoning ordinance, all of the town, except for the highway commercial district, is zoned for a minimum lot size of at least 1.5 acres.[69] Thus, any feasible plans for vacation home development are effectively thwarted. While perhaps not exclusionary in the traditional sense,[70] the town has completely denied comprehensive development for residential land use. The court's opinion suggests that to the extent a desire to dampen the population increase of Sanbornton motivated the zoning amendment, a greater population pressure on New Hampshire might subsequently endanger the ordinance's validity.[71] However, the opinion also appears to suggest that, regardless of population pressure or impermissible motives, a showing of sufficient environmental danger will continue to sustain a Sanbornton-type zoning ordinance.[72] Therefore, in seeming conflict with *Girsh*,[73] the court may be sanctioning a total exclusion of a particular land use. If such a zoning practice is followed by similarly situated New Hampshire communities, the net effect may well be an exclusionary blanket of restrictive ordinances similar to those that the Pennsylvania court was explicitly attempting to prevent.[74]

69 469 F.2d at 959 n.4.

70 The court summarily dismissed any argument that exclusionary zoning was involved here, primarily because it felt there was an absence of racial or economic discrimination. *Id.* at 960 n.5. While the motives of enactment may have been nondiscriminatory (*see* notes 29-32 and accompanying text *supra*) the net effect of the ordinance seems to be a total exclusion of second-home development. Since arguably only those financially well-off could afford such homes, it was probably assumed that this was not the type of discrimination condemned in recent cases. *See, e.g.*, English v. Town of Huntington, 335 F. Supp. 1369 (E.D.N.Y. 1970); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971). *See also* M. BROOKS, *supra* note 4, at 3.

71 469 F.2d at 962.

72 While the opinion nowhere explicitly states the precedence of environmental preservation over accommodation of population growth, the discussion of the legitimacy of ecological concerns is not conditioned on the degree of demand for land in Sanbornton. There is language that suggests the court would reconsider its decision upon a showing of pressure from "land-deprived and land-seeking outsiders." *Id.* However, this concern seems directed to a zoning ordinance enacted solely to exclude outsiders rather than to preserve and to maintain the existing environment. *Id.*

73 *See* notes 45-46 and accompanying text *supra*.

74 National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). The court in *National Land* was worried about each town reacting to a neighboring minimum lot size zoning ordinance by enacting a similar ordinance to avoid the influx of those turned away by its neighbor. *Id.* As the court in *Steel Hill* indicated: "[W]here there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channelled by the happenstance of what town gets its veto in first." 469 F.2d at 962.

The court's vagueness on the scope of environmental concerns that can validly be considered by a town and a reviewing court raises serious questions. The small quantum of evidence accepted by the court of asserted future pollution raises the possibility that mere allegations of environmental damage by towns seeking only to restrict undesired expansion will sustain local zoning ordinances. The court's seeming acceptance of general welfare as determined by the town itself further reinforces that possibility.[75] The issue of what types of ecological harm are valid local zoning concerns is also left unresolved. In *Steel Hill,* prospective air and water pollution were held sufficient to justify the ordinance. Whether either standing alone would have been sufficient remains unclear.

The failure of the court in *Steel Hill* to require Sanbornton to consider its ordinance in terms of its broader geographical impact seems unduly restrictive in light of the recoguized need for regional planning to conserve the nation's natural resources.[76] In the absence

75 *Id.* at 961.

76 Many commentators have forcefully urged a broader geographical approach to land use planning. *See, e.g.,* Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context,* 16 N.Y.L.F. 732 (1970); McCloskey, *Preservation of America's Open Space: Proposal for a National Land-Use Commission,* 68 MICH. L. REV. 1167 (1970); Comment, *The Scope of State and Local Government Action in Environmental Land Use Regulation,* 13 B.C. IND. & COM. L. REV. 782 (1972). In addition to federal concern for the environment as embodied in the National Environmental Policy Act (42 U.S.C. §§ 4321-37 (1970)) several states have promulgated statutes evidencing state movement in this area. *See, e.g.,* CAL. GOV'T CODE §§ 65100, 65300 (West 1966); HAWAII REV. STAT. § 46-4 (1968). These statutes, however, are still the exception, not the rule. Where the various legislatures are reluctant to institute regional planning, the majority of courts are unwilling to take the initiative.

Regional planning is urged primarily as a means to ensure the planned, systematic, and orderly development of the nation's remaining open spaces and to provide for a rational allocation of population within areas already settled. Regional planning may take several forms. One would be to require (by state statute) that each town take into consideration regional environmental factors when enacting a zoning ordinance. This is what seems to have been done in Pennsylvania and New Jersey by court decision. This approach has the disadvantage of allowing individual towns within a given regional area, assuming one could be adequately defined by the statute, to make varying assessments of the needs of the same area, with likely divergent zoning results. This method, if challenged in the courts, would leave the ultimate determination of what is or is not a proper zoning consideration to the judiciary. That is perhaps a determination better left to the legislature. *See* Marcus, *supra* at 736.

Perhaps a better plan would be the formulation of a set of policy guidelines instituted by the state but implemented by regional commissions. *See* CAL. GOV'T CODE §§ 65300-06 (West 1966). Such a plan could ensure a state-wide comprehensive growth plan. The drawing of regional lines may present some problem because county lines may not be useful boundaries. *See* Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959) (county zoning ordinance attempting to preserve open spaces

of any effective regional planning board or state intervention,[77] the court's decision leaves the development or nondevelopment of the Northeast's remaining unfouled recreation areas to a patchwork quilt of unintegrated local zoning ordinances.

The most significant problem raised by *Steel Hill* is determining its effect on cases factually similar to *National Land*: that is, what will be the effect of environmental damage claims asserted in support of suburban zoning ordinances which exclude residential development in regions characterized by housing shortages? This question presents the issue which the *Steel Hill* court did not confront: does the right of outsiders to decent homes outweigh the right of those within a community to protect and preserve the environment in which they live?[78] While this conflict has not been resolved, *Steel Hill* may suggest an approach. Since most suburban areas are, to some extent, already congested and increasingly subject to contamination and pollution from their urban neighbors, environmental concerns should not take precedence over regional housing considerations in zoning enactments. This may involve giving up on a particular area as ecologically hopeless, but the approach could be justified by according greater weight to environmental considerations in more pristine and untrammeled areas such as Sanbornton. This would be true regional planning, for one broad policy would encompass both areas that are now relatively polluted and likely to become increasingly fouled, as well as other areas which are not yet

in western part of county held invalid); *cf.* Honeck v. County of Cook, 12 Ill. 2d 257, 146 N.E.2d 35 (1957) (upholding five-acre minimum lot size county zoning ordinance). *See generally* AMERICAN SOC'Y OF PLANNING OFFICIALS, PROBLEMS OF ZONING AND LAND USE REGULATION RESEARCH REPORT No. 2 (1968); Marcus, *supra* at 738-40. For a broad discussion of the competing goals and policies involved in changing from a local to a regional perspective, see AMERICAN SOC'Y OF PLANNING OFFICIALS, *supra* at 7-13.

The ultimate level of supervision and control, of course, would be a federal program for land use. *See, e.g.*, McCloskey, *supra* at 1172-74.

[77] The court of appeals suggested that the most appropriate procedure in enacting future zoning ordinances would be the adoption by the state of a statute similar to the National Environmental Policy Act (42 U.S.C. §§ 4321-37 (1970)), which would require the developer to submit environmental impact statements. 469 F.2d at 962.

[78] In Town of Groton v. Laird, 353 F. Supp. 334 (D. Conn. 1972), the court rejected the town of Groton's attempt to use the environmental impact statement requirement of NEPA to block construction of a low and middle income housing development. The court stated:

> NEPA is not a sort of meta-zoning law. It is not designed to enshrine existing zoning regulations on the theory that their violation presents a threat to environmental values. NEPA may not be used by communities to shore up large lot and other exclusionary zoning devices that price out low and even middle income families.

Id. at 350.

defiled and which will be allowed to attempt to maintain their relatively unspoiled status.[79]

CONCLUSION

Steel Hill does indeed present "[d]ifficult and novel legal and factual questions."[80] Unfortunately these questions are not adequately answered. Realizing that its decision was injecting a new element into the hodgepodge of judicial zoning review, the court proceeded cautiously and reminded the parties that the ordinance was certainly open to subsequent court attack.[81] While environmentalists may well rejoice at this judicial recognition of their concerns within the context of zoning, only future decisions, which further clarify and define *Steel Hill*, will reveal the extent to which such optimism is justified.

Steven M. Wheeler

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79 The argument against such an approach would emphasize the inherent unfairness of allowing one area to zone under standards different from another, an argument that would be obviated by regional or state control over land-use planning.

This would also probably raise equal protection issues, which might be met by employing a balance-of-interest test, weighing the benefit to the public of preserving undeveloped and relatively unpolluted areas versus the private right of an individual to live in such an area. *See* Comment, *supra* note 76, at 788-90. To the extent constitutional objections could not be overcome, eminent domain proceedings providing for compensation, although expensive, could be employed by the governmental unit.

80 469 F.2d at 959.

81 *Id.* at 962.