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Public policies on both the local and national level have contributed to the mobility of the white and the relatively affluent within metropolitan regions.[1] Increasingly the groups benefited by these policies have opted to move to the suburbs. At the same time, low- and moderate-income families have generally been unable to enjoy this opportunity for access to suburban land.[2] The zoning ordinances and practices of suburban municipalities have in effect acted to insure that only those who can afford to pay the price of admission have a realistic choice of where to live.

When a suburban municipality uses the instrument of zoning to exclude housing which is within the financial abilities of low- and moderate-income families—a technique hereinafter referred to as exclusionary zoning—it is invariably effective. When zoning ordinances exclude apartments from a suburban area, there are, of course, no apartments constructed. When minimum lot-size and floor-space requirements cause the cost of a new house to soar, no new homes of modest price are built. Thus, exclusionary zoning operates to deny access to suburbia to many nonaffluent people.

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[1] Examples of such expressions of public policy include the mortgage insurance provisions of the National Housing Act, 12 U.S.C. § 1707 *et seq.* (1970), and home loan benefits for veterans, 38 U.S.C. §§ 1810-1824 (1970). These policies have provided the means which enabled many to locate new housing in the metropolitan area.

[2] Both low- and moderate-income families are defined in this article in terms of income limits for admission to federally subsidized housing. The admission income limit is the maximum annual income permissible in order for a family or an individual to be eligible for admission to low-rent public housing. For example, for a family of four to be eligible for public housing in Chicago, it must have an income below $6,000. 42 U.S.C. §§ 1408, 1410(g) (1970). Moderate-income families are defined by the income-eligibility limits of admission to the housing programs known as Section 235 (single-family housing) and Section 236 (multi-family housing). 12 U.S.C. §§ 1715z, 1715z-1 (1970). Generally, the income limits for moderate-income housing are 135 percent of those for low-income or public housing. For example, a family of four in Chicago must have an income of less than $8,100 (135 percent of $6,000), to be eligible for the moderate-income subsidized housing programs. *Id.* §§ 1715z(2)(h)(2), 1715z-1(i)(2).

The problem of the inability of persons with limited financial means to acquire adequate housing does not end, however, with the abolition of exclusionary tactics. When the courts hold exclusionary zoning practices to be invalid and seek to include low- and moderate-income families in a community, housing for these previously excluded economic groups does not appear simply as a result of a court judgment. The traditional remedies provided by the courts do not guarantee that low- and moderate-income housing will actually be built. To date, victories for antiexclusionary zoning forces have established important precedents but have had a limited impact in terms of increasing the housing opportunities available for low- and moderate-income people in communities previously engaged in exclusionary zoning.

If traditional judicial remedies available in exclusionary zoning cases have not succeeded in increasing the access of low- and moderate-income families to municipalities previously engaged in exclusionary practices, a vital question arises as to what the courts can do to right these wrongs. Hand in hand with this inquiry is the question of the responsibility of the courts to provide effective relief to vindicate constitutional rights. To be effective, a remedy for exclusionary zoning must take into account the realities of the housing development process, such as the need for multiple local approvals before construction in addition to a rezoning or variance. The nature of the available public subsidy programs must also be considered because it is generally not economically feasible to provide new low- and moderate-income housing unless this is done in conjunction with subsidies.

This article discusses affirmative approaches to providing effective relief in two types of exclusionary zoning cases: (1) remedies specific to a particular proposed development or a given site and (2) regional remedies, which provide a generalized framework for meeting what courts are increasingly identifying as a regional problem: the need for decent housing for all families. In the first instance (the "single-site" case) a court would remove obstacles in order to facilitate development of low- and moderate-income housing on a particular suburban site. In the second case (the regional approach) a court would specify the obligation of the municipalities in a "region" in terms of the number of units of low- and moderate-income housing to be provided in each particular community. This obligation would be a proportionate share of the low- and moderate-income housing needed in the region as a whole, and would constitute the measure of relief to which an aggrieved plaintiff would be entitled. The court would

also adopt mechanisms to insure implementation of this regional housing distribution system. Under either approach invalidation of exclusionary zoning schemes by the courts would be converted into the only form of effective relief, increased housing opportunities in suburban areas for low- and moderate-income families.

## I. HOUSING PROGRAMS AND THE DEVELOPMENT PROCESS

If exclusionary zoning litigation is to result in actual housing opportunities for low- and moderate-income families in suburban areas, heavy reliance must be placed on federal housing subsidy programs.[3] The form of these programs has changed over time, and they are likely to continue to evolve.[4] Whatever their form, these subsidies are critical to increasing access to suburban areas, because these low- and moderate-income groups often cannot afford new housing built solely by private enterprise.

The initiative in developing federally subsidized housing rests with local public bodies as well as private sponsors and developers. The U.S. Department of Housing and Urban Development (HUD), which administers the present array of subsidy programs, itself builds no housing. Its role is primarily reactive, *i.e.*, funding proposed housing projects which meet the Department's statutory and administrative requirements and project selection criteria.[5]

The oldest of the federal subsidy programs, low-rent public housing,[6] is administered locally by a local housing authority (LHA). The LHA initiates, develops, owns, and manages the housing units or contracts with private parties to carry out one or more of these functions. HUD itself does not seek the creation of

[3] The other major vehicle for providing housing for this income group is mobile homes, which have increased their share of the new housing market substantially in the last decade. Mobile homes now constitute approximately one-fourth of the new houses produced each year.

[4] On January 9, 1973, the continued existence of all current subsidy programs was placed in doubt, when outgoing U.S. Department of Housing and Urban Development (HUD) Secretary Romney announced an indefinite moratorium on funding new projects. N.Y. Times, Jan. 9, 1973, at 1, col. 1.

The future form of federal housing subsidies, if any, is not yet known. A recent development which is likely to become increasingly important over time is the "housing allowance." This subsidy is related to the family rather than the housing unit. Families who cannot afford adequate housing receive subsidies which enable them to secure standard housing of their own choice in the private market. The difference between the market cost of the housing and the amount the family can afford to pay is subsidized by the government.

[5] *See* Maxwell, *HUD's Project Selection Criteria—A Cure for 'Impermissible Color Blindness'?*, 48 NOTRE DAME LAW. 92 (1972).

[6] 42 U.S.C. § 1401 *et seq.* (1970).

LHAs, nor does it generally require particular communities to seek subsidy funds to develop public housing.

In the last dozen years, Congress has created an additional array of direct subsidy programs for low- and moderate-income people. These programs depend on *private* sponsors for initiative, unlike the public housing program, which relies on local government. In 1961 Congress enacted the Section 221(d)(3) program.[7] Under this program, new apartments were constructed for moderate-income families, who had been priced out of the new housing market. Rents for these apartments were federally subsidized. The rent supplement program, which followed in 1965, has proportionately greater subsidies and serves low-income families (much like public housing) in accomodations which are privately developed and owned.[8]

Finally, the omnibus Housing and Urban Development Act of 1968 created the Section 235 program, which assists moderate-income families in attaining home ownership. The 1968 Act also initiated the Section 236 program (successor to the Section 221(d)(3) program), which subsidizes rental housing for the same income group.[9] Under both of these programs, an eligible sponsor applies to HUD for subsidies which reduce the cost to the occupant, thus bringing adequate housing within the range of low- and moderate-income families.

In addition to weaving his way through the federal administrative maze associated with these programs, a public or a private developer of subsidized housing must secure a number of approvals at the local level before starting construction. Obtaining desired zoning may be a major hurdle. Often, it is necessary to seek separate permission to tap into the municipal sewer system. A developer must also obtain a building permit, which involves demonstrating that the building plans conform to the requirements of the local building code. If a municipality desires to exclude low- and moderate-income housing, all of these apparently neutral administrative devices are at its command. In addition, the suburb seeking to exclude people with limited incomes has a frequent, and not altogether unconscious, ally in the Congress. The federal subsidy programs include constraints which, directly or indirectly, permit the local community to prohibit the use of the program within its borders. Of the four major subsidy programs, the local

[7] 12 U.S.C. § 1715*l* (1970).
[8] *Id.* § 1701s.
[9] *Id.* §§ 1715z, 1715z-1.

governing body has a direct veto power in two (public housing and rent supplement) and indirect "assistance" in this endeavor from the Congress in the other two (Sections 235 and 236).

When the rent supplement program was enacted, HUD considered using this program as a means of providing integrated housing opportunities in the suburbs. When Congress was informed of these plans, it approved only a small appropriation and placed a condition on the use of these funds, prohibiting their use in any community without the express approval of the local governing body.[10] Inaction by the community is thus sufficient to exclude rent supplement units.

Failure of local government to act may also serve to keep low-rent public housing out of a community. This local veto may take the form of failing to create a local housing authority to administer the program. Even if a housing authority exists which has jurisdiction over a particular suburb, the housing authority cannot operate within the boundaries of any municipality without the consent of the local governing body. Generally, that approval takes the form of a cooperation agreement between the local government and the independent housing authority.[11]

Thus, Congress has clearly made the low-income housing programs a matter of local option. A similar result is achieved with the moderate-income programs by means of the cost ceilings written into the law. Section 235 and Section 236 units may not exceed approximately $24,000 in total development cost.[12] Through the use of any number of zoning devices a suburb can effectively exclude this housing. Although federal subsidy programs are an imperfect vehicle for relief in exclusionary zoning cases, the absence of subsidy funds would present a far greater roadblock to providing realistic remedies.[13]

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[10] An appropriation of $30 million was originally requested for this program. Congress reduced that to $12 million and attached the limiting rider. *See* Welfeld, *Rent Supplements and the Subsidy Dilemma*, 32 LAW & CONTEMP. PROB. 465, 470–71 (1967). The local veto power also enables the community to prevent development of mixed-income projects, which could otherwise be created by "piggy-backing" the rent supplement subsidy onto a portion of the units in a Section 236 development.

[11] 42 U.S.C. § 1415(7)(a)(i) (1970). The locality agrees to provide municipal services and to accept 10 percent of shelter rents as a payment in lieu of taxes. Local governing bodies have generally refused to sign such agreements for projects in nonslum areas, in central cities, and in suburbs.

[12] 12 U.S.C. §§ 1715z(i)(3)(B), 1715z-1(i)(3)(1970).

[13] In addition to the extraordinary impoundment of appropriated funds, announced by the federal government in January, 1973, these programs are subject to the annual uncertainties of the congressional appropriation process. Each of the existing programs is politically controversial in part because of efforts to use the programs in suburban areas. Even if the moratorium on spending is eventually lifted, there is no assurance of continued congressional appropriations for the programs.

## II. EQUITABLE RELIEF IN CONSTITUTIONAL CASES

Assuming that federal subsidy programs continue to exist in some form, the courts will continue to have the potential to provide effective relief in the form of actual housing opportunities in exclusionary zoning cases.[14] Indeed, they have a responsibility to do so when local zoning practices are held unconstitutional. This obligation is based on the principle that courts of equity have a duty to provide effective relief, once a constitutional violation is found.[15] A substantial portion of the judicial review of local zoning which has occurred in both federal and state courts is, in fact, couched in constitutional terms.

### *A. Recent Zoning Cases in Federal Courts Finding Constitutional Violations*

Several recent federal court decisions have explicitly held that local zoning actions violated constitutional norms. In *Kennedy Park Homes Association v. City of Lackawanna*,[16] a United States court of appeals affirmed a district court holding that refusal by the city to permit the development of a low-income subdivision in an all-white area was illegal. The plaintiffs' claims were based on both constitutional (fourteenth amendment) and statutory grounds (Fair Housing Act of 1968[17]). Neither the district court nor the court of appeals distinguished between the legal theories presented. Rather, the courts treated these arguments as basically coextensive. The United States Court of Appeals for the Tenth Circuit upheld a similar finding of unconstitutionality in

[14] Assuming no federal subsidies and the continuation of the present economics of housing, the courts' remedial powers would realistically be limited to permitting the inclusion of mobile homes in suburban areas.

[15] The jurisdiction of an equity court is triggered by the constitutional claims at stake. It is well established that equity courts will entertain jurisdiction in cases where constitutional attacks are made. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 16 (1971).

[16] 318 F. Supp. 669 (W.D.N.Y. 1969), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). In *Lackawanna*, the vast majority of the city's black population lived in substandard housing in the first ward. Two other wards were essentially white and characterized by a better housing and living environment. In response to community opposition to a project in one of the white wards, the city council, in 1968, rezoned the area of the proposed project for park and recreational purposes. The council also imposed an indefinite moratorium on further approval of subdivisions. After the developer sued and the federal government intervened, the council rescinded the rezoning and the moratorium. The mayor later refused, however, to approve an extension of the sewage system necessary for the proposed subdivision.

Based on the specific facts revealed at trial, the district court found that the actions of the city officials were in response to the discriminatory attitudes of the community, which sought to continue the confinement of the city's low-income blacks to the first ward. The Court of Appeals affirmed this particular finding. 436 F.2d at 109.

[17] 42 U.S.C. § 3601 *et seq.* (1970).

*Dailey v. City of Lawton.*[18] In *Dailey* the city refused to grant a rezoning necessary for the development of a low- and moderate-income project. The district court had found that the purposeful racial discrimination implicit in the denial of a rezoning constituted a violation of the equal protection clause.[19] In a third federal zoning case, *Sisters of Providence v. City of Evanston,*[20] the district court denied a motion to dismiss, holding that an action could be maintained under both the equal protection and due process clauses, as well as on statutory grounds. As in *Lawton,* the city had refused to rezone a parcel of land on which a developer proposed to build federally subsidized low- and moderate-income housing.[21]

Equal protection claims were also raised in *Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City.*[22] SASSO, which was composed primarily of Mexican-American persons, was a nonprofit sponsor of subsidized housing. The organization obtained a rezoning for land it owned in a middle-class area of Union City. The proposed project was blocked by a referendum which nullified the city council's action in rezoning the parcel. A federal district court refused to enjoin the referendum and after the referendum, the court of appeals declined to overturn it. The court of appeals made no decision on the equal protection issue but remanded to the district court, noting that a substantial constitutional question would be raised if the plan were discriminatory and acted to deny "decent housing and an integrated environment to low-income residents of Union City."[23] In a subsequent unpublished memorandum, the district court did not find that the zoning denial violated equal protection rights, but it did find that the housing shortage for low-income residents of Union City was so severe that failure by the city to take imme-

[18] 425 F.2d 1037 (10th Cir. 1970), *aff'g* 296 F. Supp. 266 (W.D. Okla. 1969).

[19] The site of the proposed development was zoned for public facilities and was being used as a parochial school. The surrounding area was largely zoned for relatively high-density residential uses. When the sponsor of a subsidized housing project sought to have his parcel rezoned to the same classification as the surrounding area, the application was denied. As in *Lackawanna,* the district court in *Dailey* looked at the specific facts in concluding that the city's inaction was racially motivated, and intended to "keep a large concentration of Negroes and other minority groups from living" in the area. 296 F. Supp. at 269. Facts relied on in finding racial motivation included anonymous calls to the developers, testimony of a dissenting zoning board commissioner, and the racial composition of the area.

[20] 335 F. Supp. 396 (N.D. Ill. 1971).

[21] As in *Lackawanna* and *Dailey* the complaint alleged that the city's denial was based on racial discrimination and that there was a history of housing segregation in this racially mixed suburb of Chicago. The court stated that "Evanston cannot deny a petition to rezone by relying on existing zoning, absent a valid land use reason, where the effect of this denial is to further racial discrimination." 335 F. Supp. at 404.

[22] 424 F.2d 291 (9th Cir. 1970), *aff'g* 314 F. Supp. 967 (N.D. Cal. 1970).

[23] 424 F.2d at 295.

diate action to alleviate the problem would result in a denial of equal protection. The court

> reserved the right . . . to grant plaintiffs relief in respect to rezoning . . . if and when it finds . . . that the housing situation has become such that the failure to rezone has become, in effect, denial of decent housing to low-income residents and denial of equal protection of the law.[24]

*Crow v. Brown*[25] involved a related situation in which the federal courts ventured into exclusionary suburban practices. In this case, low-income public housing was proposed. The Atlanta Housing Authority attempted to exercise its statutory prerogatives to provide housing in suburban Fulton County, Georgia. The county government had granted the necessary rezoning before the public housing developer acquired the land, on the assumption that luxury apartments would be developed on the sites in question. When the developer subsequently sought building permits, he was turned down by the same county officials who had granted the rezoning. Relying on minutes of meetings and official

[24] Southern Alameda Spanish Speaking Organization v. City of Union City, No. 51590 (N.D. Cal., July 31, 1970).

[25] 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972). It has been commented that:

> The *Lawton-SASSO-Lackawanna* rulings constituted an impressive first round of 14th Amendment challenges to exclusionary zoning. They set forth strong principles of law indicating that the Federal Courts were prepared to protect minorities and the poor from zoning and planning decisions which deprive them of equal housing opportunities. These victories, however, were followed by a setback in April, 1971, when the U.S. Supreme Court held in *James v. Valtierra* that a California constitutional provision requiring local voter referendum approval as a prerequisite for the construction of public housing was constitutional. . . . Two post-*Valtierra* decisions *(Crow v. Brown, Sisters of Providence v. City of Evanston)* do indicate that the lower courts are still prepared to move boldly in ruling on Fourteenth Amendment challenges in this area.

R. BELLMAN & A. BAKER, SUMMARY OF RECENT COURT CHALLENGES TO EXCLUSIONARY LAND USE PRACTICES 5-6 (1972).

In two federal cases which have received a great deal of pretrial publicity, the plaintiffs have alleged a variety of constitutional violations. When a subsidized housing development was announced for the unincorporated area of St. Louis County, Missouri, the residents of the area decided to incorporate. After receiving permission from the county council to do so, the new municipality of Black Jack adopted a zoning ordinance which prohibited multifamily housing on the proposed site. The plaintiffs in Park View Heights Corp. v. City of Black Jack, 335 F. Supp. 899 (E.D. Mo. 1971), *rev'd*, 467 F.2d 1208 (8th Cir. 1972) claimed that the action by the city constituted a taking of property without due process, under the fifth and fourteenth amendments, and a violation of the right to travel, the equal protection clause, and the thirteenth amendment. The last two claims were also made by the plaintiffs in the subsequently filed federal suit concerning the same housing development, United States v. City of Black Jack, Civil No. 71C-372 (E.D. Mo., filed June 14, 1971). Other federal suits alleging that local zoning practices have violated constitutional rights include Fair Housing Dev. Fund Corp. v. Burke, Civil No. 71-328 (E.D.N.Y., filed July 18, 1972); Accion Hispania, Inc. v. Town of New Canaan, Civil No. B312 (D. Conn., filed June 14, 1971); Cornwall Estates Co. v. Town of Cornwall, Civil No. 72-3291 (S.D.N.Y., filed Aug. 2, 1972).

memoranda, the district court found that the denial of building permits was based on the race of the potential occupants. The court went on to hold that the refusal to grant the permits constituted a denial of equal protection.

### *B. Recent Zoning Cases in State Courts Finding Constitutional Violations*

Similarly, state courts have held zoning actions unconstitutional. In *Molino v. Mayor and Council of the Borough of Glassboro*,[26] the New Jersey Superior Court invalidated an ordinance which limited the number of bedrooms per apartment and required that luxury amenities be included in apartment complexes. The court found that the bedroom restrictions precluded occupancy by families with children and that the amenities requirement would exclude housing which was needed immediately in the borough, "a blend of living units for middle income and low income families."[27] The court stated:

> There is a right to be free from discrimination based on economic status. There is also a right to live as a family, and not be subject to a limitation on the number of members of that family in order to reside in any place. Such legal barriers would offend the equal protection mandates of the Constitution.[28]

In other cases, state courts have used substantive due process doctrine to declare local zoning actions unconstitutional. Frequently, these opinions speak in terms of exceeding the police power, unreasonable practices, or actions inconsistent with the general welfare, rather than clearly articulating the due process rationale. For instance, in *Appeal of Girsh*[29] and *Appeal of Concord Township (Kit-Mar Builders, Inc.)*,[30] the Pennsylvania Supreme Court held that in many circumstances total exclusions of certain types of residential land-use and large lot-size restrictions were completely unreasonable and outside the scope of the police power. Recent New Jersey cases, including *Oakwood at Madison, Inc. v. Township of Madison*,[31] *Southern Burlington County*

[26] 116 N.J. Super. 195, 281 A.2d 401 (1971).

[27] *Id.* at 202, 281 A.2d at 405.

[28] *Id.* at 204, 281 A.2d at 405–06. *See also* Sager, *Exclusionary Zoning: Constitutional Limitations on the Power of Municipalities to Restrict the Use of Land*, in AMERICAN CIVIL LIBERTIES UNION PAPER (1972), for an extensive discussion of state cases upholding and rejecting constitutional claims.

[29] 437 Pa. 237, 263 A.2d 395 (1970).

[30] 439 Pa. 466, 268 A.2d 765 (1970).

[31] 117 N.J. Super. 11, 283 A.2d 353 (1971).

*NAACP v. Township of Mount Laurel*,[32] and *Baskerville v. Town of Montclair*,[33] are at least partially grounded on concepts of due process. Similarly, the Michigan courts have invalidated local prohibitions against mobile home parks as being inconsistent with the general welfare in *Bristow v. City of Woodhaven*[34] and *Green v. Township of Lima*.[35] To the extent, then, that the courts have held local zoning actions to be illegal, these decisions have generally been based on a denial of constitutional rights.

### *C. Analogies to Constitutional Violations in Other Areas of the Law*

When constitutional rights are violated, basic principles come into play relative to the relief which courts of equity must provide. The United States Supreme Court has consistently held that in such cases the court has a duty to provide effective relief. Effective relief includes whatever action is necessary to right the wrong. The principle has been most clearly and frequently stated in the school desegregation cases. In an oft-quoted phrase, the Supreme Court in *Green v. County School Board*[36] set as the standard of relief a decree "that promises realistically to work, and promises realistically to work *now*."[37]

In *Davis v. Board of School Commissioners*,[38] the Supreme Court elaborated on the *Green* notion and indicated the lengths to which district courts should go in attempting to achieve school desegregation and to provide relief for the plaintiffs:

> Having once found a violation, the district judge or school authorities should make every effort to achieve the *greatest possible degree of actual desegregation*, taking into account the practicalities of the situation. *A district court may and should consider the use of all available techniques* . . . .[39]

[32] 119 N.J. Super. 164, 290 A.2d 465 (1972).

[33] Baskerville v. Town of Montclair, Docket No. L-35387-68 (N.J. Super. Ct., June 2, 1971).

[34] 35 Mich. App. 205, 192 N.W.2d 322 (1971).

[35] 40 Mich. App. 655, 199 N.W.2d 243 (1972).

[36] 391 U.S. 430 (1968).

[37] *Id.* at 439. The Supreme Court held that the "freedom of choice" plan which was being employed by the school board was unacceptable because it failed "to provide meaningful assurance of prompt and effective disestablishment of a dual system" of public education. *Id.* at 438. *See also* Kemp v. Beasley, 389 F.2d 178, 183 (8th Cir. 1968); Wanner v. County School Bd., 357 F.2d 452, 454-55 (4th Cir. 1966).

[38] 402 U.S. 33 (1971).

[39] *Id.* at 37 (emphasis added). In *Davis*, the metropolitan area of Mobile, Alabama, was divided by a major highway. Virtually all of the blacks in the area lived east of the highway, and the schools there were two-thirds black. The schools to the west of the highway were 88 percent white. The district court and the court of appeals approved desegregation plans which treated the western section as isolated from the eastern, with

In *Swann v. Charlotte-Mecklenburg Board of Education,*[40] the most comprehensive recent case on the equitable remedy, the Supreme Court drew upon prior cases to support the use of flexible means to achieve desegregation:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . . To effectuate [plaintiff's interest here] may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. *Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.* But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education,* 349 U.S. 294, 299-300 (1955).[41]

In *Swann,* the Supreme Court upheld the use of complex forms of relief, including busing to achieve school desegregation, even though the order posed significant administrative burdens in its implementation.[42]

In the related area of voting rights, the Supreme Court has reiterated the duty of a district court, acting as a court of equity, to provide effective relief when constitutional rights have been violated. In *Louisiana v. United States,*[43] the Supreme Court stated that a district judge has "not merely the power but the

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unified geographic zones and providing no transportation of students for desegregation purposes. The Supreme Court held that treating these sections as isolated from each other was error on the part of the district court since it did not adequately consider the use of all available techniques to maximize desegregation. Because "inadequate consideration was given to the possible use of bus transportation and split zoning," the Court remanded the case for the development of a decree consistent with *Green. Id.* at 38.

[40] 402 U.S. 1 (1971). The Supreme Court affirmed a district court order which required the use of bus transportation for school desegregation purposes. The Court found "no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30. In defining the equitable remedial power of the district courts, the Supreme Court in *Swann* reemphasized the *Green* concerns for a decree that is reasonable, workable, and effective. 402 U.S. at 31.

[41] *Id.* at 12 (emphasis added).

[42] *Id.* at 28. The Court observed:

> The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

[43] 380 U.S. 145 (1965).

duty to render a decree which [would] . . . so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[44]

### *D. The Use of Supplementary Remedies*

The duty to provide effective relief in constitutional cases often requires courts to retain jurisdiction to oversee implementation. The courts have often issued supplemental orders, which may be significantly different from the original order and perhaps several years after the initial decree. The most frequent factual context is in the area of school desegregation. Initial relief frequently consisted of a "freedom of choice" plan, under which students could choose the school they wished to attend. When these plans failed to produce actual desegregation, district courts followed the *Green* decision and issued further remedial orders, requiring radically different steps by school boards to provide effective relief. For example, in *Wright v. Council of the City of Emporia,*[45] the courts have engaged in a six-year process of continuous judicial supervision over desegregation of the Emporia, Virginia, schools. The district court has issued three radically different types of orders in a continuing effort to provide effective relief, in the face of ingenious tactics by the defendants to frustrate that relief.[46] In

[44] *Id.* at 154. The district court had held unconstitutional a state statute which required persons seeking to register to vote to pass a test involving interpretation of the Constitution. The district court found that this test, which as applied gave registrars complete discretion to determine voting qualifications without objective standards, deprived blacks of their constitutionally protected voting rights. The district court not only enjoined further use of the interpretation test, but also barred application of a new citizenship test, which also had a discriminatory effect. The Supreme Court affirmed the district court decree.

[45] 407 U.S. 451 (1972). In January, 1966, the federal district court issued an order approving a freedom of choice plan adopted by the county in April, 1965. Wright v. County School Bd., 252 F. Supp. 378 (E.D. Va. 1966). By the advent of the 1968-69 school year, not a single white student was attending a black school under this plan. Only ninety-eight of the county's 2,510 black students were attending white schools. Furthermore, the faculties remained completely segregated. After the Supreme Court held in Green v. County School Bd., 391 U.S. 430, 438 (1968), that any plan is unacceptable if it "fails to provide meaningful assurance of prompt and effective disestablishment of a dual system," the petitioners in *Emporia* sought further relief. In June, 1969, three and one-half years after the original order, the district court ordered the county to implement a "pairing plan" submitted by the petitioners, effective at beginning of the 1969-70 school year. Finally, in 1972, the Supreme Court affirmed a district court injunction aimed at insuring effective desegregation of the school district. The Court held that the order was within the remedial powers of the lower court. Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). In this instance, the plan enjoined involved a new school district for the city alone, which had been carved out of the county school district. The Supreme Court held that a "new school district may not be created where its effect would be to impede the process of dismantling a dual system." 407 U.S. at 470.

[46] In the *Green* case itself, the Supreme Court looked toward the potential need for additional implementing orders by the district court: "Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed." 391 U.S. at 439.

*Kelley v. Altheimer*[47] the United States Court of Appeals for the Eighth Circuit further emphasized the continuing duty of the district courts to retain jurisdiction in school segregation cases. The court emphasized the need to insure that a constitutionally acceptable plan is adopted and that the plan is operated in a constitutionally permissible fashion so that the goal of a desegregated school system is rapidly and finally achieved.[48]

In *Louisiana v. United States*,[49] the Supreme Court also recognized the continuing remedial duty of the district courts in the context of voting rights:

> The need to eradicate past evil effects and to prevent the continuation or repetition in the future of the discriminatory practices shown to be so deeply engrained in the laws, policies, and traditions of the State of Louisiana, completely justified the District Court in entering the decree it did and in retaining jurisdiction of the entire case . . . and to enter such orders as justice from time to time might require.[50]

Several principles of fashioning appropriate relief in the vindication of federal constitutional rights can be distilled from these cases. First, the remedy must be effective: it must maximize the actual relief sought, such as actual desegregation. Second, the court must be flexible and consider the use of all available techniques. A choice of remedies must take into account the practicalities of relief. Nor can the existence of administrative inconvenience bar the use of a particular form of relief. Third, courts must supervise these cases until such time as full relief has been provided. Supplemental orders, encompassing additional or different approaches from the original order, may be necessary to accomplish this purpose.

These are the standards, then, against which remedies in exclusionary zoning cases are to be measured. When applied in the zoning context, a court should consider: (1) the number of actual low- and moderate-income housing opportunities created; (2) the use of all available techniques for achieving this end; and (3) continuing supervision by the court until complete relief is provided. The remainder of this article seeks to demonstrate the shortcomings of traditional remedies in exclusionary zoning cases in terms of these standards. Thereafter it proposes alternative forms of relief which could fulfill the courts' remedial responsibilities.

[47] 378 F.2d 483 (8th Cir. 1967).
[48] *Id.* at 489.
[49] 380 U.S. 145 (1965).
[50] *Id.* at 156.

## III. TRADITIONAL REMEDIES IN EXCLUSIONARY ZONING CASES

Traditional exclusionary zoning litigation has proved particularly inefficacious in providing increased housing opportunities for low- and moderate-income families. The first problem contributing to this inadequacy is illustrated in the three leading Pennsylvania exclusionary zoning cases which demonstrate the true difficulties in translating a courtroom victory into opportunities for those economic groups in need of housing. In these cases the plaintiff developers were not even seeking to produce low- and moderate-income housing; rather they were attempting to use their land more intensively in order to make a greater profit in developing housing for the relatively affluent.

In *National Land and Investment Co. v. Easttown Township Board of Adjustment*,[51] the plaintiff developer challenged an ordinance which required a four-acre minimum lot-size. The plaintiff applied for and was denied a building permit to construct a single-family home on a one-acre lot. The Pennsylvania Supreme Court invalidated the ordinance in question on due process grounds. In *Appeal of Girsh*,[52] the developer sought to build two nine-story luxury apartment houses on a tract of land zoned for single-family dwellings on lots of no less than 20,000 square feet. On the particular facts before it, the court held the municipality's total prohibition on apartments invalid. Finally, in *Appeal of Concord Township (Kit-Mar Builders, Inc.)*,[53] the relief requested and granted was the right to build single-family homes on one-acre lots, rather than the two- and three-acre lots which the township required. In each of these three cases, the relief requested and the remedy given were not designed to increase housing opportunities for the nonaffluent in these communities.

A second problem in converting a judicial victory into a housing reality is the ability of municipalities to prevent development of housing while literally complying with the court order. As one commentator has stated:

> As any experienced zoning lawyer will tell you, a victory at the appellate level may be of limited utility if a town wishes to frustrate a developer. There are so many points during the process where local officials can cause delay and hamper a

[51] 419 Pa. 504, 215 A.2d 597 (1965).
[52] 437 Pa. 237, 263 A.2d 395 (1970).
[53] 439 Pa. 466, 268 A.2d 765 (1970).

> builder that a developer armed with a stunning victory at the appellate level has only begun the fight.[54]

The Pennsylvania cases previously discussed illustrate the further roadblocks local communities can erect to resist the development of housing even after judicial decisions which are adverse to the communities:

> None of the landmark decisions of the Supreme Court of Pennsylvania . . . resulted in a victory for the builder in the sense that the builder was able, as a result of litigation, to construct the development he proposed to build. Joseph Girsh never built his apartments. After the decision of the Supreme Court, *In re Girsh* . . . the Township classified several properties other than that owned by Girsh for apartment development. The present owners of the Girsh property are still attempting to convince the Township and the courts that apartments should be permitted on the tract involved in the *Girsh* case. In fact, the Girsh property, possibly as a result of the persistence demonstrated by the would-be developers, has now been condemned as a public park . . . .
>
> Kit-Mar Builders . . . are still negotiating for subdivision approval. . . . Finally, even after the Supreme Court invalidated the four-acre zoning involved in *National Land and Investment Co. v. Easttown Township Board of Adjustment* . . . , Easttown Township then threatened to impose three-acre zoning. National Land finally abandoned its effort to build on one-acre lots, and the case was settled at two-acre minimum lots.[55]

In the subsidized housing context evasive tactics are even more readily available to communities acting in bad faith.[56] Judicial orders which are not specifically grounded in the realities of the local development process are likely to result in the community's preventing the development of unwanted housing.

Thus, the types of remedies traditionally provided by courts in exclusionary zoning cases have done little to alleviate the plight of low- and moderate-income families. They have not provided actual housing opportunities. The means used have been limited to prohibitive and injunctive ones, rather than flexible, affirmative approaches. Finally, the courts have generally failed to supervise

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[54] *Hearings before United States Commission on Civil Rights*, July 14-17, 1971, at 853 (testimony of Mr. Trubek, Hearing Exhibit No. 32) [hereinafter cited as Trubek].

[55] Brief for Appellants at 45-47, Commonwealth v. County of Bucks, 22 Bucks County L. Rep. 179 (Ct. C.P. 1972), *appeal docketed* Commonwealth Ct. Pa., 27 T.D. 1972.

[56] *See generally* Trubek, *supra* note 54.

the progress of a case after the initial order, thus inviting evasion by the locality.

## IV. PAST EXPERIENCE WITH AFFIRMATIVE APPROACHES

### *A. Zoning Cases*

Past experience has demonstrated that wholly negative remedies in exclusionary zoning cases do not provide complete relief. As a result, both federal and state courts have begun to order affirmative action rather than merely prohibiting further action. In *Kennedy Park Homes Association v. City of Lackawanna,*[57] the district court held that Lackawanna has an "obligation to consider and plan for all of the citizens in the community."[58] The court ordered defendants to take whatever affirmative steps were necessary to allow the proposed project to begin construction. Among other things, the court ordered the defendants to provide adequate sewage service and to issue the necessary building permits for the project.[59]

In *Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City,*[60] the municipality was ordered by the court to take *affirmative* steps to insure equal availability of housing in the future. Union City was ordered to develop an appropriate plan to provide for the construction of low- and moderate-income housing. The district court had required the town to take major action to remedy the plaintiffs' grievances within a ten-month period. It also suggested that advantage should be taken of available federal assistance:

> Such steps shall include, so far as necessary and reason-

[57] 318 F. Supp. 669 (W.D.N.Y. 1969), *aff'd,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

[58] 318 F. Supp. at 697.

[59] The remedy ordered by the court in *Lackawanna* contained *inter alia* the following instructions:

> 2. That . . . defendants shall immediately take whatever action is necessary to provide adequate sewage service to the K.P.H.A. subdivision.
>
> . . . .
>
> 5. That defendants affirmatively take whatever steps are necessary to allow the Kennedy Park Subdivision to begin construction.
>
> 6. That defendants be enjoined from issuing building permits for any construction in the second and third wards which will contribute additional sanitary sewage to the municipal system until Kennedy Park Subdivision has been granted permission to tap into the sewer system by the appropriate authority.

*Id.* at 697-98.

[60] 424 F.2d 291 (9th Cir. 1970).

> ably feasible under the law, not only encouragement and, if possible, implementation of programs dependent on the initiative of private residential developers and upon the cooperation of private landowners or occupants, e.g., Section 235 and 236 programs, the so-called Section 23 Alameda County low-cost leasing program and housing rehabilitation grant and loan program (including, if possible, implementation of the SASSO housing Section 236 program either as now proposed or as modified) but also public housing programs requiring the exercise of the fiscal and eminent domain powers of the City if such be necessary and reasonably feasible under the law to accomplish the object of this order in the event that private initiative and landowner cooperation (over which admittedly the City has no control) are insufficient to reasonably accommodate the housing needs of low income residents (e.g., public housing, public urban renewal programs and other similar public programs designed for that purpose).[61]

In *Southern Burlington County NAACP v. Township of Mount Laurel*,[62] a New Jersey court held a zoning ordinance unconstitutional because it acted to exclude completely multifamily developments and mobile homes. The court ordered broad, affirmative relief and ordered Mount Laurel Township to prepare a plan which included consideration of the housing needs of present and prospective low- and moderate-income persons. The township was further ordered to decide upon the estimated number of both low- and moderate-income units which should be constructed each year.[63] In addition to the preparation of a plan, the court ordered the township to develop "an affirmative program" to encourage the satisfaction of local housing needs. The plan was to utilize the most effective and thorough means by which municipal action could accomplish the desired goals.[64]

### *B. Low-Income Housing Cases*

The site-selection cases involving low-income housing provide another example of courts' requiring affirmative action to remedy the effects of past discrimination. In *Gautreaux v. Chicago Housing Authority*,[65] a detailed order was entered compelling the Chicago Housing Authority to prepare a plan for the construction of

[61] Southern Alameda Spanish Speaking Organization v. City of Union City, No. 51590 (N.D. Cal., July 31, 1970).

[62] 119 N.J. Super. 164, 290 A.2d 465 (1972).

[63] *Id.* at 178, 290 A.2d at 473.

[64] *Id.* at 179, 290 A.2d at 474.

[65] 304 F. Supp. 736 (N.D. Ill. 1969).

public housing units in predominantly white areas of the city. The plan was to include designation of specific sites. After several years of litigation subsequent to the initial order the trial judge entered a second order which required additional action by the housing authority. The housing authority was directed to file with the court a final list of the sites for the construction of public housing. In addition, the authority was ordered to prepare a list of all the vacant residentially-zoned parcels of land within the area in which the court had concluded that additional public housing should be constructed.[66]

In *Crow v. Brown*,[67] the federal district court issued an order requiring the issuance of building permits for two specific public housing projects. In addition, the court ordered that a site-selection committee be established for the purpose of selecting sites for additional low-income housing. Moreover, the activities of the site-selection committee were not restricted to the city of Atlanta. On appeal, the opinion and order of the district court were affirmed. Similar orders were entered by district courts in *Garrett v. City of Hamtramck*[68] and *Banks v. Perk*.[69] In these cases local authorities were ordered to plan affirmatively for non-segregated housing at scattered sites throughout the city.

### *C. Other Uses of the Affirmative Approach*

Cases dealing with the provision of municipal services offer yet another example of the courts' requiring affirmative action in order to remedy the effects of past discrimination. In *Hawkins v. Town of Shaw*,[70] a federal court of appeals declared that a municipality cannot discriminate in the provision of municipal services and required the town to submit a plan for the equitable distribution of these services. In a similar case, *Haduot v. City of Prattville*,[71] the court found discrimination in the provision of various facilities in municipal parks. The court ordered the city to equalize the equipment, facilities, and services provided in a park located in a black neighborhood with those provided in white neighborhoods.

Another category of cases involving the provision of effective, affirmative relief is that group of cases which deal with problems of school desegregation. Courts have long expounded the position

[66] Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827, 830-31 (N.D. Ill. 1972).
[67] 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).
[68] 335 F. Supp. 16 (E.D. Mich. 1971).
[69] 341 F. Supp. 1175 (N.D. Ohio 1972).
[70] 437 F.2d 1286 (5th Cir. 1971).
[71] 309 F. Supp. 967 (M.D. Ala. 1970).

that they have an affirmative obligation to ensure the success of desegregation decrees. It is not enough merely to strike down a school board's actions as unconstitutional. In *Bradley v. Milliken*,[72] the district court found that it was the duty of the court to order a program of affirmative action, metropolitan in scope, to be devised where the facts indicate that such drastic remedies are necessary to provide a complete remedy for state-approved racial segregation.

In zoning and related cases, courts are increasingly willing to use affirmative remedies to fulfill their duty to provide effective remedies for the prior violation of constitutional rights. On occasion, the courts have recognized a need for fashioning remedies which extend beyond the confines of the locality in issue. In other cases innovative, far-reaching techniques have been used to achieve constitutional objectives. Often the courts retain jurisdiction to supervise implementation of relief. The refinement and extension of these approaches in exclusionary zoning cases remain to be seen.

## V. Application of the Affirmative Relief Approach to Exclusionary Zoning Cases

### *A. Single-Site Relief*

The simplest case in which affirmative relief might appropriately be used is the single-site rezoning situation. Typically a developer owns a specific piece of land on which he desires to build low- and moderate-income housing. After applying for a necessary rezoning, his application is rejected. In the past, successful litigation has brought the developer only limited relief, requiring at most that the municipality rezone the parcel.[73] This injunctive approach has proven to be ineffective because it has failed to recognize the realities of the local administrative process.

A rapid determination of whether the developer will be able to proceed with his activities, a determination essential to the success of almost any real estate development, is impossible, if the relief accorded the developer is limited to rezoning. This is the case because

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[72] Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1972), *aff'd*, —F.2d— (6th Cir. 1972), *rehearing en banc granted*, —F.2d— (1973). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Davis v. Board of School Comm'rs, 402 U.S. 33 (1971); Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969); Jenkins v. Township of Morris School Dist., 58 N.J. 483, 279 A.2d 619 (1971).

[73] *See* notes 54–56 and accompanying text *supra*.

> [t]he number of review agencies that a developer has to go through increases the likelihood of administrative delays. At a minimum he is likely to face the planning board, the commission, and the board of zoning appeals or adjustment—plus the zoning enforcement officer, the building inspector, and the health department. He is probably at the mercy of the fire department, water and sewer authorities or a public works department, the engineering department, the school board, the traffic department or state highway department, the park and recreational department or park authority, the redevelopment and housing authority, and so on. He may also be subject to review by a design or architectural review committee, a conservation department, . . . [or a] site plan review committee. In other words, if . . . [a local] administration should find delay an enticing form of exclusion, it would be difficult to avoid.[74]

Thus, even if the developer is victorious in his challenge to the existing zoning regulations, he must overcome further hurdles before he receives effective relief—the opportunity to engage in the actual building of housing for low- and moderate-income families.

As was the case with the school desegregation cases, in which the courts sought new remedies when those first attempted proved ineffective, so should the courts seek to design innovative approaches when faced with local evasive tactics in the zoning context. These tactics may include: (1) misuse of the administrative approval framework; (2) refusal to provide the local approvals necessary for the use of federal subsidy programs; and (3) general delay, which may result in the loss of an option or the land's being turned over to a developer who is not interested in developing low- and moderate-income housing.

In response to dilatory administrative tactics, the court could use a remedy provided in the Massachusetts anti-snob zoning statute.[75] In Massachusetts, the legislative response to the problem of remedies in zoning cases has been a one-step, comprehensive permit approach. Certain sponsors of subsidized housing are permitted to forgo seeking multiple local approvals. Rather, one local board of appeals initially reviews and approves all permits in a single hearing process. If the local board denies the omnibus permits, the sponsor can appeal to a state board. The state board can order the issuance of a comprehensive permit if it

[74] M. BROOKS, LOWER INCOME HOUSING: THE PLANNER'S RESPONSE (Am. Soc'y of Planning Officials 1972).

[75] MASS. ANN. LAWS ch. 40B, §§ 20–23 (Supp. 1971).

finds that the original decision was inconsistent with local needs. Furthermore, this system prevents the locality from using nonzoning regulatory powers to exclude a project after the state board has reversed the local decision denying the developer's application.[76]

The comprehensive permit approach employed in the Massachusetts statute is also possible in the judicial setting as a response to administrative delay. As a corollary to the duty to provide effective relief where a federal constitutional wrong has been demonstrated, a district court has the power to set aside state or local laws which impede complete relief, even when those laws do not violate any provision of the constitution.[77] Thus, where necessary to remedy the effects of past discrimination, local officials may be ordered to ignore state law, and actions taken or proposed to be taken under otherwise valid state laws may be enjoined.[78]

This principle, which requires interference with collateral laws which are otherwise valid, has been most readily employed in cases of racial discrimination. Thus, in *Louisiana v. United States*,[79] the Supreme Court, while declining to pass on the validity of a statutorily authorized voter-qualification test, affirmed a district court order enjoining use of the test in twenty-one Louisiana parishes until past discrimination in those parishes had been remedied. Similarly, in *Haney v. County Board of Education*,[80] the required remedy for school segregation necessitated annexation of a school district and establishment of a new school board for the resulting enlarged district, even though this order involved ignoring and perhaps violating other state law. The court stated that the remedial equitable powers of a federal court under the fourteenth amendment are not limited by state law.[81]

This method of relief has come to the foreground most dramatically in the recent cases involving transportation of students

[76] *Id.* § 23.

[77] Some cases speak loosely of the invalidity of the state law which is thus collaterally enjoined. In United States v. Greenwood Municipal Separate School Dist., 406 F.2d 1086, at 1094 (5th Cir. 1969), the court stated that "a state law is invalidated to the extent that it frustrates the implementation of a constitutional mandate." The better view seems to be that "[t]he question of the law's validity never arises . . . , its disregard is directed as a matter of remedy alone, in order to undo the effects of proved unconstitutionally discriminatory acts." *See also* Bradley v. School Bd., 324 F. Supp. 396, 400 (E.D. Va. 1971), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3391 (U.S. Jan. 8, 1973) (Nos. 72-549, 72-550); Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, 424 F.2d 291, 296 (9th Cir. 1970).

[78] United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970); Burleson v. County Bd. of Election Comm'rs, 308 F. Supp. 352 (E.D. Ark. 1970).

[79] 380 U.S. 145 (1965).

[80] 429 F.2d 364 (8th Cir. 1970).

[81] *Id.* at 368.

across school district boundaries to achieve racial balance. In *Bradley v. School Board*,[82] the defendants contended the relief sought would have the effect of enjoining them from enforcing or complying with state law. The district court stated:

> Assuming arguendo that this Court, in granting relief requested, required certain of the defendants to fail to comply with a requirement of state law, such an order would not necessarily imply a holding that the statute violated was unconstitutional.
>
> . . . .
>
> . . . The question of the law's validity never arises; its disregard is directed as a matter of remedy alone, in order to undo the effects of proved constitutionally discriminatory acts.[83]

In a situation closely analogous to rezoning, a federal district court in *Gautreaux v. Chicago Housing Authority*[84] ordered the housing authority to proceed to plan and develop low-rent public housing on selected sites, even though the city council had not approved the sites as required by state law. The state law was set aside for purposes of the particular housing sites in question. The setting aside was necessary to provide housing on a desegregated basis in order to remedy past discrimination. The validity of the state law was not in issue, nor were the reasons for inaction by the city council. Indeed, the city council might have had reasons for not approving the sites which would otherwise have been perfectly valid. In order to be applicable, then, the set-aside principle requires only that the operation of a state or local law be frustrating constitutionally required relief. In the exclusionary zoning context, the local approval process might be set aside without challenging its validity when it frustrates the necessary relief, construction of low- and moderate-income housing.

In all of these cases legislative judgments on complex matters were overridden when it was determined by a court that adherence to those judgments would frustrate the constitutional mandate to remedy discrimination. Thus, discretionary as well as ministerial actions can be limited by the set-aside power. In the zoning context, the set-aside process would allow the developer to

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[82] 324 F. Supp. 396 (E.D. Va. 1971), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3391 (U.S. Jan. 8, 1973) (Nos. 72-549, 72-550).

[83] 324 F. Supp. at 400-01. *See also* Kelley v. Metropolitan County Bd. of Educ., 463 F.2d 732 (6th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3254 (U.S. Nov. 6, 1972); Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509 (N.D. Miss. 1968); Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1972), *aff'd*, —F.2d— (6th Cir. 1972), *rehearing en banc granted*, —F.2d— (1973).

[84] 342 F. Supp. 827 (N.D. Ill. 1972).

bypass otherwise valid local regulations such as building code requirements or subdivision approvals because the court has the power to set aside these requirements to initiate construction. To obtain a local set-aside order, the developer would be required to show that he made a good faith effort to obtain necessary local approvals, that the city denied approval, and that the denial is now frustrating complete relief.

In a recent complaint involving a denial of a rezoning for subsidized housing, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[85] the plaintiffs requested relief which would

> enjoin all defendants from enforcing any zoning ordinance or other restriction as to the subject property which would prohibit the proposed development and from refusing to take any affirmative steps necessary for plaintiff MHDC to begin and complete construction.[86]

The plaintiffs recognized the potential for the imposition of other obstacles even if the rezoning were granted. They therefore requested that the court grant relief which would be effective and that the court retain jurisdiction until construction was completed. A similar affirmative requirement might be placed on the community to provide any local approvals necessary for the use of federal subsidy programs.[87]

To insure that a site is actually used for low- and moderate-income housing, even if ownership changes, the court could make the rezoning conditional upon the owner's developing only low- and moderate-income housing. This solution resembles contract zoning. Exactly what is meant by contract zoning is unclear, although the term refers generally to the zoning authority's consenting to zoning changes contingent upon the landowner's agreeing to specific conditions upon the use of the land.[88] Some courts maintain that these arrangements are prima facie evidence of spot zoning,[89] while others uphold this approach on the theory that the court or zoning board, in exercising its discretion to grant a rezoning based on the peculiar hardship to the applicant, may limit or condition the rezoning in such a way as to maximize the benefits to the community as well as to the landowner.[90] In the

[85] Civil No. 72C-1453 (N.D. Ill., filed June 12, 1972).

[86] *Id.*, plaintiff's complaint at 23.

[87] *See* part V *B 6 infra*.

[88] *See generally* Strine, *The Use of Conditions in Land Use Control*, 67 DICK. L. REV. 109 (1963); Trager, *Contract Zoning*, 23 MD. L. REV. 121 (1963).

[89] *See, e.g.*, Bayliss v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); 3 C. RATHKOPF, THE LAW OF ZONING AND PLANNING 74-1 *et seq.* (3d ed. 1972).

[90] Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

exclusionary zoning situation the argument for upholding the imposition of conditions seems particularly persuasive. The landowner or other interested party is asking for a rezoning (to change otherwise valid zoning) to fulfill a need for low- and moderate-income housing.

### *B. The Regional Impact Approach*

Beyond affirmative relief related to a specific site, it is increasingly apparent that relief in the form of housing for low- and moderate-income families must be provided on a regional basis.[91] The courts have recognized the regional nature of local zoning actions, particularly those related to housing. The land-use decisions of any one community have a significant impact on surrounding municipalities, as well as on the region as a whole. Consequently, rational planning of low- and moderate-income housing can only take place on a multiple community scale. It is only in the regional context that the remedial obligations of a single municipality can be established.

*1. Case Law Development of the Regional Approach*—The first United States Supreme Court decision upholding the constitutionality of zoning foreshadowed almost fifty years ago the recent trend toward recognition of the regional impact of zoning decisions. In *Village of Euclid v. Ambler Realty Co.*,[92] the Court pointed to the position of suburban Euclid in the Cleveland metropolitan area and raised the "possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[93] Recent zoning decisions, particularly in the state courts of New Jersey and Pennsylvania, support this broad geographic definition of the term general welfare. Increasingly, the judicial inquiry relates the consistency of a local zoning practice or action not only with the needs of the individual community, but with the welfare of the larger region or metropolitan area.

More elaborate principles of the regional nature of zoning were articulated as early as 1949. In *Duffcon Concrete Products v. Borough of Cresskill*,[94] the Supreme Court of New Jersey clearly

[91] Officials at all levels of government, as well as leaders of concerned private groups, are on record in support of the need for metropolitan or regional solutions to the low- and moderate-income housing problem. Other urban experts who have studied this question have also reached the same conclusion. *See, e.g.*, statement by President Richard Nixon on federal policies relative to equal housing, N.Y. Times, June 12, 1972, at 1, col. 8.

[92] 272 U.S. 365 (1926).

[93] *Id.* at 390.

[94] 1 N.J. 509, 64 A.2d 347 (1949).

indicated that local zoning decisions must take into account regional effects:

> What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on *the nature of the entire region* in which the minicipality is located and the use to which the land in that region has been or may be put most advantageously. The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning.[95]

Two decades later, a New Jersey court reiterated the principle that the general welfare crosses municipal boundaries, particularly with regard to housing. In invalidating a zoning amendment which had the effect of permitting only luxury apartments, the court in *Molino v. Mayor and Council of Borough of Glassboro*[96] stated:

> No municipality can isolate itself from the difficulties which are prevalent in all segments of society. When the general public interest is paramount to the limited interest of the municipality then the municipality cannot create road blocks.[97]

Having identified the region as a geographic base for certain zoning decisions and having designated housing as one of the matters of regional concern, these courts have begun to indicate that local communities have a legal responsibility to accept their proportionate share of low- and middle-income housing.

Applying this principle, the court in *Oakwood at Madison, Inc. v. Township of Madison*[98] held an entire zoning ordinance unconstitutional because it included illegal minimum lot-size provisions. The New Jersey Superior Court found that housing was a land use with a regional impact, thus obligating each community to accept a proportionate share of the regional need:

> Regional needs are a proper consideration in local zoning. . . .
>
> In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, *its fair proportion of the obligation to meet the housing needs of*

[95] *Id.* at 513, 64 A.2d at 349-50 (emphasis added).
[96] 116 N.J. Super. 195, 281 A.2d 401 (1971).
[97] *Id.* at 204, 281 A.2d at 406.
[98] 117 N.J. Super. 11, 283 A.2d 353 (1971).

> *its own population and of the region.* Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and undeveloped land should not be zoned as Madison Township has, to such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside.[99]

The Pennsylvania Supreme Court has also declared invalid several zoning ordinances which possessed an exclusionary impact. The one factor that has emerged as decisive in all three cases is the regional impact of zoning ordinances which operate to preclude certain persons from living within the communities zoned in an exclusionary manner. The recognition given to these interests—unrepresented in the traditional sense—in all three cases shows that the Pennsylvania court regards housing as a matter of regional concern which must be accommodated by all the communities of a metropolitan region.

In *National Land and Investment Co. v. Easttown Township Board of Adjustment,*[100] the issue before the Pennsylvania Supreme Court was the validity of a zoning ordinance establishing a minimum lot-size of four acres. The court concluded that the ordinance had been adopted primarily for exclusionary purposes rather than for the prevention of sewage disposal problems as the township had contended. The court further held that it was an unreasonable exercise of the police power to prevent population growth in the community as a means of retaining its character:

> [Zoning] must not and can not be used by . . . officials to shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. . . . Zoning provisions may not be used, however to avoid the increased responsibilities and economic burdens which time and national growth invariably bring.[101]

Five years after *National Land,* in *Appeal of Girsh,*[102] the Pennsylvania Supreme Court invalidated a zoning ordinance because it failed to provide for apartments in the zoning plan of the town concerned. The *Girsh* court took little note of the township's purported rationale: that apartments had in fact been allowed in the township by means of variances and that the lack

[99] *Id.* at 20, 283 A.2d 358 (emphasis added).
[100] 419 Pa. 504, 215 A.2d 597 (1965).
[101] *Id.* at 527-28, 215 A.2d at 610.
[102] 437 Pa. 237, 263 A.2d 395 (1970).

of such uses in the zoning plan did not amount to an express prohibition of apartments. The town also argued that apartment uses would cause a significant strain on available municipal services and roads. In rejecting these arguments the court focused on the causes and effects of exclusionary zoning, taking note of the suburban antipathy toward apartments and pointing out statistics which support the need for more apartments in the suburbs. The opinion emphasized the fact that the challenged zoning ordinance significantly reduced the opportunities for those outside the community to move into it in search of housing:

> Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find "a comfortable place to live" are for someone else to worry about. That decision is unacceptable. . . . [T]he suburbs, which at one time were merely "bedrooms" for those who worked in the urban core, are now becoming active business areas in their own right. It follows then that formerly "outlying", somewhat rural communities, are now becoming logical areas for development and population growth—in a sense, suburbs to the suburbs.[103]

The court further pointed out the danger implicit in such exclusionary tactics:

> Municipal services must be provided *somewhere,* and if 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.*[104]

The same judicial attitude was displayed in *Appeal of Concord Township (Kit-Mar Builders, Inc.),*[105] the third of the Pennsylvania cases. In this case, the court, on facts very similar to those in *National Land,* invalidated a minimum lot-size ordinance. Although the court acknowledged that the form of litigation seemed to involve the due process rights of the landowner whose property had suffered the adverse zoning, the fundamental issue concerned the rights of nonresidents who sought housing in the area:

> [C]ommunities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given Township to say

[103] *Id.* at 244, 263 A.2d at 398.
[104] *Id.* at 244-45, 263 A.2d at 398-99 (emphasis added).
[105] 439 Pa. 466, 268 A.2d 765 (1970).

> who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.
>
> . . . .
>
> . . . [*This*] *power currently resides in the hands of each local governing unit, and we will not tolerate their abusing that power in attempting to zone out growth at the expense of neighboring communities.*[106]

In viewing housing and zoning as matters of regional concern, the New Jersey and Pennsylvania courts have recognized the realities of population growth and mobility. This point of view has resulted in the courts' adopting an expanded concept of the general welfare embracing the fact that the suburbs must share the burden of population growth, that interests other than those of local inhabitants must be considered by local authorities of suburban communities, and that outsiders have an important interest in the housing available in suburban areas.[107]

*2. Possible Definitions of the Region*—Defining the "region" is conceptually the first step in designing a regional remedy. A number of publicly defined regions exist which are arguably relevant in fashioning a regional remedy. Plaintiff will, of course, initially suggest a relevant region. Ultimately resolution of this issue will be for the court.

*a. The County*—In *Commonwealth v. County of Bucks*,[108] the plaintiffs urged the county as the relevant region. Bucks County is adjacent to Philadelphia and contains fifty-four municipalities, each of which is a defendant in the suit. The plaintiffs suggested

[106] *Id.* at 474-75, 476, 268 A.2d at 768-69 (emphasis added).

[107] *See also* Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954); Gartland v. Maywood, 45 N.J. Super. 1, 131 A.2d 529 (1957). For extensive discussions of regional considerations in zoning, *see* Comment, *The Pennsylvania Supreme Court and Exclusionary Suburban Zoning: From* Bilbar *to* Girsh—*A Decade of Change*, 16 VILL. L. REV. 507 (1971); Davidoff & Davidoff, *Opening the Suburbs: Towards Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Bowe, *Regional Planning versus Decentralized Land Use Controls—Zoning For the Megalopolis*, 18 DEPAUL L. REV. 144 (1968); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970); Note, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966); Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029 (1972); Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?*, 3 CONN. L. REV. 244 (1971).

[108] 22 Bucks Co. L. Rep. 179 (Ct. C.P. 1972), *appeal docketed* Commonwealth Ct. Pa., 27 T.D. 1972.

the county as the appropriate unit in considering regional influences because:

> [T]he legislature has designated the county as the appropriate planning unit by granting county planning commissions the authority to adopt comprehensive plans for counties. . . . The municipalities are required to give such county comprehensive plan consideration in their own planning and zoning. . . . Moreover, the Bucks County Planning Commission is presently preparing such a comprehensive plan, aided by a grant of federal funds. . . . Therefore, the Bucks County Planning Commission is required to include the consideration of housing for low-income and moderate-income persons in its comprehensive plan.[109]

*b. The Multicounty Area*—In some situations the appropriate region for providing low- and moderate-income housing remedies would include two or more counties. In the related area of school desegregation, a federal district court has defined a multicounty region for purposes of relief. The court, in *Bradley v. Milliken*,[110] determined that desegregation could not be achieved within the boundaries of the City of Detroit and ordered the development of a metropolitan desegregation plan based on a three-county area.

*c. The Standard Metropolitan Statistical Area*—The Federal Office of Management and Budget recognizes approximately 250 Standard Metropolitan Statistical Areas (SMSA) in the 1970 census.[111] Generally, an SMSA is a county or a group of contiguous counties which contains at least one city of 50,000 people. In addition to the county or counties containing such a city or cities, contiguous counties are included in an SMSA if, according to certain criteria, they are socially and economically integrated with the central city.

*d. The Urbanized Area*—The term urbanized area is a creation of the United States Bureau of the Census. The major objective of the Census Bureau in delineating urbanized areas is to provide better separation of urban and rural housing within SMSAs. As defined by the Census Bureau, an urbanized area consists of a central city or cities of 50,000 or more inhabitants and surrounding closely settled territory.[112]

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[109] Brief for Appellants at 48–49, Commonwealth v. County of Bucks, 22 Bucks Co. L. Rep. 179 (Ct. C.P. 1972), *appeal docketed* Commonwealth Ct. Pa., 27 T.D. 1972.

[110] 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, —F.2d— (6th Cir. 1972), *rehearing en banc granted*, —F.2d— (1973).

[111] U.S. DEPARTMENT OF COMMERCE, 1970 CENSUS TRACTS, CHICAGO, ILLINOIS SMSA, pt. 2 at App. 2.

[112] U.S. DEPARTMENT OF COMMERCE, 1970 CENSUS OF HOUSING, GENERAL HOUSING CHARACTERISTICS, ILLINOIS HC(1)-A15, Appendix A, p.2.

The urbanized area has been urged as the relevant region in recent litigation. In seeking the provision of desegregated low-income housing on a regional basis, the plaintiffs in *Gautreaux v. Chicago Housing Authority* proposed that the "region" be defined as the Chicago "urbanized area."[113] The case had originally involved segregation in public housing within the City of Chicago. Relief was sought outside the city, in addition to that already granted within the city, when the plaintiffs concluded that a regional approach was necessary to provide long-term desegregated housing opportunities. The Chicago urbanized area was urged in *Gautreaux* as the appropriate area for relief since it excludes rural areas, which are not suited to receive subsidized housing for low-income Chicago residents. The lack of proximity of jobs and public transportation also excluded these rural areas from consideration. Furthermore, the urbanized area is large enough to insure that there would be enough vacant land to build the necessary units for the plaintiffs, while avoiding the problem of undue concentration of low-income families.

*e. The Housing Market Area*—HUD defines "housing market areas" throughout the country, for which it undertakes market analyses every two years.[114] These are areas which presumably represent coherent markets in which there is a certain amount of mobility and identity of available housing.

These five concepts do not exhaust the possibilities for defining the region. For example, an area which includes parts of two or more states might constitute a region. The region around Washington, D.C., would undoubtedly include substantial portions of Maryland and Virginia. The definitional problem is made simpler, however, by the fact that many of the possible definitions will coincide. Generally, the Housing Market Area is identical to the SMSA, which is identical to a county or multi-county area.

*3. Factors To Be Considered in Defining the Region*—If alternative definitions are available in a particular case, the determination of the appropriate region should be based on several factors. First, if a designated planning commission already exists, on either a county or regional basis, the geographical jurisdiction of that agency should be considered.[115] Those boundary lines repre-

[113] 304 F. Supp. 736 (N.D. Ill. 1969). The term, in this instance, refers to the central city, Chicago, and the closely surrounding settled areas, which include most of Cook and DuPage counties, a strip along Lake Michigan in Lake County, and a small portion of Will County. The urbanized area extends into Indiana, but the region was limited to the Illinois portion.

[114] Interview with Preston Caplan, Area Economist, Chicago Area Office, U.S. Department of Housing and Urban Development, in Chicago, Ill., Jan. 19, 1973.

[115] A possible complication here is that both county and regional planning agencies may have been designated for the same area.

sent a legislative identification of a coherent, interrelated area for planning purposes. In addition to the deference due that assessment, use of the planning agency's jurisdiction insures the availability of an expert body capable of carrying out the planning necessary to effectuate a remedial decree.[116]

A second related factor is that the region should be the area within which development and movement are currently taking place and in which they will continue in the foreseeable future. These areas are places where middle-income families have already exercised their option to move, places which have been identified as appropriate for regional growth and mobility.[117] From the plaintiff's perspective, the area should be perceived as a region by low- and moderate-income people, and it should be relatively homogeneous in character. The area should include locations which would be desirable to low- and moderate-income groups if housing opportunities were available. It should not include areas which are presently rural or agricultural and likely to remain so indefinitely, or which possess few job opportunities, or are otherwise unattractive to groups which may presently be excluded from the suburbs. For example, the SMSA may be inappropriately expansive in some metropolitan areas. The Chicago SMSA includes two counties which are predominantly rural in character. Including those counties in a remedial plan might merely further complicate the effectuation of relief and perhaps result in unnecessary community opposition in the rural areas, without concomitantly providing additional housing opportunities.

Third, the region should be defined so as to simplify implementation of a plan of relief by the court. Although the differences may be marginal, a larger region may require additional judicial time in supervision, through hearings and supplemental orders.[118]

In sum, the appropriate region is likely to be either a county or multicounty area, perhaps coextensive with the SMSA or the Housing Market Area. The choice will depend on the growth and mobility patterns in the particular area, as well as the geographical authority of the appropriate planning agency. Finally, the urbanized area may provide a useful definition in those unusual situations in which significant portions of the SMSA are unlikely to experience urbanization in the indefinite future, and, as a result, there is little potential for movement to these parts of the SMSA.

*4. Quantifying Regional Housing Needs*—Once a court has defined the relevant region, it must still quantify the remedial

[116] *See* note 120 and accompanying text *infra*.

[117] *See* text accompanying note 1 *supra* and notes 108–15 *supra*.

[118] *See* text accompanying note 134 *infra*.

obligations of the individual municipalities within the region. The court must identify the number of low- and moderate-income housing units each municipality will be required to accept. It will be necessary to assess the need for low- and moderate-income housing in the region as a whole. The overall requirements will then be distributed among the municipalities. Regional needs might be defined as the number of new housing units that would be necessary to provide each low- and moderate-income family in the region with a decent, standard housing unit within the financial means of the family.[119]

This determination of housing needs is beyond the expertise of the court and probably that of the parties as well. Thus, a court must turn to an expert third party to perform this task. In most instances a county, metropolitan, or regional planning agency which has jurisdiction over the area which the court has defined as the region will be in operation. Most of these agencies receive federal funds from HUD under the Comprehensive Planning Assistance program to engage in comprehensive planning as well as in specialized functional planning on an areawide basis.[120] In 1968, Congress required the planning undertaken under this program to include an assessment of housing needs. Section 601 of the Housing and Urban Development Act of 1968 provided in part that:

[119] A study of the planner's role in housing clarifies the definition of needs:

> It is also important to assess the need for lower income housing with some specific and special considerations in mind. This can be illustrated by considering three major factors: 1) the housing demand, 2) the housing need, and 3) the housing supply. The terms are often used differently, or misused altogether. It is important to note that in a housing survey for lower income families, there are more considerations than those for families that can compete in the housing market. That is, there is a noneffective demand, the "social" need. To ignore this component is to ignore a large problem of housing lower income families.
>
> This noneffective demand assumes that in assessing housing demand lower income families have essentially a need for housing but do not necessarily compete in market demand terms. This "social" need can be described in a variety of ways and is characterized by a variety of phenomena. It is made up primarily of families who are paying a disproportionate amount of their income for housing (e.g., more than 20 percent), over and above those families living in substandard or overcrowded housing units. Three groups—the elderly, large families, and the lowest income families—have been repeatedly identified as in greatest need of housing. Essentially it is a category of lower income families who, for a variety of reasons, need housing but may not create an economic market demand for it.

M. BROOKS, *supra* note 74, at 14. *See also* AMERICAN INSTITUTE OF PLANNERS & U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REGIONAL HOUSING PLANNING, A TECHNICAL GUIDE (1972).

[120] 40 U.S.C. § 461 (1970). This is usually referred to as the Section 701 program, after the section of the statute creating it. Housing and Urban Development Act of 1968, § 601, Pub. L. No. 90-448, 82 Stat. 526, *amending* Housing Act of 1954, ch. 649, § 701, 68 Stat. 640.

> Planning carried out with assistance under this section shall also include a housing element as part of the preparation of comprehensive land use plans, and this consideration of the housing needs and land use requirements for housing in each comprehensive plan shall take into account all available evidence of the assumptions and statistical bases upon which the projections of zoning, community facilities, and population growth is based, so that the housing needs of both the region and the local communities studied in the planning will be adequately covered in terms of existing and prospective in-migrant population growth.[121]

In administering this housing element requirement, HUD has included a requirement that the agency analyze the housing needs within its jurisdiction:

> The housing work program shall analyze the existing housing market in terms of supply and demand by user group. The work program shall further identify:
> (1) Needs met by private market;
> (2) Needs met with public assistance; and
> (3) Needs not being met.[122]

The planning agency is a peculiarly appropriate institution to which a court could turn for an analysis of housing needs, in light of the preexisting requirements imposed on the planning agency by the federal government.[123] In some cases housing needs will have been measured recently, and the court can merely adopt the findings of the planning agency. If there is no available planning agency, or if it is otherwise appropriate, the court might require the defendants to retain an expert acceptable to the plaintiffs, presumably a planning consultant, to develop an analysis of the regional need for low- and moderate-income housing.[124] The court may wish to provide some guidelines to the planners to insure that the analysis is consistent with the rights of the plaintiffs.

In contrast to housing needs, the relevant income group—low- and moderate-income families—could most easily be defined by the court in terms of those who are eligible for existing federal

[121] 40 U.S.C. § 461(a) (1970).

[122] U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, COMPREHENSIVE PLANNING ASSISTANCE REQUIREMENTS AND GUIDELINES FOR A GRANT, HUD HANDBOOK 1, CPM 6041.1A, ch. 4, § 5 (Mar., 1972).

[123] The plaintiffs would presumably have included the planning agency among the named defendants. The court could then order the agency to carry out any planning necessary to develop the remedial framework.

[124] In Shannon v. United States Dep't of Housing & Urban Dev. 436 F.2d 809 (3rd Cir. 1970), and Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971), the courts issued supplemental orders requiring an expert acceptable to the plaintiffs to be hired by the defendant to assist in the development of a remedial plan.

subsidized housing programs. Those definitions would thus vary from one region to another.[125] A further issue for consideration by the court is the time frame to be utilized. The court might require that needs be projected for an appropriate future date or that current housing needs be identified.[126] After considering these factors the designated planner would submit to the court, within a designated period, an analysis and conclusion of the number of new housing units for low- and moderate-income families needed in the region.

*5. The Municipal Responsibility: A Proportionate Share of the Region's Need*—Simultaneously with an analysis of the regional low- and moderate-income housing needs, court-designated planners should be ordered to develop a plan for distributing or allocating the needed housing among the municipalities in the region. Although the first regional housing allocation plan was developed only as recently as 1970, this concept has become widely accepted by the planning profession as well as by the federal government.[127] Thus, a body of expertise has already been

[125] *See* note 2 *supra*.

[126] The purpose in projecting needs is to provide a realistic basis for planning programs to meet the identified need. The implementation of programs may require a substantial period of time after the analysis of needs is completed. To identify the appropriate period for projection, the court may consider that the planning agency is undertaking a general plan and other functional planning (*e.g.*, water, sewer, and parks) and identify the time period which permits maximum integration and coordination of various phases of the planning for the metropolitan area or the region. On the other hand, the court might choose to require that the needs analysis include a calculation of current housing needs. This approach avoids the uncertainty implicit in making future projections.

Under either approach, the need for housing may be determined by calculating the number of low- and moderate-income persons and families who are in need of housing and the units meeting housing code standards which are available to this group. The difference between these figures is the remaining need, the number of additional standard units needed, in the appropriate price range, to house the group adequately.

[127] A number of regional and county planning agencies have developed allocation plans in the last three years. *See* MIAMI VALLEY REGIONAL PLANNING COMMISSION, A HOUSING PLAN FOR THE MIAMI VALLEY REGION (July, 1970); METROPOLITAN COUNCIL OF THE TWIN CITIES AREA, INTERIM HOUSING ALLOCATION PROPOSAL (Staff Report Release, Dec. 15, 1971); METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, FAIR SHARE HOUSING FORMULA (Jan., 1972); SAN BERNARDINO COUNTY PLANNING DEPARTMENT, GOVERNMENT SUBSIDIZED HOUSING DISTRIBUTION MODEL FOR VALLEY PORTION SAN BERNARDINO COUNTY, CALIFORNIA, (Jan. 20, 1972); SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION, A SHORT-RANGE ACTION HOUSING PROGRAM FOR SOUTHEASTERN WISCONSIN—1972 AND 1973 (July, 1972); SACRAMENTO, CALIFORNIA, REGIONAL AREA PLANNING COMMISSION, AN APPROACH TO THE DISTRIBUTION OF LOW AND MODERATE-INCOME HOUSING, A TECHNICAL REPORT (Aug., 1972); DADE COUNTY, FLORIDA, PLANNING DEPARTMENT, HOUSING IN THE METROPOLITAN PLAN (n.d.).

Other agencies which are in the process of developing some form of regional allocation plan include the Delaware Valley Regional Planning Commission in the Philadelphia area; the East-West Gateway Coordinating Council in St. Louis, Missouri; the Mid-America Regional Council in Kansas City, Missouri; the Regional Planning Council in Baltimore, Maryland; the Southeast Michigan Council of Governments in Detroit, Michigan; the Puget Sound Governmental Conference in Seattle, Washington; and the Metropolitan Area Planning Council in Boston, Massachusetts.

In addition, the national organizations of professional planners have indicated strong

built up, enabling a planning agency to develop a plan for purposes of court-ordered implementation. In addition planning agencies will be in a position to fashion a plan because those planning agencies which receive HUD funds are presently required to implement activities in this area. This assistance-related mandate required affected planning agencies to "define strategies and specific steps by which housing needs, and its [sic] related public services and facilities, can be met through responsive governmental programs and private action."[128]

As with an analysis of housing needs, the court would need to provide a framework to guide the planners, such as a definition of the region which the distribution plan was to cover and a designation of the municipalities constituting subareas to which allocations of housing units will be made. In addition, the court might identify the criteria to be used in allocating the needed housing.[129]

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support for low- and moderate-income housing allocation plans. *See Hearings on H.R. 9688 Before the Subcommittee on Housing of the Committee on Banking and Currency*, 92d Cong., 1st Sess., pt. 2, at 674 (1971). (remarks of Mr. Davidoff); M. BROOKS, *supra* note 74, at 3; letter from Howard A. Glickstein, Staff Director, U.S. Civil Rights Commission, to Secretary of HUD George Romney, July 26, 1971.

Finally, HUD has encouraged, rewarded, indeed insisted upon, the development of so-called "fair share" plans for allocating low- and moderate-income housing throughout metropolitan areas. *See* Secretary of HUD George Romney, October 27, 1971, quoted in METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, FAIR SHARE HOUSING FORMULA ii (Jan., 1972); Remarks prepared for delivery by Deputy Secretary Richard C. Van Dusen, issued by HUD NEWS for release on Feb. 29, 1972, at 16-17.

In one instance HUD insisted upon the presentation of a fair share plan as a condition of making planning funds available. On March 31, 1971, HUD withdrew its support of a housing study being conducted by the Southeastern Wisconsin Regional Planning Commission (SEWRPC) for Milwaukee and six surrounding counties. HUD said its primary concern with the SEWRPC housing program was its lack of a "short term action plan or strategy," and offered "an example of what might be done to meet that need." The example was a fair share plan for the seven-county region. Letter from Edward M. Levin, Jr., Acting Assistant Regional Adminstrator for Metropolitan Planning and Development, Chicago Regional Office of HUD, to George C. Berteau, Chairman, Southeastern Wisconsin Regional Planning Commission, Mar. 31, 1971.

The first allocation plan in the country, and the farthest along in implementation, is the "Dayton Plan." For a detailed discussion of the development and implementation of the Dayton Plan, *see* Bertsch & Shafor, *A Regional Housing Plan: The Miami Valley Regional Planning Commission Experience*, PLANNERS NOTEBOOK, April, 1971, at 1-8; Craig, *The Dayton Area's "Fair Share" Housing Plan Enters the Implementation Phase*, CITY, Jan.-Feb., 1972, at 50-56; National Committee Against Discrimination in Housing, *Fair Share Idea Begins to Spread*, TRENDS IN HOUSING, July-Aug., 1972.

[128] *See* note 122 *supra*.

[129] One study has suggested that the criteria can be categorized in terms of (1) the need for low- and moderate-income housing in the particular community; (2) distribution; and (3) suitability of the area.

Local need criteria which have been used in various distribution plans include a consideration of the low- and moderate-income population of the municipality; the number of substandard or overcrowded housing units within its borders; the number of commuters into the community or the number of jobs located there.

Distributive criteria attempt to insure that the supply of housing in each community is balanced between low- and moderate-income housing and other kinds of housing. In its simplest form, such a criterion would allocate an equal share to each community or a proportion equal to its share of the regional number of households.

The criteria for distributing the needed housing should focus on land, for access to land is the basic issue in exclusionary zoning litigation. Thus, the numerical obligation of each community should depend in part on the amount of vacant land which is capable of being developed in the community.

Other factors should also be considered. The allocation of required housing might also be designed, for example, to maximize the plaintiffs' employment and educational opportunities, which have been diminished by the exclusionary practices.[130] Such a plan should be equitable for all parties, providing realistic access for low- and moderate-income families while fairly distributing the costs involved among the relevant communities.[131] To accomplish this latter purpose, criteria such as population and fiscal capacity might be included in the distribution formula. In addition, the court should give weight to the previous good faith efforts of a community to deal with the region's low- and moderate-income housing problem. If a community has taken some steps to open its gates, its judicially-imposed responsibility should be reduced accordingly. The obligation should be decreased by the number of standard low- and moderate-income housing units already existing in the community. This will prevent a community from bearing a disproportionate share of the remedial responsibility.[132]

Planning agencies which have developed criteria and collected

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Suitability criteria look to the ability of the community to absorb additional low- and moderate-income housing. Under these criteria, units have been allocated on the basis of the amount of vacant land, the availability of water and sewer and other facilities, the assessed valuation per pupil in the local schools, and the public school capacities related to current number of students. These criteria attempt to measure current and potential capacity of each community to support low- and moderate-income housing. M. BROOKS, *supra* note 74, at 20–21, 37–38.

[130] For extensive discussions of these issues, *see, e.g.*, NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, THE IMPACT OF HOUSING PATTERNS ON JOB OPPORTUNITIES (1968); Downs, *Alternative Futures for the American Ghetto*, 97 DAEDALUS 1331 (1968); Downs, *Residential Segregation: Its Effects on Education*, 36 EDUCATION DIGEST 12 (1971); NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, JOBS AND HOUSING: A TWO YEAR STUDY OF EMPLOYMENT AND HOUSING OPPORTUNITIES FOR RACIAL MINORITIES IN SUBURBAN AREAS OF THE NEW YORK METROPOLITAN REGION (1972); Kristensen, Levy, & Savir, *The Suburban Lock-Out Effect*, SUBURBAN ACTION INSTITUTE, RESEARCH REPORT # 1, (1971); Davidoff, Davidoff, & Gold, *Suburban Action: Advocate Planning for an Open Society*, 1970 J. AM. INSTITUTE OF PLANNERS 12; Davidoff, Davidoff, & Gold, *The Suburbs Have to Open Their Gates*, N.Y. Times, Nov. 7, 1971, (Magazine), at 40.

[131] *See* National Association of Regional Councils, *Summary: Special Preview of Regional Council Housing Programs*, HOUSING REPORTER, Sept., 1972, at 5–6; M. BROOKS, *supra* note 74, at 17–21.

[132] One approach which has been suggested is a "population percentage" standard:

> A community would be relieved of its duty to zone more land in high density categories suitable for the use of low- and moderate-income housing if its indigent population bore approximately the same percentage relationship to the entire metropolitan area's indigent population as the community's total

relevant data have found that many of the potential criteria measure the same factors. It is possible, therefore, to establish a small number of relatively simple criteria and arrive at an equitable distribution of low- and moderate-income housing. These criteria might include: (1) amount of vacant, developable land; (2) number of relevant jobs; (3) degree of underutilization of classrooms; (4) population; and (5) assessed valuation per pupil, as a measure of the municipality's fiscal capacity. These criteria, or others like them, could be established by the court. In the alternative, the court might defer to the planners to select the criteria which are appropriate in light of the character of the region.[133]

*6. Implementation of the Plan*—Under the allocation plan, the parties would be able to know with relative simplicity when a given municipality had met the legal obligation of supplying housing as ordered by the court. Until the required number of housing units for low- and moderate-income families was provided, the community would be required to permit further development. To facilitate construction according to the plan, an appropriate decree would include implementation provisions.[134] Because the court

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population bore to the metropolitan area's total. Essentially, this test would require each community to assume the burden of providing for its "share" of the poor in the metropolitan area, at least in terms of its zoning plans.

Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774, 793 (1971) (footnote omitted).

This approach, however, ignores the basic legal question of access to land. It also runs into practical problems, such as land shortages and unavailability of jobs. For discussions of alternative approaches, *see* Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970); Comment, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966); Note, *The Equal Protection Clause and Exclusionary Zoning After* Valtierra *and* Dandridge, 81 YALE L.J. 61 (1971).

[133] Criteria vary among plans. For a small region or one in which the job opportunities are concentrated and not moving, such as the Dayton, Ohio area, the location of jobs may not be a significant factor. In a large region, characterized by suburbanization of jobs and long, expensive reverse commuting, job location may be a critical factor. Each areawide planning agency which has developed an allocation plan has established its own criteria, based on local conditions and considerations.

[134] Several exclusionary zoning cases are currently pending which assert the need for affirmative relief, involving planning (on a citywide or regional basis) and implementation vehicles in the requested decree. *See, e.g.*, Bayliss v. Borough of Franklin Lakes, No. L-33910-71 T.W. (N.J. Sup. Ct., Bergen County, filed Aug. 3, 1972); Cornwall Estates v. Town of Cornwall, Civil No. 72-3291 (S.D.N.Y., filed Aug. 2, 1972); Planning for People Coalition v. County of DuPage, Civil No. 71-C587 (N.D. Ill., filed Sept. 14, 1971); Fair Housing Dev. Fund Corp. v. Burke, Civil No. 71-C328 (E.D.N.Y., filed July 18, 1972); Accion Hispana, Inc. v. Town of New Canaan, Civil No. B312 (D. Conn., filed June 14, 1971).

This kind of case raises many questions, a number of which are procedural in nature and must be resolved favorably for the plaintiffs before the question of remedy is even addressed. Future residents of subsidized housing projects have been held to have standing in cases involving government officials' impeding construction of such units. *See* James v. Valtierra, 402 Y.S. 137 (1971); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 401 U.S. 953 (1972); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970),

will retain jurisdiction over the case, it should state the limited purposes for which it would continue to intervene in the development process. Included in this should be an outline of the type of action the court would take.

*a. Criteria for Selecting a Plan of Implementation*—In setting out when, why, and how it will supervise implementation of the plan after the initial order is issued, the court might consider the need to balance several potentially conflicting objectives. First, any approach adopted must be judicially manageable: it should be within the competence of the court to administer. The court should not be confronted with constant, lengthy hearings and the resultant need to issue numerous, complex supplemental orders. Second, the remedial scheme should maximize efficiency in developing low- and moderate-income housing. It should emphasize providing relief to the plaintiffs as rapidly as possible. Unnecessary delay itself is an additional hardship for the litigants. It also imposes costs on developers, including increased interest on loans, payments for options, and rising costs of materials and labor. The developer may not be able to build the project at all if delays are so great that it becomes financially infeasible. Finally, the court's approach should seek to maximize retention of local control of the planning process and should insure that valid local considerations, such as those clearly related to health and safety, would be attended to.

*b. The Set-Aside*—Several alternatives are available to the courts for implementing the allocation plan. Some have been presented to the courts in the form of requested relief in recently filed cases. Each should be evaluated in terms of the criteria set

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*cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969). Standing was found in these cases because the denial of housing opportunities violated the constitutional rights of potential residents who were within the zone of interests protected by the statutes involved.

For a discussion of a broadened concept of standing in the exclusionary zoning context, *see, e.g.*, George, *Standing to Challenge Exclusionary Local Zoning Decisions: Restricted Access to State Courts and the Alternative Federal Forum*, 22 SYRACUSE L. REV. 598 (1971); Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774 (1971); Note, *Extending Standing to Non-Residents-A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 VAND. L. REV. 341 (1971); Hendel, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967); Comment, *Standing to Appeal Zoning Determinations: The 'Aggrieved Person' Requirement*, 64 MICH. L. REV. 1070 (1966).

On the related issues of exhaustion of administrative remedies and ripeness and justiciability in the exclusionary zoning context, *see* Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972). *See also* Southern Burlington County NAACP v. Township of Mount Laruel, 199 N.J. Super, 164, 290 A.2d 465 (1972); Note, *Exhaustion of Remedies in Zoning Cases*, 1968 WASH. U.L.Q. 368; 3 R. ANDERSON, AMERICAN LAW OF ZONING § 22 (1968); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20 (1968).

forth above. First, the set-aside principle discussed above in relation to providing relief on a single site could be applied in the regional context. Any developer of subsidized housing whose project was consistent with the court-ordered allocation plan and who was denied a rezoning or any of the other necessary local approvals could request the court to set aside the local requirements as frustrating constitutionally required relief. Presumably, the developer would be able to secure the approvals in most instances, and relatively few projects would require judicial intervention. The court would step in only after a developer had made a good faith effort to obtain the local approvals.

A hearing would be held which would be limited to establishing that the developer had made a good faith effort to secure necessary approvals, the locality had denied the approvals, and the denial frustrates effective relief for the plaintiffs. The reasons for the denial and the merits of those reasons would not be at issue, for the set-aside principle provides for the court-ordered bypass of local regulations if they frustrate constitutionally required relief, even if they are otherwise valid. The supplemental order in this situation would enjoin the community from impeding the building of the development in any way, thus permitting the developer to commence construction of the particular project without securing further local approvals.

In addition to limiting the amount of court participation, the set-aside technique as applied here would facilitate rapid development of housing. The developer would proceed through the local administrative process in the same way as any other residential developer. If his original or revised plans were approved, he could proceed to build his project. If not, a single, short judicial procedure would be initiated, resulting in court permission to build.

The municipal interest in health, safety, and other valid local concerns could be protected in several ways within the set-aside framework. First, if the project were subsidized by HUD, it would be required to meet federal standards for construction and environmental quality, including the availability of supportive services and facilities. Second, the developer here has the same incentives to build projects which are sound as in the single-site context.[135] Finally, the court might order municipalities which have received subsidized housing to make periodic reports, perhaps on an annual basis, of their progress and their problems. These reports would point out any hardships the set-aside has

[135] *See* notes 73-90 and accompanying text *supra*.

caused them, which might lead the court to impose additional requirements on developers seeking similar orders. Although these protections do not assure that every subsidized housing project will comply literally with the maze of local administrative regulations, substantial deviations should be minimal under this process.

*c. Override*—A similar remedial vehicle available to the court is the "override." The court could grant to developers of low- and moderate-income housing a generalized authority to override local zoning and other codes, after having made good faith efforts to comply with these requirements and having had their applications to the appropriate authorities rejected. This approach would in essence permit the court to follow the model of the legislatively created State of New York Urban Development Corporation (NYUDC). This agency is authorized to plan, fund, and develop low- and moderate-income housing projects.[136] The Corporation has the power to ignore local laws, ordinances, zoning codes, and building regulations when, in its discretion, compliance is not feasible or practicable. Before doing so, NYUDC must work closely with elected officials and community leaders to achieve local and regional goals.

In following an NYUDC model the court would identify those developers to whom it would grant the authority to override local regulations. It might include all developers of publicly subsidized housing, or a subgroup such as state housing agencies (where such agencies exist).[137] These developers would be required to seek local approvals and would be entitled to ignore local ordinances only after efforts to obtain these approvals failed. The override would continue in effect until the locality's remedial obligation was fulfilled.

One of the primary advantages of the override technique is that it minimizes continuing judicial intervention. Once the court designates recipients of this authority, the court would not play a role in individual projects but would merely monitor regional progress on a periodic basis. Developers who are granted this authority might be given a mandate at the outset to use their best efforts to expand the housing supply as rapidly as possible. If the developer does not proceed on this basis, the court might issue

[136] New York Urban Development Corporation Act, N.Y. UNCONSOL. LAWS § 6251 *et seq.* (McKinney Supp. 1972).

[137] Approximately twenty-two states have created housing finance agencies. This group includes many of the urbanized states. For a discussion of their operation, *see* Alexander, *Fifteen State Housing Finance Agencies in Review*, J. HOUSING, Jan., 1972, at 9; EARL WARREN LEGAL INSTITUTE, LAW PROJECT BULLETIN, Oct. 15, 1972, at 9; EARL WARREN LEGAL INSTITUTE, LAW PROJECT BULLETIN, Apr. 15, 1972, at 5; AMERICAN INSTITUTE OF PLANNERS, AIP NEWSLETTER, Oct., 1971, at 8.

more specific supplemental orders or designate additional or alternative grantees of the override authority. Additionally, housing would probably be built rapidly under an override system. Individual projects would not require advance judicial approval. Thus, most projects would move through the local administrative process at a reasonable pace.

*d. Mixed Income Developments*—A third implementation vehicle would be a court-ordered requirement that developers building *any* housing in the relevant municipalities include a specified percentage of low- and moderate-income housing units within their project. Just as the override technique has a statutory analogy in the New York State Urban Development Corporation Act, this mandate for developers is based on an ordinance enacted by the County Council of Fairfax County, Virginia. The Fairfax County ordinance, passed in August, 1971, requires that for any residential development of fifty or more units:

> An applicant for RPC (Residential Planned Community) zoning or for an amended development thereunder . . . shall provide or cause others to provide, under the development plan, low-income units which shall not be less (and may be more) than six percent (6%) of the total number of units (other than detached single family dwelling units) specified in the development plan. The applicant shall also provide, or cause others to provide, the number of moderate-income dwelling units which, when added to the number of low-income dwelling units, shall not be less (and may be more) than fifteen percent (15%) of the total number of dwelling units (other than detached single family dwelling units) specified in the development plan.[138]

Under the Fairfax ordinance the county executive is authorized to withhold approvals for a development until the applicant complies with these requirements. If government subsidies are not available, the developer is excused, but he must satisfy the county executive that he is making persistent good faith efforts to obtain the proposed subsidies and provide such dwelling units.[139]

Transposing this device to the remedial context, the court

[138] Fairfax County Code, Fairfax County, Va., Zoning Amendment # 156, Aug., 1971. The ordinance covers planned unit developments, planned communities, planned apartment developments, multifamily districts (except high rises) and townhouse zones. The ordinance was challenged in the state courts, in DeGroff Enterprises Inc. v. Board of County Supervisors, Law No. 25609 (Fairfax County Civ. Ct., Nov. 11, 1971). The trial court held that the ordinance excluded the powers which the State Zoning Enabling Act delegated to the County Board. The County petitioned for an appeal to the Virginia Supreme Court of Appeals. M. Romansky, Fairfax County Zoning Amendment # 156, at 6, 14 (unpublished report on file at Center for Urban Affairs, Northwestern University).

[139] The applicant's efforts are to be judged according to the normal processing time and procedures required to obtain the various subsidies.

might enjoin the municipalities from granting zoning or other approvals to residential developments unless the projects will contain a specified percentage of low- and moderate-income housing units. In a pending case, *Planning for People Coalition v. County of DuPage*,[140] the plaintiffs seek such relief, requesting that DuPage County be enjoined from giving any zoning approval for new residential developments for the relatively wealthy without simultaneously making adequate provisions for housing for persons with low and moderate incomes.

This approach assumes, of course, a potential for unsubsidized residential development or redevelopment in the subject municipalities. Furthermore, the suburban communities involved will usually have a supply of vacant land and will be experiencing growth and in-migration.

Unless municipalities attempted to exclude all residential developments, the court's continuing role could be limited to periodic monitoring of the progress of development. If any community did become intransigent and attempted to block all residential developments, the developer of an economically integrated project could seek a set-aside order, after making good faith efforts to secure the necessary local approvals. From the plaintiff's standpoint, providing developers with this additional incentive to build low- and moderate-income housing may accelerate the provision of such housing. A final advantage inherent in this technique is that local control of planning and zoning would remain largely intact. The community would continue to decide which areas should be residential, industrial, and commercial. This was the original task of zoning as articulated by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*[141]

*e. Miscellaneous*—To insure that relief is comprehensive and effective, the court might include other provisions in its decree, in combination with one or more of the techniques discussed above. On the basis of its finding that certain zoning practices are exclusionary and thus invalid, it could enjoin any municipality from enforcing or relying on such practices in conjunction with any rezoning, variance, building permit, or other local approval which is necessary for the development of subsidized housing units.[142] The court could also specify a period of time before the set-aside or other provisions of the order would become effective, during which individual municipalities could rezone enough appropriate

[140] Civil No. 71-C587 (N.D. Ill., filed Sept. 14, 1971).

[141] 272 U.S. 365, 396-97 (1926).

[142] Bayliss v. Borough of Franklin Lakes, Docket No. L-33910-71 T.W. (N.J. Sup. Ct., Bergen County, filed Aug. 3, 1972).

land for low- and moderate-income housing to meet their obligations under the allocation plan. This would provide additional protection for the municipalities' planning and zoning prerogatives. Furthermore, it would keep the court from becoming involved in the selection of individual sites for low- and moderate-income housing.

As in the case involving a specific project, the court would order the individual municipalities to grant any approvals necessary for the utilization of federal subsidy programs. Finally, in the regional context, there may be one or more local housing authorities with jurisdiction in suburban areas. These agencies could assist in providing relief by developing low-rent public housing as rapidly as possible, in accordance with the allocation plan. In order to achieve maximum relief for plaintiffs, they should be ordered to do so.[143]

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[143] *See* Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969).

In several pending cases, plaintiffs seek variations of the relief discussed in this section. Accion Hispana Inc. v. Town of New Canaan, Civil No. B312, (D. Conn., filed June 14, 1971) involves a challenge to the zoning scheme of an affluent suburb of New York City. The complaint attacks a whole range of land-use practices, including two- and four-acre minimum lot-sizes, extreme limitations on multifamily housing and prohibition of mobile homes. The broad relief requested includes invalidating the existing land-use laws and ordering enactment of new laws which would include:

> (1) The reservation of not less than five sites of vacant, developable land to be used solely for the development of single and/or multifamily housing units for persons of low and moderate income, such sites to be:
>
> (a) Zoned for a density approximately equal to the average density of middle and upper-income multi-family housing now in New Canaan;
>
> (b) Of sufficient distance from one another so as to avoid ghettoization and provide prospective residents with a diversity of choice of surroundings similar to that enjoyed by existing white middle and upper-income residents of the town; and
>
> (c) Of sufficient land area so that, when developed as aforesaid, the proportion that New Canaan's minority residents bears to New Canaan's population as a whole will be approximately equal to such proportion in the State, region or nation, as the Court deems most appropriate;
>
> (2) Diversified sites throughout the Town for the development of significant numbers of housing units other than single-family detached dwellings;
>
> (3) Land for housing sufficient to meet the needs of all employees of business, industry and public service which enter New Canaan subsequent to the commencement of this suit;
>
> (4) The utilization of mobile homes as dwellings; and
>
> (5) The utilization of new and more economical construction techniques including, but not limited to, modular and pre-fabricated housing units.

*Id.* Plaintiff's Complaint, at 28–29.

The defendant town would be given forty-five days to submit such a new law for the court's approval. In the interim, the town would not be permitted to grant rezonings, or issue any building permits or certificates of occupancy. The town would be required to vote the necessary approval so that developers could make use of the federal rent supplement program. The court would retain jurisdiction, and the town would submit quarterly reports to the court on the developmental status of the low- and moderate-income housing sites.

In Cornwall Estates Co. v. Town of Cornwall, Civil No. 72-3291 (S.D.N.Y., filed Aug. 2, 1972), the plaintiffs include ten low- and moderate-income black individuals from

## VI. CONCLUSION

As in the school segregation and housing segregation cases, providing relief for those excluded by suburban zoning practices will be a stiff test of judicial ingenuity and stamina. In seeking to vindicate the constitutional rights of low- and moderate-income families, courts alone cannot guarantee that the necessary housing will actually be built. Subsidy funds must be appropriated by Congress. Developers interested in building subsidized housing will also be needed.

In spite of the fact that parts of the process may be beyond the control of the courts, the courts' responsibility is to take all possible steps to provide real remedies for those whose constitutional rights have been abridged. The courts cannot hold zoning practices discriminatory and then declare that they can do nothing to provide a remedy. They must take the initiative to develop affirmative relief which removes the exclusionary suburban barriers and insures that alternative exclusionary tactics do not prevent complete relief.

Suits will continue to be brought under the single-site approach, concerning specific housing developments. Some of these will have major implications, in terms of increasing suburban housing opportunities for low- and moderate-income families.[144] In these

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neighboring Newburgh, New York, who are potential consumers of low- and moderate-income housing in Cornwall, suing on behalf of all minority and lower income persons who are excluded from residence in Cornwall. Also a plaintiff is Cornwall Estates Company, which had tried unsuccessfully for more than six years to build townhouse apartments in Cornwall for persons of moderate income. Cornwall Estates alleges that the town and various of its officials have thwarted its efforts to develop housing on a site which it owns because it proposed to build units with three or more bedrooms, thus bringing school children into the community.

In their request for relief, plaintiffs ask that Cornwall be required to rezone substantial portions of its land for low- and moderate-income housing, to take all steps necessary to permit the development of federally subsidized housing, and to permit the Cornwall Estates project to proceed. *Id.* Plaintiff's Complaint at 36-39. Cornwall Estates is pledged to construct federally subsidized housing on its site.

In the Fair Housing Dev. Fund Corp. v. Burke, Civil No. 71-328 (E.D.N.Y. filed July 18, 1972), the plaintiffs have charged that the zoning ordinances of the Town of Oyster Bay, Long Island, New York, exclude low-income families. In addition to seeking to have the ordinance declared unconstitutional, the plaintiffs have requested the court to order the town to prepare and implement a plan to accommodate the housing needs of low-income families, both residents and non-residents of the town. This would be a:

> comprehensive plan which will eliminate the racially impacted residential enclaves within the Town and which will provide for and assure land-use opportunities for the construction of low and moderate income dwelling units within the Town to meet the needs of the Plaintiffs and the members of the class they represent, and will end existing racial segregation in housing therein.

*Id.* Plaintiff's Complaint, at 19. *See generally* Shields & Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change,* 2 YALE REV. L. & SOCIAL ACTION 300 (1972).

[144] An illustration of the potential under the single site strategy is the approach of the Garden Cities Development Corporation of New Jersey. Garden Cities is a nonprofit

cases courts must insure that the site is preserved for low- and moderate-income housing and that the locality's intransigence does not impede construction of the housing.

Regional remedies must also be employed. The courts increasingly are asserting that housing and zoning are regional questions, which require multijurisdictional solutions. Individual communities cannot be permitted to ignore this problem, nor can the measure of their responsibility be assessed without a regional analysis and plan. The court's role is not to engage in areawide planning but to require that planning bodies do so.

The mere adoption of such an allocation plan is not sufficient to satisfy the court's duty. It must take the necessary steps to see to it that the plan becomes a reality. In employing these vehicles in the conduct of a regional plan, the courts will reduce the amount of litigation needed, avoiding a project-by-project, city-by-city approach. A framework will be established, which minimizes the necessity for continual judicial intervention and maintains maximum local control of the zoning and planning process. At the same time, the courts will meet their responsibility by insuring that real housing opportunities for low- and moderate-income families are created in suburban areas.

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housing developer affiliated with Suburban Action Institute, a nonprofit organization whose purpose is to gain access to the suburbs for low- and moderate-income families.

Garden Cities entered into a conditional sales contract to purchase a large piece of land in Mahwah, New Jersey. The sale is conditional on Garden Cities' obtaining a zoning amendment. Mahwah is an affluent community, with low density zoning. The Garden Cities site was previously zoned single-family residential, with a minimum lot-size of two acres.

In its application to the Township Committee of Mahwah and the Planning Board requesting a zoning amendment, Garden Cities indicated its desire to develop a community of 6,000 townhouse and garden apartment units on 720 acres of land in Mahwah. The proposed amendment would enable Garden Cities to construct garden apartments and townhouses at a gross density of nine units per acre, and the limitation on the number of bedrooms would be removed. In addition the amendment would allow some limited three-story residences and commercial development. Overall, however, only 20 percent of the subject land is to be covered with structures.

The development planned by Garden Cities would accommodate almost 19,000 people with annual incomes between $5,000 and $20,000. Current population of the 25.7 square mile town is under 11,000. Forty percent of the dwelling units were to be subsidized. This would permit many of the 6,000 employees of Mahwah's Ford plant as well as those of the town's Western Union, ABEX, and other corporate facilities to live in the community. Previously, only a few of these employees were able to live in Mahwah, with the remainder commuting from as far away as the ghettoes of New York City, one to two hours away.

The application for the zoning amendment was submitted on September 6, 1972. The public hearing on the Garden Cities proposal was held on December 11, 1972. If the plan is rejected by the town, it is likely that Garden Cities would seek judicial reversal of that decision. A favorable determination by the courts could lead directly to implementation of the plan and development of an economically and racially integrated community of several thousand families. *See* Garden Cities Development Corporation, Application for Zoning Amendment to the Township Committee of the Township of Mahwah, New Jersey, Sept. 6, 1972.