Spring 1984

Public Land Banking and Mount Laurel II — Can There Be a Symbiotic Relationship?

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PUBLIC LAND BANKING AND *MOUNT LAUREL II* — CAN THERE BE A SYMBIOTIC RELATIONSHIP?

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"The best laid plans of mice and men often go awry."[1]

I. INTRODUCTION

The story behind the litigation that produced two decisions in *Southern Burlington County NAACP v. Township of Mount Laurel*[2] may accurately be told in terms of plans having gone awry. The New Jersey Supreme Court invalidated the two attempts by Mount Laurel to regulate land through the implementation of fiscal zoning ordinances.[3] In its most recent decision, *Mount Laurel II*,[4] the court imposed upon communities a state constitutional obligation to provide adequate housing opportunities for low- and moderate-income families. *Mount Laurel II* thus defines the constitutional limitations on a municipality's power to regulate land. It also establishes a supporting corollary: in order to fulfill this constitutional obligation, a municipality must

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The author would like to thank Jim Carr and Ralph Smith for providing comments on an earlier draft of this Article.

1. R. Burns, *To A Mouse*, in THE POEMS AND SONGS OF ROBERT BURNS 127, 128 (J. Kinsley ed. 1968) (translated from original).

2. 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mount Laurel I*], *modified and enforced*, 161 N.J. Super. 317, 391 A.2d 935 (Law Div. 1978), *rev'd in part and remanded*, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter cited as *Mount Laurel II*]. The issues of these cases have been well discussed and do not require further elaboration.

3. Fiscal zoning has been defined as zoning and housing regulations designed to discourage the migration of families whose local tax contributions are not expected to cover the cost of supplying them with public services at the current levels in that community. *See* AMERICAN BAR ASSOCIATION, ADVISORY COMMISSION ON URBAN GROWTH, HOUSING FOR ALL UNDER LAW 534 (1978). *See generally* Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662 (1979); Scheider & Logan, *Fiscal Implications of Class Segregation: Inequalities in the Distribution of Public Goods and Services in Suburban Municipalities*, URB. AFF. Q., Sept. 1981, at 23.

4. 92 N.J. 158, 456 A.2d 390 (1983).

plan for the growth of its low- and moderate-income population by providing adequate housing opportunities for this population.

This Article presents an alternative land use regulation, a municipal land bank, as a means to aid municipalities in planning for and providing housing opportunities for its low- and moderate-income families.[5] Municipal land banks acquire, manage and dispose of land according to legislatively authorized policies and objectives, and can help ensure that sufficient land is available to provide for a municipality's supply of fair share housing. In addition, a municipal land bank would shift the responsibility of designing affirmative measures to attack exclusionary zoning practices from the judiciary to the legislature.[6] The Article presents a policy overview of legislation and planning regulations necessary for the establishment of land banks, as well as the interrelationship between the local governmental body and the state and regional agencies that will oversee the operation.

Part II focuses on the *Mount Laurel* doctrine through an examination of *Mount Laurel I* and *Mount Laurel II*. The section concludes that the establishment of a municipal land bank would better serve the *Mount Laurel* doctrine than the remedy proposed by the court in *Mount Laurel II*.[7] Part III introduces the concept of land banking, and provides a description of its operation and its implementation in foreign countries. The American Law Institute's study of land banking[8] is also considered. Part IV discusses the legal issues surrounding the land banking concept: the constitutionality of the acquisition of property, the requirement that the land banking objectives benefit the general welfare of the public, and judicial review of land dispositions. Finally, Part V considers issues related to the operation of the land bank, including the legislation necessary to establish entities to oversee the land bank, as well as local development plans.

II. THE CASE LAW

A. Mount Laurel I *and* Mount Laurel II

In *Mount Laurel I*, the New Jersey Supreme Court invalidated that portion of Mount Laurel's zoning ordinance that effectively excluded those who

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5. Proponents of land banking are diverse and range from governmental bodies to private organizations. For a listing of these advocates, see Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. 897 (1972).

6. The remedy proposed by the court in *Mount Laurel II* requires extensive judicial participation in the implementation of the *Mount Laurel* doctrine. All *Mount Laurel* litigation is to be handled by judges appointed by the chief justice of the state supreme court specifically to deal with this type of litigation. *Mount Laurel II*, 92 N.J. at 253, 456 A.2d at 439. These judges have been granted broad remedial powers, including active intervention in a municipality's adoption of zoning ordinances. *Id.* at 285-86, 456 A.2d at 455. *See infra* notes 29-30 and accompanying text.

7. *See infra* notes 24-30 and accompanying text.

8. MODEL LAND DEV. CODE (Tent. Draft No. 6 1974) [hereinafter cited as MODEL CODE]. *See infra* notes 64-68 and accompanying text.

could not afford housing in the township because of certain residential restrictions and exactions. In striking down the ordinance, the court imposed a constitutional obligation on municipalities to provide housing opportunities for low- and moderate-income persons through appropriate land use regulations. The court's decision proved inadequate, however, because it imposed the obligation without requiring affirmative public action.[9] Because *Mount Laurel I* proved ineffective in forcing municipalities to change their land use regulations, the court modified the doctrine in *Mount Laurel II* to require affirmative public action.[10]

The *Mount Laurel* doctrine, as articulated by the decision in *Mount Laurel II*, is predicated upon the notion that comprehensive municipal planning is necessary to provide realistic housing opportunities within a regional area. Although *Mount Laurel II* requires municipalities to take affirmative measures to provide a realistic opportunity for the construction of low- and moderate-income housing, the doctrine is problematic because it also requires extensive judicial oversight and administration.[11]

B. *The* Mount Laurel II *Mandate*

Despite the problematic extensive judicial involvement mandated by *Mount Laurel II*, the decision provides the framework within which a municipal land bank can operate. The *Mount Laurel* obligation requires municipalities to revise land use regulations that preclude the construction of their fair share[12] of the region's[13] needed housing for low- and moderate-income persons, and also requires municipalities to take affirmative measures[14] to promote construction.

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9. The *Mount Laurel I* court specifically declined to impose affirmative action saying, "Courts do not build housing nor do municipalities." *Mount Laurel I*, 67 N.J. at 192, 336 A.2d at 734.

10. *See Mount Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

11. The court explained the necessity for its lengthy opinion in *Mount Laurel II* by saying, "The doctrine is right but its administration has been ineffective." *Id.* at 201, 456 A.2d at 411.

12. The court identified, without defining, three issues that will determine fair share: the relevant region, the present and prospective housing needs, and allocation of these needs to the municipalities involved. *Id.* at 248, 456 A.2d at 436.

Shortly after the release of the *Mount Laurel II* decision, the Center for Urban Policy Review prepared an extensive analytical study of the terms left open in the court's opinion. R. BURCHELL, W. BEATON & D. LISTOKIN, MOUNT LAUREL II, CHALLENGE AND DELIVERY OF LOW-COST HOUSING (1983) [hereinafter cited as BURCHELL STUDY]. The Study defines "fair share" as "a plan or process which determines where housing, especially low- and moderate-income units, should be built *within* a region." (emphasis in original). *Id.* at 31.

Fair share plans attempt to allocate subsidized housing according to need, factors of location and availability of employment and services. *See generally* M. BROOKS, LOWER INCOME HOUSING: THE PLANNER'S RESPONSE (1972).

13. Six "housing regions" are delineated within the state, based upon a journey-to-work relationship between the counties. BURCHELL STUDY, *supra* note 12, at 51.

14. In defining the degree of "affirmativeness" in which communities must

The court's opinion in *Mount Laurel II* focused on enforcement of the municipal duty to provide fair share housing for low- and moderate-income persons. The court ordered the removal of those "municipally created barriers" that impede "fair-share" housing construction.[15] Municipal regulations must now bear a direct relationship to the public health and welfare; they may not unnecessarily restrict the use of land, thereby artificially increasing the cost of housing.[16]

Mount Laurel II is novel in its assessment that communities have an obligation to provide housing for low- and moderate-income persons within a regional context. The theoretical basis underlying that assessment is that housing is a regional problem.[17] In selecting the regional areas upon which to impose an obligation, the court approved of the use of the New Jersey State Development Guide Plan (SDGP), a planning document written by state administrative agency officials.[18] The SDGP identifies areas within the state where certain

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engage, the court stated: "Satisfaction of the Mount Laurel doctrine cannot depend upon the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real." *Mount Laurel II*, 92 N.J. at 261, 456 A.2d at 442. However, the court pointedly limited the extensiveness of a municipality's affirmative measures: "Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair-share of lower income housing, the *Mount Laurel* doctrine requires it to do no more." *Id.* at 259-60, 456 A.2d at 442.

15. *Id.* at 258-59, 456 A.2d at 441.

16. *Id.*, 456 A.2d at 441-42.

17. Municipal zoning regulations must now take regional factors into consideration, pursuant to the Municipal Land Use Law. N.J. STAT. ANN. § 40:55D-28(d) (West Supp. 1984). For that reason, the *Mount Laurel II* court changed the focus of its remedy to a regional context. 92 N.J. at 238, 456 A.2d at 430.

Writing in the context of improvements to implementation of urban renewal programs, one planning law scholar has noted that a program designed to improve the housing stock in a single municipality must be designed on a regional scale because "housing demands and needs are regional in nature." Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 28 (1967). *But cf.* Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URB. LAW. 262 (1975) (when viewed from a regional perspective, theoretical deficiencies in definition and delineation of a region may actually make a municipality's supply of low- and moderate-income housing appear statistically sufficient when in fact that supply is deficient).

18. NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, DIVISION OF STATE AND REGIONAL PLANNING, STATE DEVELOPMENT GUIDE PLAN (1980). The court recognized the presumptive validity of this legislatively authorized master plan for guiding "future growth and development of [the] state." *Mount Laurel II*, 92 N.J. at 226, 456 A.2d at 424. Promulgated pursuant to the powers and duties of the Division of State and Regional Planning, N.J. STAT. ANN. § 13:1B-15.52 (West 1979), the SDGP requires that all land use development conform to the policies established for the designated areas. The major use categories are: growth, limited growth, agricultural, conservation, pinelands and coastal zones. *See Mount Laurel II*, 92 N.J. at 226, 456 A.2d at 424.

general uses should predominate and recommends appropriate action to fulfill policy objectives and considerations.[19]

The court imposed the *Mount Laurel* obligation upon both growth and non-growth areas of the state. In non-growth areas, municipalities must provide appropriate housing for present low- and moderate-income families residing in the area.[20] That mandate requires the communities to provide housing for those persons presently living in deficient housing who meet the *Mount Laurel* income levels.[21] In areas of regional growth, municipalities must provide housing for present and future residents who meet the income requirements.[22] The court neither defined the state's housing regions nor specified a community's fair share; instead, it left those matters open for a determination on a case-by-case basis.[23]

In order to implement the fair share obligation, the court suggested four bridge mechanisms that a community might use to meet its *Mount Laurel* obligation. Bridge mechanisms are approaches that close the gap between housing costs and the amount of income a family has available for housing.[24] Suggested bridge mechanisms include removal of zoning and subdivision restrictions and exactions that are unnecessary to protect the public health and safety,[25] use of governmental subsidies to write down housing costs,[26] use of zoning areas to either encourage or force builders to provide affordable housing,[27] and allowance of mobile homes and other cost-efficient manufactured housing.[28] The judicial administration of exclusionary zoning lawsuits

19. Although the *Mount Laurel* obligation requires housing construction for prospective need only in growth areas, it is not intended to preclude a municipality from regulating land use for such construction whenever the regulation will not conflict with the SDGP or the statutory restrictions. *Id.* at 247, 456 A.2d at 435.

20. The court referred to two income groups, low- and moderate-income, to which communities are responsible for providing adequate shelter. Low-income households are defined as those households whose income falls under 50% of the regional median income; moderate-income households are those households whose income falls between 50% and 80% of the regional household income. *Id.* at 221 n.8, 456 A.2d at 421 n.8.

21. "Present *Mount Laurel* households" refers to those persons meeting the income constraints of the federal section 8 housing assistance program who presently reside in the regional area and whose housing needs are deficient. BURCHELL STUDY, *supra* note 12, at 25.

22. "Prospective *Mount Laurel* households" refers to those persons expected to reside in the area who will meet the income constraints and will need adequate housing. *Id.*

23. *Mount Laurel II*, 92 N.J. at 281-85, 456 A.2d at 453-55. In order to allocate the housing need according to the developable land, the definition of the regional area is an essential element of a land bank operation. Drafting those areas begins with a determination of the state's growth. *See infra* text accompanying notes 109-16.

24. BURCHELL STUDY, *supra* note 12, at 29-30.

25. *Mount Laurel II*, 92 N.J. at 258, 456 A.2d at 441.

26. *Id.* at 262-65, 456 A.2d at 443-45.

27. *Id.* at 265-74, 456 A.2d at 445-50.

28. *Id.* at 274-77, 456 A.2d at 450-51.

will be handled by three appointed judges permanently assigned to each regional area to hear those cases.[29] To assist the judges, planning masters may be appointed to determine region and fair share.[30]

Although the supreme court fashioned an enforceable solution to exclusionary zoning and housing problems because the legislature failed to act,[31] *Mount Laurel II* will undoubtedly meet some of the same sharp criticism as did the earlier decision.[32] The enforcement mechanisms cannot be effective without either commitment or ability on the part of individual municipalities to plan for their future low- and moderate-income population. Thus, the issue becomes whether an alternative land use regulation that involves comprehensive planning can implement the constitutional obligation. A municipal land bank would provide such an alternative.

III. The Land Bank Concept

The land bank concept is both an accepted and workable means of land use regulation. It has been implemented successfully in foreign countries[33] and studied in this country as a means of shaping and timing the development of land.

A. An Overview

Land banking is an inclusionary land use device that permits a more direct and aggressive role for state and local governments in regulating land use.[34] As a solution to the problem of affordable and adequate housing opportunities

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29. *Id.* at 216-17, 253-54, 456 A.2d at 419, 438-39.

30. *Id.* at 281-85, 456 A.2d at 453-55.

31. *Id.* at 212-14, 456 A.2d at 417.

32. *Cf.* Rose, *The Mount Laurel II Decision: Is It Based Upon Wishful Thinking?*, 12 Real Est. L.J. 115 (1983) (questioning the effectiveness of the court's remedies given the current political arena and economic conditions).

33. *See infra* notes 49-63 and accompanying text.

34. *See generally* Model Code, *supra* note 8. For a discussion of the land banking concept, see H. Flechner, Land Banking in the Control of Urban Development (1974); S. Kamm, Land Banking: Public Policy Alternatives and Dilemmas (1970); Note, *supra* note 5, at 916-23; Note, *Public Land Ownership*, 52 Yale L.J. 634 (1943).

The *Mount Laurel II* court found that inclusionary devices are within a municipality's constitutionally granted zoning powers and can be used to satisfy the *Mount Laurel* obligation. *Mount Laurel II*, 92 N.J. at 271, 456 A.2d at 448. The court specifically discussed the use of mandatory set-asides, which require the developer to rent or sell units at a lower than full market value in order to make them affordable to lower-income people. *Id.* at 267-70, 456 A.2d at 446-47. As an inclusionary land use device, land banking places a more direct obligation on the municipality as opposed to the developer to provide realistic housing opportunities. However, land banking arguably falls squarely among the types of affirmative measures that the *Mount Laurel II* court suggested.

for low- and moderate-income persons, land banking addresses the problem at its source: municipalities that either do not have the ability or refuse to plan for their future low- and moderate-income population growth.[35]

Generally, land banking has been defined as "a system in which a governmental entity acquires land in a region that is available for future development for the purpose of controlling the future growth of the region."[36] As used in this Article, land banking means the advance acquisition of land by a municipality for sale to private developers to promote housing opportunities for the low- and moderate-income population of a community.[37] The operation of the bank as a function of municipal government must be authorized by state legislation.[38]

In its simplest terms, land banking can be explained in three stages. The initial stage involves preparation of an area's growth plan.[39] This stage requires the identification of developable land and its preferred use within a specified time frame,[40] as well as the complete integration of the land use planning process with the bank's goals to ensure overall effectiveness and efficiency. The second stage involves the acquisition and management of the land. The bank's holdings may consist of land acquired through purchase on the open market or through the use of eminent domain.[41] It may also consist of municipal

35. In the early 1970's New Jersey was among several states that proposed establishing a State Planning Commission to implement a land banking operation for public uses, new communities and critical areas. The program was opposed because of the fears that minorities would move into suburban communities and that there would be a loss of home-rule. The housing policy in New Jersey was attacked as exclusionary during that time because of local zoning controls. *See* Williams, *The Three Systems of Land Use Control*, 25 RUTGERS L. REV. 80 (1972).

36. MODEL CODE, *supra* note 8, commentary at 254. The Code distinguishes advance land acquisition for provision of municipal services from general land banking because in the latter the future land use is unspecified at the time of purchase. Housing land banking, as discussed in this Article, is distinguishable from advance land acquisition, as land is purchased for subsequent sale to a private developer. Therefore, the governmental body does not actually develop the land.

37. The concept developed in this Article is closely akin to "project land banking," which refers to a municipality's advance acquisition of undeveloped land, for a specific purpose. *See generally* Flechner, *supra* note 34, at 3-6. For a discussion of advance land acquisition as a means of guiding urban growth and implementing comprehensive plans, see D. SHOUP & R. MACK, ADVANCE LAND ACQUISITION BY LOCAL GOVERNMENTS 106-08 (1968). Although similar to urban renewal in the purchase of land for conformance to a plan, a land bank program would confine its acquisitions neither to the urban core nor to previously developed lands. The distinguishing element in a housing land bank is that, in an effort to execute its obligation to provide housing for all of its economic sectors, the municipality is purchasing the land to subsidize private developers who are seeking to build low- and moderate-income housing.

38. *See infra* notes 109-34 and accompanying text.

39. *See* Note, *Judicial Review of Land Bank Dispositions*, 41 U. CHI. L. REV. 377, 378 (1974).

40. *Id.*

41. *Id.*

surplus and tax delinquent lands. The land is held in reserve until a development scheme consistent with its use under the growth plan is presented. During the holding period, the land may be parceled and subdivided or used for other purposes consistent with the development plan.[42] In the final stage of the process, land is transferred in a way that conforms with the development plan.[43]

For communities implementing land use regulations under a *Mount Laurel* obligation, land banking allows the private sector to assist the community in meeting its constitutional requirement to provide affordable housing. The land bank has two goals related to the development of low- and middle-income housing. The first goal is to control the location of low- and moderate-income housing.[44] This ensures that such housing is accessible to employment centers, schools, recreation areas and mass transportation.[45] Municipal governments, guided by regulations implementing the land banking statute, must determine sites within their borders available for the bank's use. The bank's second goal is to reduce development costs.[46] Private developers purchase the bank's lands for the construction of low- and moderate-income housing at a lower-than-market price, thus decreasing the development cost that artificially increases housing costs. The cost reduction, in turn, encourages construction of low- and moderate-income housing by those who now view it as an unprofitable business venture.[47]

A land bank, acting as both a regulatory reform and a source of financial assistance for low- and moderate-income housing, provides a feasible means for achieving an economically mixed community.[48] Land banks require the integration of planning techniques with well-defined development objectives. Intertwined within the concept is a dual level of effectiveness: developers purchase the land aware of its intended purpose and municipalities experience planned growth and development.

B. Foreign Experiences

Foreign governments have entered the land market, through land banks, to guide the development of new areas in conformance with a well-conceived master plan.[49] The two most distinctive factors that have led to successful

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42. *See id.*
43. *Id.*
44. *Id.* at 379.
45. *See Mount Laurel II*, 92 N.J. at 268 n.32, 456 A.2d at 447 n.32.
46. *See* Note, *supra* note 39, at 379.
47. *See id.*
48. A more extensive management of public and private land was the subject of proposed federal legislation in the early 1970's. *See* Harr, *Wanted: Two Federal Levers for Land Use — Land Banks and Urbank*, in LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORMS 365, 369-70 (D. Listokin ed. 1974); *see also* Hartke, *Toward a National Growth Policy*, 22 CATH. U.L. REV. 231 (1973).
49. Note, *supra* note 5, at 913. *See generally* A. STRONG, LAND BANKING (1979).

land reserve policies in other countries are the role of the government in the regulation of property and the concept of property ownership.[50] This section examines land banking techniques in other countries, highlighting their acquisition policies, financing and structure.[51]

In Sweden, the land banking concept is used for large-scale acquisitions in Stockholm by granting an autonomous municipal corporation the power of condemnation and the authority to acquire land before adopting specific plans for its development.[52] The predominant method for administering the program is the use of long-term leases.[53] At disposition, the land is used for development of a general nature,[54] and the corporation finally owns a substantial percentage of the land within the municipal borders and on its fringes.

Leasing is the preferred alternative for the management of land bank holdings for two reasons. First, leasing allows for flexibility. The municipal government can terminate the contract as the city's land development patterns change.[55] Second, the city captures the profits from the land as the land

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50. There are two reasons that land banking has not developed as a planning policy in the United States. First, there is the notion that private decisionmaking should determine land use, and that government should intervene for only specific public purposes. Second, land is regulated under the police powers at a minimal cost, whereas land acquisition is a more costly approach of regulation. Babcock, *Regulating Land Development: Some Thoughts on the Role of Government*, in LAND USE — TOUGH CHOICES IN TODAY'S WORLD 34 (1977) [hereinafter cited as TOUGH CHOICES]. Babcock notes that land is the only limited commodity that is unregulated and attributes that fact to the American "mystique" that property ownership denotes a privileged status that should not be interfered with by the government. *See also* A. DAWSON, LAND USE PLANNING AND THE LAW 187-89 (1982). *Cf.* S. KAMM, *supra* note 34, at 15-17 (arguing that while there is philosophical opposition of governmental ownership of land to control growth and development in the United States, the economic stakes of land banking are also great).

51. The master plan technique for land banking used by most foreign countries fully integrates local, regional and national policies of taxation, land development, plan review and land use controls. This creates the flexibility to adapt to changes in conditions and land use that the land bank needs. H. FLECHNER, *supra* note 34, at 76-81. Conversely, there is resistance to an invalidation of a zoning ordinance as a remedial measure because such an invalidation controverts the comprehensive planning process. *See* F. BOSSELMAN, THE TAKING ISSUE 27-39 (1973).

52. *See generally* A. STRONG, *supra* note 49, at 43-65 (history and objectives of Stockholm's land bank program). STRADA, the city's private building company, was designated in 1956 as the entity which would actually develop the land. *Id.* at 57.

53. *Id.* at 59-60, 93.

54. *See id.* at 52-53, 60-65.

55. Leaseholds on the land are for an unspecified length of time. However, they are subject to termination after 60 years for residential properties, 20 years for commercial and industrial properties, if the municipality can prove it needs the land. Municipalities may revise the lease terms every 10 years. *Id.* at 59, 64. One of the purposes of the land bank operation in Stockholm is to provide communities for low- and moderate-income families. Through the use of a leasing arrangement, the city can

appreciates in value by increasing the rent on the property. Acquisition is financed through the municipality's taking powers.[56]

Municipal governments in the Netherlands routinely guide the development of new areas through land banks.[57] Land is sold to private developers, but conforms to a land use plan at disposition.[58] The municipality does not purchase land many years in advance in order to avoid speculation, as it is valued according to current use.[59] The government finances acquisitions through government loans at the market rate for a lengthy period.[60]

The Canadian experience in land banking is perhaps most relevant to the model proposed in this Article because of the types of properties acquired. The Canadian government exerts its influence over the use and planning of land and other natural resources through national fiscal policies and by imposing conditions on financial assistance programs.[61] Unlike their European counterparts, Canadian local governments retain extensive control over the use and planning of land and other natural resources.[62] Local Canadian governments have routinely identified critical areas requiring governmental control and intervention and have established urban land banks for improved land use planning.[63]

These land bank experiences in foreign countries obviously operate in a different political and social context than would an American parallel. Their success, however, is attributed to the integration of comprehensive planning concepts by land banks that oversee new development uses of the land.

C. *The American Law Institute Proposal*

The American Law Institute studied the land banking concept as a part of its Model Land Development Code. That study was not included in the

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subsidize low- and moderate-income housing by deciding not to adjust the terms of the lease when the land value increases. *See* G. MILGRAM, THE CITY EXPANDS: A STUDY OF THE CONVERSION OF LAND FROM RURAL TO URBAN USE (1967). Kamm takes the position that the Swedish experiment presents no parallels to the implementation of land banking in the United States given the differing concept of property ownership and the constitutional limitations on the taking of land. S. KAMM, *supra* note 34, at 15-17.

56. *See* A. STRONG, *supra* note 49, at 83-86.

57. *Id.* at 100-35.

58. *Id.* at 106-08. Strong criticizes the Dutch approach because the government, rather than the individual municipalities, possesses most of the decisionmaking power. *Id.* at 101-02.

59. *Id.* at 100, 106-07. It "is accepted that a fair purchase price is one equal to farm value plus moving, resettlement, and, possibly, retraining expenses, plus compensation for the disruptive effect of moving." *Id.*

60. *Id.* at 122-25.

61. Higgs, *Land Use Planning and Resource Management: Some Ontario Experiences*, in TOUGH CHOICES, *supra* note 50, at 329.

62. *Id.* The government does not substantially intervene in management of the provinces' natural resources, and it does not become involved directly in land use planning. *Id.* at 329-30.

63. *See id.* at 330.

proposed official draft because of the Reporters' ambivalence about the nature and scope of the system.[64] Instead, the Code presented a general discussion of a land bank operation. The Code's operation had two goals: to reduce the cost of land through elimination of land speculation and to permit more rational patterns of development.[65]

As a means of development control, a Model Code land bank would act as both a regional planning authority and a landowner. It would assume control of an area by acquiring land on the fringe of a municipal area and holding it for development and use according to a purpose consistent with the regional development plan.[66] The acquisitions would be made in conformance with previously adopted policy objectives that would determine the timing, structure and quality of the areas.[67]

The Model Code land bank would regulate growth patterns through pricing, thereby controlling the supply and demand of land within the land bank's area. The amount of land prepared for development would be closely related to the market demand. By setting prices in competition with the private market, the land bank would affect the location and type of the lands within its control for development, as well as timing of acquisition.[68]

Vast land holdings are implicit in both the planning authority and landowner goals of a land bank. This presents an ideological conflict between public goals and private ownership of land that perhaps contributed to a rejection of the land bank notion by the American Law Institute. The development and price control goals of the model proposed in this Article are distinguished from those under the Code because they address these precise problems. They are not intended to change the private market, but merely to facilitate public participation in it. The development goal is confined to the location, timing and type of housing. The price control goal is lower land costs through lower development costs. Both are based upon the bank's acquisition of property for the construction of low- and moderate-income housing. This type of land regulation is practical, in the wake of *Mount Laurel II*, as a means for a municipality to meet its constitutional obligation and as an inducement to private developers to construct this type of housing.

IV. THE LEGAL ISSUES

Legal issues surrounding the land banking concept include the constitutionality of the acquisition and holding of property for a substantial time and

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64. MODEL CODE, *supra* note 8, commentary at 253.

65. *Id.*, commentary at 254.

66. *Id.*, commentary at 256-57 (citing Buttenheim & Cornick, *Urban Land Reserves*, 14 J. LAND PUB. UTIL. ECON. 254 (1938); Reps, *The Future of American Planning: Requiem or Renascence?* 1967 PLANNING 47, 52).

67. *Id.* § 6-301.

68. *See id.*, commentary at 255-56 (noting reduction in land costs around Saskatoon, Saskatchewan).

later development of the property according to the plan. The land bank act must meet both state and federal constitutional requirements. The land bank act proposed in this Article would meet these requirements.

A. The Taking Problem

Two growth management tools that have a federal constitutional basis are the power to regulate land through condemnation, emanating from the police powers, and the power to purchase land, emanating from the acquisition powers.[69] In order to implement its development plan, the land bank agency must be able to acquire land through eminent domain in order to obtain needed property from unwilling sellers.[70] However, a constitutional issue arises when the property is taken through condemnation without immediate plans for redevelopment.[71]

The power of eminent domain allows a governmental body to condemn property against an owner's will. The constitutional limitation on the use of that power requires not only that the land owner receive just compensation, but that the taking be for a public purpose. The prohibition on the taking of property only for public use applies to the states through the fourteenth

69. These powers are delegated to local political units by means of enabling legislation and home rule provisions. *See* C. ANTIEAU, MUNICIPAL CORPORATION LAW § 21.56 (1976); C. LAMB, LAND USE POLITICS AND LAW IN THE 1970'S (1975); Reps, *Public Land, Urban Development Policy, and the American Planning Tradition*, in MODERNIZING URBAN LAND POLICY 15 (M. Clawson ed. 1973). Municipal powers used for growth management fall into several general categories: acquisition, spending, regulation and taxation. *See generally* R. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 26 (1979) [hereinafter cited as CONSTITUTIONAL ISSUES]. The most common exercise of the police power is zoning. *Cf.* 1 R. ANDERSON, AMERICAN LAW OF ZONING 2D § 7.01 (1976) (discussing use of police powers to enforce zoning regulation). A broad definition of the police power incorporates both the power to regulate and the power to condemn. Such a definition makes available other novel approaches to control of land use. *See, e.g.*, Krasnowiecki & Paul, *Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 190-202 (1961).

70. The land bank's enabling legislation would presumably give it the power to purchase the land needed to carry out the bank's purposes. *Cf.* Lewis v. City of Shreveport, 108 U.S. 282, 286-87 (1883) (power must be expressly granted to a municipal corporation by the state legislature in order to issue bonds to aid a railroad company in purchasing lands). The power of acquisition is broader than the power of condemnation; therefore, the constitutional limitations that are applicable to the use of the condemnation powers are also applicable to the use of the acquisition powers. *See generally* Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717, 719 (1963); Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958).

71. A less costly technique of property acquisition is the purchase of less than a fee simple interest in the land, *e.g.*, purchase of development rights or an easement. *See, e.g.*, CONSTITUTIONAL ISSUES, *supra* note 69, at 30; Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Reserve Open Space*, J. URB. L. 461, 466-67 (1974).

amendment's due process clause.[72] The need for the taking must exist either presently or in the immediate future, and the taking must be necessary for both the condemnation and the contemplated public purpose.[73]

Historically, the condemnation of property under eminent domain powers required the involvement of a traditional governmental function and a direct benefit through actual use by the public at large.[74] As the needs of society expanded, courts began to recognize the government's power to condemn land for social purposes that would inure to the public's benefit.[75] The courts do, however, require a finding that the purpose of the project is to promote public welfare. Judicial deference is usually accorded to that determination if the specific use of the land bears some reasonable relationship to that purpose.[76]

The United States Supreme Court acknowledged these requirements when it reviewed the use of eminent domain to execute a redevelopment plan in the District of Columbia. At issue in *Berman v. Parker*[77] was whether a congressionally authorized urban renewal project requiring the use of eminent domain for redevelopment could meet the public use requirement. The Court held that the use of eminent domain was proper, and gave presumptive validity to a legislative determination that the project would serve the public interest.[78] State courts following the lead of *Berman* have expanded the meaning of "public use" to find a valid public purpose in redeveloping a vast open unmarketable area,[79] creating a residential area from a blighted area,[80]

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72. U.S. CONST. amend. XIV, § 1. *See* Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

73. The "public use" requirement could be met even if the public is not allowed to enter the property. It is enough that the taking is done for a public purpose. Examples of such taking include the taking of property for construction of an arsenal or fort. 2A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 7.02[2] (Rev. 3d ed. 1983). One of the problems with public land banking, if land is taken pursuant to eminent domain to control development and regulate land prices, is the length of the holding period. *See* MODEL CODE, *supra* note 8, at § 6-502 note.

74. *See generally* J. SACKMAN, *supra* note 73, §§ 7.02 -7.02[1].

75. The movement began as early as 1890 when the Massachusetts Supreme Judicial Court held that the public use requirement did not mean that the entire community had to participate in an improvement. Moore v. Sanford, 151 Mass. 285, 24 N.E. 323 (1890). By 1916, the United States Supreme Court had found the "use by the public" test to be an inadequate standard. *See* Mount Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).

76. *See* New York City Housing Auth. v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936) (use of condemnation allowed to clear a rundown neighborhood for public housing despite the defendant's challenge that only a few individuals were primary beneficiaries).

77. 348 U.S. 26 (1954). *Berman* involved a constitutional challenge under the District of Columbia Redevelopment Act of 1945, D.C. CODE ANN. §§ 5-701 to 5-719 (1973).

78. *Id.* at 32-33. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* at 32.

79. Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A.2d 612 (1950).

80. People *ex rel.* Gutknecht v. City of Chicago, 3 Ill. 2d 539, 121 N.E.2d 791

rehabilitating a deteriorating business district,[81] creating an industrial zone from a blighted area[82] and redeveloping a nonblighted area that had proved economically deficient.[83]

The Supreme Court recently determined that the public use requirement of the fifth amendment was coterminous with the scope of a sovereign's police powers. In *Hawaii Housing Authority v. Midkiff*,[84] the Court validated a land condemnation scheme enacted by the Hawaii Legislature to reduce the effects of the state's pattern of oligopolic land ownership. In refusing to declare the act unconstitutional under the fifth amendment's public use clause, the Court recognized the legitimacy of the governmental taking of property that would be transferred initially to private beneficiaries. Because the taking was for a legislatively determined purpose that would benefit the public, it was legitimate.[85] The ruling therefore effectively upholds the expansive definition of the public use clause as articulated in *Berman,* reinforces the limitations on judicial review and ensures that the exercise of the power of eminent domain is "rationally related to a conceivable public purpose."[86]

The only case that has tested the specific constitutional issues raised by land banking is *Commonwealth v. Rosso*.[87] In that case, plaintiffs challenged a land bank's exercise of the power of eminent domain to take private property for some unspecified future use. The Legislative Assembly of Puerto Rico had approved the creation of the Land Administration of Puerto Rico in order to promote efficient use of land and to promote the welfare of present and future inhabitants.[88] In refusing to hold the condemnation of plaintiffs' property unconstitutional, the court stated:

> Once there has been a legislative declaration or a declaration by the delegated entity that there is public utility, within the present meaning of the concept, the courts cannot intervene with the manner and the means which the Legislature or its delegated entities choose to

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(1954). *See also* Foeller v. Housing Auth. of Portland, 198 Ore. 205, 256 P.2d 752 (1952).

81. Redevelopment Agency of San Francisco v. Hayes, 122 Cal. App. 2d 777, 266 P.2d 105, *cert. denied*, 348 U.S. 897 (1954).

82. People *ex rel.* Adamowski v. Chicago Land Clearance Comm'n, 14 Ill. 2d 74, 150 N.E.2d 792 (1958).

83. Graham v. Houlihan, 147 Conn. 321, 160 A.2d 745 (1960); Cannata v. New York, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903, *cert. denied*, 371 U.S. 4 (1962).

84. 104 S. Ct. 2321 (1984).

85. The court stated that the "public use" requirement does not mean that the government must actually possess and use the property in order to legitimate the taking. *Id.* at 2331.

86. *Id.* at 2329.

87. 95 P.R. 488, 95 P.R. Dec. 501 (1967), *appeal dismissed*, 393 U.S. 14 (1968). *See* Callies, *Commonwealth of Puerto Rico v. Rosso: Land Banking and a Expanded Concept of Public Use*, 2 LAND USE CONTROLS 17 (1968).

88. Puerto Rico Land Administration Act, P.R. LAWS ANN. tit. 23, § 311 (1974 and Supp. 1983). *See* 95 P.R. at 498-501, 95 P.R. Dec. at 511-15.

> exercise the power of condemnation, nor with the selection made respecting what properties are to be condemned.[89]

The court rejected the trial court's determination that the condemnation did not serve the public use because the property's use was unspecified. Instead, the court determined that the land itself was the focus of the public use addressed by the legislation.[90]

The New Jersey courts have been unwilling to overturn a legislative determination designating property for a public use,[91] holding that the legislative determination may be overturned only if it is "unreasonable, arbitrary or a perversion of power."[92] A public purpose has been found where only a portion of the public stands to benefit from the condemnation. This condemnation of land for social purposes includes such uses as the enhancement and preservation of scenic beauty along the state highways[93] and the removal of blighted conditions as a part of a redevelopment plan.[94]

Given the legislature's exercise of eminent domain and the judicial deference usually accorded to those decisions, it is unlikely that the regulatory scheme as outlined in this land bank proposal is unconstitutional. The underlying need for the statute is for the provision of land to accommodate the regional housing need for the low- and moderate-income population. The critical factor in examining the rationality of the scheme is the legitimacy of the purpose rather than the intended use of the property.[95] The state legislature is capable of assessing the public purposes that can be advanced by this use of the police power. A legislative finding that the acquisition and development of the land

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89. *Id.* at 524, 95 P.R. Dec. at 537.

90. 95 P.R. at 525-26, 95 P.R. Dec. at 538. One of the chief concerns surrounding the legality of land banking has always been that the property is acquired for an unspecified use and time. This particular issue was not reached in *Rosso*. However, a recent amendment to HUD legislation permits advance land acquisition for "a public purpose within a reasonable period of time. . . ." That period, defined as five years, can be extended. 42 U.S.C. § 3104(c) (1982). This type of provision alleviates some of the early concerns surrounding land acquisition and holding and provides some basis for the court's review of a municipality's noncompliance.

91. N.J. STAT. ANN. §§ 20:1-1 to 1-32 (West 1969 & Supp. 1984).

92. State v. Lanza, 27 N.J. 516, 530, 143 A.2d 571, 578, *appeal dismissed*, 358 U.S. 333 (1958). *See also* Whelan v. New Jersey Power & Light Co., 45 N.J. 237, 212 A.2d 136 (1965) (land sold by city to utility company; held, transfer was part of plan to achieve public result and thus was not done for purely private gain); City of Trenton v. Lenzner, 16 N.J. 465, 109 A.2d 409 (1954) (city entitled to presumption that exercise of eminent domain is done in accordance with proper interests of city residents), *cert. denied*, 348 U.S. 972 (1955).

93. Wes Outdoor Advertising Co. v. Goldberg, 55 N.J. 347, 262 A.2d 199 (1970).

94. Wilson v. City of Long Branch, 27 N.J. 360, 142 A.2d 837, *cert. denied*, 358 U.S. 873 (1958).

95. Hawaii Housing Auth. v. Midkiff, 104 S. Ct. 2321, 2331 (1984).

will benefit the state in the above-described manner satisfies the rational relationship prong of the test.[96]

There are several factors that support this finding. The state's objective is initiated by requiring municipalities to identify developable land within their jurisdictions for this purpose. The requirement will apply to municipalities designated as growth areas according to the SDGP, which specifies land uses within the state.[97] The municipalities will also submit a housing allocation/development plan. The conformance requirements at disposition provide an enforcement mechanism; the citizen complaint process provides an oversight mechanism.[98] Thus, the statutory scheme provides a comprehensive and rational manner in which to promote its objective. This conclusion receives even more support given the various uses the New Jersey Supreme Court has sustained in similar legislative determinations.[99] Land banking does not represent the type of misuse of condemned property that the courts are trying to guard against when reviewing a municipality's use of eminent domain powers.

B. The General Welfare Theory

A land bank's operations must also be examined to determine whether its objectives meet the state constitutional requirement that it benefit the general regional welfare.[100] Theoretically, the general regional welfare concept is based upon the notion that local governments are given regulatory powers to further the health, safety, morals or general welfare of the states.[101] The effects of a municipality's land use regulations extend logically beyond its jurisdictional boundaries into the regional area.[102] Under a broadened impact approach to

96. Generally, courts have been willing to uphold advance land acquisition for a future purpose that will occur at a specified time. *See* MODEL CODE, *supra* note 8, commentary at 261-63.

97. *See supra* notes 18-19 and accompanying text. A municipality may not acquire land outside of its jurisdiction unless the acquisition is the only practical way to implement an express grant of power. City of Wichita v. Clapp, 125 Kan. 100, 107, 263 P. 12, 16 (1928).

98. *See infra* text accompanying notes 109-44.

99. *See supra* notes 92-94 and cases cited therein.

100. This model suggests growth management that takes a "broadened impact perspective." As a planning approach, it allows more protection for both present and prospective regional residents by "assessing the distributive impacts of proposed policies on affected parties, not only in terms of traditional private property impacts, but also in terms of regional racial, socioeconomic, and environmental impacts." CONSTITUTIONAL ISSUES, *supra* note 69, at 206. *Cf.* Lowrey, *Exclusionary Zoning:* Mount Laurel — *Seminal or Tempest-in-a-Teapot*, 4 W. NEW ENG. L. REV. 541 (1982) (arguing that regions are not capable of controlling growth).

101. *See* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (citing Euclid v. Ambler Co., 292 U.S. 365 (1926) (due process clause of fourteenth amendment requires that objectives of a government's regulatory power be necessary to protect health, safety, morals and welfare of the population)).

102. *See* City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976), *rev'd on other grounds*, 561 F.2d 1032 (2d Cir. 1977).

land use regulation, a municipality enhances the general regional welfare by providing its fair share of housing to low- and moderate-income residents both presently and prospectively.[103]

When viewed from the regional perspective, the general welfare standard is actually an attack on fiscal zoning. Its widest application requires municipalities to shoulder their regional responsibilities by accommodating their fair share of the region's low- and moderate-income population through public services and facilities, including housing. Several state courts have used the general regional welfare concept when reviewing the fiscal balance of growth management plans.[104] As evidenced by the *Mount Laurel* decisions, the New Jersey courts have long recognized the general regional welfare concept. It is therefore probable that the state supreme court would uphold the land banking concept under this theory.[105]

C. *Judicial Review of Land Bank Dispositions*

A land bank's success is determined when it releases land to private builders for development. At the time of disposition, several intertwined and competing decisions must be made, including identifying the interests to be transferred, prescribed or prohibited uses, the best method of assuring disposition and the process for selecting transferees.[106] Thus, a municipality must make clear

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103. Federal courts have been reluctant to require that a municipality be responsible for the regional impacts of its land use decisions. *See* Hills v. Gautreaux, 425 U.S. 284 (1976) (interdistrict relief was the only possible means of remedy for an interdistrict housing violation); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (available housing in nearby community allowed municipality to prevent the construction of low- and moderate-income housing); Acevedo v. Nassau County, 369 F. Supp. 1384 (E.D.N.Y. 1974) (available land within the county was adequate grounds for municipality to refuse to allow the construction of multi-family housing). *But see* United States v. City of Blackjack, 508 F.2d 1179 (8th Cir. 1974) (lack of factual basis for local fair-share ordinance prohibited court from upholding ordinance on a local general welfare theory), *cert. denied*, 422 U.S. 1042 (1975); Board of Supervisors v. De Groff Enters., Inc., 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973) (court invalidated a local ordinance requiring developers to build at least 15% of their housing for low- and moderate-income residents, declaring that by promoting socioeconomic objectives, the municipality exceeded its authority under the police power). The *Mount Laurel II* court declined to rely on *De Groff*, 92 N.J. at 271, 456 A.2d at 448.

The requirements of standing diminish the opportunity for a regional general welfare approach in federal courts. *See* Warth v. Seldin, 422 U.S. 490 (1975) (potential residents of two lacked standing to challenge town's exclusionary zoning requirements).

104. Michigan, New York and Pennsylvania have joined New Jersey in recognizing the regional general welfare concept. CONSTITUTIONAL ISSUES, *supra* note 69, at 66.

105. The factors of the general welfare theory by which the land banking operation would be evaluated are: "where to draw the line between developed and developing communities, how to define the region, how to calculate fair share, whether the formulation extends beyond lower-cost housing, and which defenses will result in a reduction of the jurisdiction's share." *Id.* at 75.

106. Note, *supra* note 39, at 381.

the connection between the actual disposition of the land and the goals that the land bank is designed to serve when setting forth procedures for disposition and transfer.

However, a land bank needs some flexibility for instances when a disposition is challenged because it conflicts with the development plan or statutory objectives. Without denying the bank the flexibility needed for its operation, the enabling legislation must specify the procedures surrounding disposition, as well as the actual release of the land, in order to safeguard the operation from abuse.[107] The municipal development plan implementing the statute's regulatory provisions would allow the bank some flexibility, permitting it to exercise control over the ownership of its acquired land in a similar manner as do private developers: through rights of sale or lease with conditions on ownership and use, through easements, and through covenants.

In addition to statutorily prescribed regulations, judicial review must be available to safeguard land bank dispositions. The court would initially review the plan to determine whether it meets due process requirements.[108] As do state and regional land bank agencies, the court must also review the development plan for conformance with statutory regulations. Assuming that the plan legally conforms, the court would most likely defer to the agency on the specific tenets of a municipality's approved development plan. The underlying rationale is that the agency's approval process incorporates technical expertise on both the municipality's individual plan and its effect on the surrounding region as well as on the legal requirements imposed by the statute. Judicial review, which is limited to an agency's record and its proper adherence to procedures, would incorporate those statutory requirements and take away the possibility of the court substituting its judgment in a way that would hamper the overall scheme of the operation.

V. The Operational Issues

Land banking requires legislative action to establish an operational entity with the functional powers and authority to implement the bank's program. As a land use control, the land bank's program balances its developmental objectives with regional planning concerns and financial considerations. The integration of development, planning and financial aspects of the operation ensures the bank's effectiveness and efficiency.

A. The Enabling Legislation

The problems of inadequate planning in individual suburban communities require solutions that reach beyond the parochial borders of municipalities. As a land use regulation, zoning is ineffective in solving problems outside a municipality's jurisdiction.[109] Therefore, a land bank implementing the *Mount*

107. *Id.* at 381-82.
108. *Id.* at 384.
109. *Cf.* Godschalk & Brower, *Beyond the City Limits: Regional Equity as an*

Laurel obligation must operate within a regional planning framework, since housing need is clearly regional in nature. The land banking statute must establish the relationship of the state government to the individual municipalities as well as the relationship of those municipalities to each other.[110]

1. Government Interaction

The most efficient operation of a low- and moderate-income housing land bank would involve local, regional and state governments. Optimally, the land bank statute would establish a state land banking commission within the present state planning agency. The state commission would have regional land bank offices that oversee and interact with the municipalities in that regional area to provide fair share housing. The regional land bank offices would review municipal development plans for conformance to the policies and objectives adopted by statute,[111] and serve as mediator when conflicts arise between the individual municipalities within the region over housing allocations and site location. The regional land bank office would also serve as the initial reviewer of a suitnoncompliance complaints.[112] Municipalities then independently would acquire, hold and dispose of land after adopting a housing allocation/development plan that must undergo review at both the regional and state levels.[113]

State level authority can be exercised over the first stage to ensure that the land use development within municipalities and regions is sound from an environmental and planning perspective, equitably distributed and fairly allocated.[114] This would begin with an assessment of the state's growth. In

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Emerging Issue, 15 URB. L. ANN. 159, 195 (1978) (advocating regional equity as a means to provide fairness in regional distribution of urban land).

110. There would be one regional agency for each of the state's housing regions. This type of comprehensive planning, requiring consideration of the regional impact of land development, is used in environmental land use planning to protect the development of "critical areas." California, Hawaii, Maine, Vermont, Oregon and Florida have adopted such programs. *See generally* Dawson, *supra* note 50, at 89-95.

As originally proposed, the Hawaii program included land for the construction of lower-income housing within its parameters. Selinger, Van Dyke, Amano, Takenaka & Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L.Q. 639 (1978).

111. *See* MODEL CODE, *supra* note 8, commentary at 263-64.

112. The statute would give developers and present residents of the regional area in which the municipality is located the right to initiate a complaint regarding a municipality's compliance with the state-wide land use development plan.

113. The regional land bank agency would be both the administrative and enforcement arm of the state land banking commission. It is anticipated that a municipality's close working relationship with the regional land bank agency in developing the housing allocation/development plan would result in a state review process that is not unduly lengthy.

114. The state land bank commission would determine available developable land for low- and moderate-income housing within each municipality. Although the approach may be criticized because state level authority may not be sensitive enough to the needs

order to assess state population growth, the state commission would need to make predictions about the state's general growth patterns and the available lands within those areas that are suitable for development. The commission could defer, as did the *Mount Laurel II* court, to the SDGP for this determination.[115] The commission would then establish the overall policy objectives and goals for the acquisition, management and disposition of land that local municipalities must incorporate into the housing allocation component of their comprehensive plans.[116] Thus, the state land bank commission would have effective control over the initial stage of every municipality's land bank operation.

2. General Policy Objectives

The state might also adopt policy objectives and guidelines to ensure that the land bank meets its intended goals. These policy objectives and guidelines would be regulations having the effect of law. The enabling statute must require each municipal land bank to incorporate these policy objectives and guidelines into its housing allocation/development plan.[117] Establishment of statewide policy objectives would affect municipalities' choices of land for banks as well as their financing and structure. In addition to providing a means of review and enforcement for the state land bank commission and the regional land bank office, the policy objectives would also provide a basis for judicial review of the bank's acquisitions and dispositions.[118]

The policy objectives must generally address the constitutional obligation to provide low- and moderate-income residents with decent, affordable housing. Each municipal land bank is primarily concerned with maintaining adequate affordable housing and eliminating substandard units within the regional area. The objectives must specify those factors that affect housing market supply and the housing market preferences of low- and moderate-income persons within the state.[119] The regulations implementing the land bank

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of a municipality, this concern would be alleviated by the interaction that the municipalities would have with the regional land bank agencies.

115. *See supra* notes 18-19 and accompanying text. Deference to the SDGP is proper because it is the state's legislatively authorized growth plan. Its usage also ensures a level of coordinated effort in terms of the planning activities statewide. A court reviewing a land bank's decisions might also defer its judgment on these issues to that plan.

116. In order for these policy objectives to have the effect of law, they must be adopted pursuant to an administrative law procedure allowing notice of proposed rulemaking and public comment on the proposed rule. *See* MODEL CODE, *supra* note 8, § 6-103 note. *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958).

117. State established guidelines overcome to some extent the parochial interests that each municipality establishes in its own behalf. It also is a means of assessing the *Mount Laurel* obligation as defined by the court. *See* 92 N.J. at 233-48, 456 A.2d at 427-35.

118. *See supra* text and discussion accompanying notes 70-108.

119. *See generally* BURCHELL STUDY, *supra* note 12, at 82-318 (discussing present and prospective supply of and demand for housing, characteristics of the *Mount Laurel-*

statute must also contain policy objectives for a municipal land bank's decision-making process. The policy objectives on location of low- and moderate-income housing within a given municipality address the three different aspects of the bank's operations: acquisitions, management and disposition of the property.

The land bank's enabling statute would provide the administrative procedures for the commission's governance of municipal land banks. These procedures would cover circumstances under which a municipality trying to develop its fair share housing through land banking would be allowed trade-offs or exemptions. It would also include public comment procedures on land bank decisions and the grant of standing to private citizens to complain of the municipalities' noncompliance with the commission's established guidelines.

3. Acquisition Policies

The acquisition policy set forth by the state might address the selection of appropriate geographic and socioeconomic sites for low- and moderate-income housing, as well as other factors including unit size and design,[120] neighborhood location,[121] lowest priced unit[122] and the distance of the move from the previous residence.[123] The policy objectives must address spatial concentration of low- and moderate-income housing so that, to the greatest extent possible, the housing is built in a racially and economically mixed area.[124] A municipality's selection of a site in a racially or economically exclusive area raises a rebuttable presumption of discriminatory intent.[125] Land bank acquisition policy must also include identification of land within a municipality for mobile homes.[126] An acquisition policy may also include the purchase of land for development of other than low-cost housing. Such a policy will encourage

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eligible population, and the unmet *Mount Laurel* housing need).

120. *See id.* at 45.

121. *See id.*

122. *See id.*

123. *See id.*

124. Although not applicable unless the program is receiving federal monies, federal policy specifically prohibits discriminatory actions in programs funded by the federal government. Among the specific types of actions prohibited are site selection or housing locations that have the "purpose or effect of excluding individual from, denying them benefits of, or subjecting them to discrimination . . . on the grounds of race, color or national origin . . . ." 24 C.F.R. § 1.4b(3) (1983).

125. However, federal courts are not usually willing to review local land use ordinances. *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (local land use decision upheld as appropriate exercise of police power). *But see* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (ordinance limiting occupancy of dwelling to members of a single family invalidated on due process grounds). *See generally* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *The Equal Protection Clause and Exclusionary Zoning After* Valtierra *and* Dandridge, 81 YALE L.J. 61 (1971).

126. Mobile homes are a type of least cost housing that communities commonly exclude and for which the *Mount Laurel II* court suggested specific inclusionary provisions should be made. 92 N.J. at 274-76, 456 A.2d at 450-51.

development of a diverse community by determining the economic mix of the community's housing. In this way, the land bank may recapture capital gains from land that it acquired cheaply and disposed of at an enhanced value.[127]

4. Holding Policies

The bank's holding policies should determine the interim use of the acquired land, the length of the holding period and a feasible date to release the lands.[128] A land bank that engages in a purely profit-making operation will experience an inherent conflict when it holds property for speculative gain that could be immediately used for some appropriate development purpose.[129] Although the land bank needs financial stability to sustain its operations, the holding policy must reflect the bank's paramount objective of providing low- and moderate-income housing development.[130]

5. Disposition Policy

The bank's disposition policy is most critical. The policy must encourage the transfer of land with conditions, covenants, and restrictions and address such concerns as to whom the properties are to be transferred, governmental subsidy as a prerequisite to a transfer, the size of the parcels to be transferred, the type of housing to be constructed on the parcels, and the type of enforcement mechanisms that will be used against a noncomplying developer.[131]

6. Financing

The enabling statute would need to address the structure and financing of the land bank in a merely advisory manner. Municipalities then would have the option to choose those methods that work best for them under the statute's regulations. The land bank's guidelines should encourage municipalities to supply their bank's initial holdings through the acquisition of municipal or tax delinquent lands.[132] In addition to state appropriations, municipalities must

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127. *See* H. FRANKLIN, D. FALK & A. LEVIN, IN ZONING: A GUIDE FOR POLICY MAKERS ON INCLUSIONARY LAND USE PROGRAMS 124-31 (1974) [hereinafter cited as IN ZONING].

128. *See generally* MODEL CODE, *supra* note 8, §§ 6-401 to 6-403 (general rules relating to disposition of land).

129. H. FLECHNER, *supra* note 34, at 15-16.

130. The operation faces the problem of having to balance continuously its financial considerations against its development objectives. The resolution of this conflict will often depend upon the pattern of growth and development as determined by the municipality's plan.

131. *See* MODEL CODE, *supra* note 8, §§ 6-401 to 6-403. *See supra* text accompanying notes 106-08.

132. The financing of a land bank admittedly calls for the development of a major economic model. *See* H. FLECHNER, *supra* note 34, at 41-44. *But see* S. KAMM, *supra* note 34, at 28-32. Municipalities could possibly acquire the initial inventory through

be encouraged to apply for federal funding.[133] The organizational structure that a land bank chooses will affect its choice of financing. For example, if a municipality elects to form a special purpose corporation that requires a legislative grant of power, it may use both bond and debt financing.[134]

B. The Local Development Plan

The local development/housing allocation plan would provide each municipality with an opportunity to specify which lands within its jurisdiction are best suited, given the SDGP guidelines, for low- and moderate-income housing. The purpose of the state regulations and guidelines would be to make consistent the differences among municipalities in terms of housing composition, location and land availability. The housing allocation plan would provide each municipality in a region with guidelines for the proper evaluation of its housing program and land use regulations. The requirement that each municipality individually submit a housing allocation plan to the regional land bank agency is necessary to promote a more favorable climate for the construction of low- and moderate-income housing construction.

The development plan must provide for adequate housing need in the reasonably foreseeable future. For communities designated by the SDGP and *Mount Laurel II* as growth areas, the housing need will represent the needs of future residents of the region. Accuracy of these projections is essential to ensure that the regional housing need is not underrepresented.[135] In addition to developable land, the allocation plan criteria will include the community's relative wealth, its ability to absorb new housing, the ratio of housing units to present and future jobs, the existing number of low- and moderate-income households, the existing density of population or housing, availability of public services, the amount of deficient housing and population growth projections.[136] In order to meet its housing allocation, the plan must also have inclusionary strategies, implementation techniques and the use of state and federal financial assistance for new housing construction.[137]

The inclusionary strategies that the municipal land bank would employ are designed to lower the cost of the housing unit. Higher density housing accomplishes this by allowing for the construction of more units on a tract

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actual use of surplus or tax delinquent lands.

133. The land bank operation may be financed through either government appropriations and grants or debt financing. Note, *supra* note 5, at 962-74.

134. A special purpose corporation must be created by statute. *Id.* at 943. Bergen County has chosen to operate a land bank program through the county housing authority and its Affordable Ownership Housing Program (AOHP). BURCHELL STUDY, *supra* note 12, at 330.

135. *See* D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 313 (1973).

136. *Id.* at 332-34.

137. IN ZONING, *supra* note 127, at 113-40.

of land.[138] A municipality might decide not to require the developer to dedicate open space for recreational facilities and other amenities that usually result in a higher cost to the purchaser, even though open space is considered a valuable natural resource in New Jersey.[139] To implement the inclusionary strategies, a municipal land bank might use several land use tools including: (1) conditional use, requiring a particular use under pre-determined stated conditions;[140] (2) special districts with detailed goals for the land use;[141] and (3) planned development that regulates the use of an entire area to promote an economic housing mix.[142] Municipalities can encourage the land bank's program by seeking available state and federal financial assistance for acquisition of the lands.[143] Additionally, municipalities can implement the plans through local acquisition.

The regional land bank agency would operate to ensure that each municipality within that regional area is meeting its fair share obligation. This would require the agency to evaluate the regional housing needs and allocate them among the municipalities. Next, the regional agency must review the plan to ensure that it is realistically meeting the needs of that jurisdiction and is fair in its distribution. Finally, the agency must decide if the municipality has an obligation outside its own jurisdiction to contribute to the regional housing need.[144] Thus, the overall purpose of the local development plan is to give the municipality a voice in executing its responsibilities for low- and moderate-income housing within its jurisdiction and to ensure that it has removed all exclusionary practices in meeting that obligation.

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138. Higher density contributes to an overall lower net cost of development because land, which is usually the highest cost of development, is distributed over more units. *Id.* at 128.

139. As a way of enhancing the community, when a large tract of land is proposed for development, the municipality usually requires the developer to dedicate a certain amount of open space for the provision of municipal services to the residents. By choosing not to impose this requirement on land of a certain size that a developer obtains from a land bank, the municipality allows the developer to realize a higher profit. The residents will not be denied access to these services, since under the regulations the development plan must choose land that is geographically accessible to municipal services. *See id.* at 131.

140. *Id.* at 118.

141. *Id.*

142. *Id.* at 124-31.

143. The *Mount Laurel II* court noted, in discussing mandatory set-asides, that scarcity of federal subsidies has undermined the success of mandatory set-asides. Nevertheless, the court suggested the use of such set-asides even without the availability of subsidies. *Mount Laurel II*, 92 N.J. at 268, 456 A.2d at 446-47.

144. *See generally* MODEL CODE, *supra* note 8, commentary at 264. Regional-level review is necessary because of the attention to detail that is necessary in determining the developable land and the housing need and housing allocation for an entire region and then for an individual municipality. It is possible that the regional land bank agency will become more of a clearinghouse for coordination of planning among municipalities and less of a monitoring and enforcement agency.

V. CONCLUSION

The problems of *Mount Laurel*-type fiscal zoning will continue to cause lengthy litigation and to require extensive judicial administration while resulting in few, if any, additional housing units for low- and moderate-income families. Implementing a statewide land banking system to provide lower cost housing requires action by the state legislature. Land banks are an innovative response to the problem of suburban development and the failure of suburban communities to assure decent housing opportunities for low- and moderate-income persons. They are also a necessary means of land acquisition because of the inability and unwillingness of local governments to use their powers aggressively for this purpose. Land banks are feasible because their legality will withstand review by the New Jersey courts under both the *Mount Laurel II* predicate of comprehensive regional planning and state constitutional challenges.

Land banking is limited in the amount of financial assistance it can offer to the construction of fair share housing. In order to house low- and moderate-income persons, shelter subsidies must be applied on a long-term basis. A major problem with implementing a land bank program is finding available or potentially available funding for the amount of land needed. Financial resources available for a local acquisition program are not abundant. Even without a large amount of initial capital, however, a land bank can amass its holdings by acquiring surplus properties.

Land banking sets a legislative agenda for making available adequate housing opportunities to a broad range of income groups in a community. As an intergovernmental response, it can provide opportunities that will benefit the regional welfare. Land banking as a method of solving exclusionary zoning problems is an idea whose time has come.