Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 40 *Symposium on Growth Management and Exclusionary Zoning*

January 1991

Exclusionary Zoning and Growth Controls: A Comment on the APA's Endorsement of the Mount Laurel Doctrine

William A. Fischel

EXCLUSIONARY ZONING AND GROWTH CONTROLS: A COMMENT ON THE APA'S ENDORSEMENT OF THE *MOUNT LAUREL* DOCTRINE

*WILLIAM A. FISCHEL**

In the interest of disclosing potential biases, let me begin this comment on the APA's amicus brief for the New Hampshire Supreme Court by noting that I am an alternate member of a zoning board in a New Hampshire town that might be regarded as practicing exclusionary zoning. This is not to say that my town's practices are illegal or differ much from those of many other New England towns. Indeed, I have argued that fiscal zoning, which the APA equates with exclusionary zoning, is the norm for most developing suburbs and growing small towns in the United States.[1]

Another point on which I agree with the APA brief is that zoning ought to work for the general welfare of all citizens of the state—indeed, of the whole country—not just for those inside the boundaries of the local government doing the zoning. My disagreement with the brief is about how to get local governments to promote the truly general welfare. The APA argues that other state courts ought to imitate New Jersey's *Mount Laurel* decisions in order to promote the construction of housing earmarked for low-income people in the suburbs. The APA expresses little concern about the supply of housing other than that for low-income people. My argument is that zoning's chief fault is

* Professor of Economics, Dartmouth College.

1. W. FISCHEL, THE ECONOMICS OF ZONING LAWS 59-79, 293-338 (1985).

to exclude too much of all development, with the result that housing prices in growing areas are too high and that metropolitan areas become too spread out.

The basis for my argument is literature overlooked by the APA brief. These are articles and books published by economists and by lawyers and planners who have adopted economic analysis.[2] This literature has dominated the intellectual terrain since the late 1970s, which may be why almost none of the APA's references to social science studies of zoning are from the 1980s.

The more recent studies indicate that suburban zoning and land use controls raise the cost of housing for everyone, not just the poor. Susan Wachter and Man Cho's article on this issue is an example of this type of study. They find that their land use restrictions index is associated with higher housing prices in the area that adopts the restrictions, even after other factors that affect housing costs, such as mortgage rates, construction costs, and location within the metropolitan area, are taken into account. The price-inflating effects of zoning also extend over the border of the restrictive districts, which is itself an important finding. The following analysis illustrates why.

If a community or district within a community received a large sum of money from a benefactor who was devoted to improving the parks, streets, schools, and other public facilities of a community, what should we expect to happen to housing prices in that community? Nearly all economists would answer that the price of housing would rise. When homes went on the market in that community, prospective buyers would see that the houses came attached to amenities superior to those in competing areas. Because it is difficult to obtain those amenities except by living in that community, buyers will be willing to pay more for houses in the favored community.

People who want to defend zoning and growth management regulations should point out possible analogies between adopting such regulations and a benevolent donor improving community facilities. Rather than being exclusionary, perhaps the ordinance accommodates development at a reasonable pace and, by better planning, improves the delivery of public services. In this pleasant scenario, the adoption of growth management or a new zoning law does not restrict the overall

2. For references and analysis of this literature, see W. FISCHEL, *supra* note 1, at 231-48; Fischel, *Do Growth Controls Really Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulations* (1990) (Lincoln Institute of Land Policy)[hereinafter *Do Growth Controls Matter?*].

supply of housing. Instead, just as in the public benefactor scenario, the supply schedule remains the same but demand shifts outward, reflecting the greater attractiveness of the community.

Zoning restrictions and growth management might, on the other hand, raise existing housing prices for a different reason. The fanciful comparison for this case is the malevolent genie who destroys three-quarters of the land available for building. After the evil genie's work, parcels on which it was once possible to build forty homes on quarter-acre lots are so disabled that only ten homes on one-acre lots can be constructed.

No cloud lacks its silver lining, though. Owners of homes that were already built in the community are spared by the genie (she thinks they are related to her forebears, so she "grandfathers" their property). These owners may be twice blessed. First, the owners escape the land use disabilities. Second, they may find that the market values of their homes are considerably higher. This is because the genie has shut out the construction of many homes that might have competed in the market for those previously built. The effect on housing prices is analogous to the effect on automobile prices when some potentially imported cars are excluded from the American market. American-made cars would go up in price, along with the resale price of existing cars and the prices of imported cars that got through the quotas.

The problem for economists is to determine which effect is pushing up housing prices. If it is the benevolent amenity effects, there is hardly cause for complaint. If it is supply restrictions, then public policies should be brought to bear to combat them. One way of separating the two effects is to determine whether the regulations of one community cause housing prices to rise in other communities in the same metropolitan area. If growth controls only make the community that adopts them more attractive, it is unlikely that there would be much effect on neighboring communities. Thus, if growth management has only benign amenity effects, we should be able to detect little or no metropolitan-wide price effects, unless most communities in the metropolitan area adopt them simultaneously.

The results of Wachter and Cho indicate that there are some spillover price effects from one district to the other. These spillover effects are not as large as the within-district effects, but they suggest that even if amenity effects exist within the community, there are some supply restriction effects as well. This analysis confirms the results of several other metropolitan-area and regional studies of growth controls as

well, which I reviewed in *Do Growth Controls Matter?*[3]

The finding that suburban zoning affects the entire housing market suggests a policy different from that of *Mount Laurel*. The preferred strategy for combatting unreasonable supply restrictions would be to give legal redress to landowner/developers. While only sparingly granted by courts, injunctive relief is the traditional remedy available to builders. The action complained of by the builder is struck down, but the community is usually free to proceed with alternative regulations that may frustrate the developer just as badly. For this and other reasons, the remedy of monetary damages, either under a taking theory or a civil rights action, is economically superior. Because both the economic and legal analysis that leads to this remedy is readily accessible in Robert Ellickson's important article,[4] I shall not belabor it here.

It is worth noting, however, that while the APA brief studiously ignores the damages remedy, it inadvertently cites the remedy's most eloquent judicial supporter. In pointing out a community's incentive to delay compliance with a court order about zoning, the brief quotes a California attorney who advised other city attorneys faced with defeat in court: "*IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.*"[5]

That quote is lifted, as noted in the APA brief, from Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[6] What the APA brief does not point out is that Justice Brennan was arguing in favor of a damages remedy for a regulatory taking of property, a remedy that the California Supreme Court seemingly had read out of the Constitution in *Agins v. City of Tiburon*.[7] Justice Brennan realized that without the threat of monetary damages, communities could win the land use war without ever winning a legal battle. The developer's banker would eventually grow impatient with the delays, and the developer would have to accede to unreasonable and unconstitutional restrictions for lack of a monetary remedy for the delay.

Justice Brennan's dissent became, in effect, the law of the land in *First English Evangelical Lutheran Church of Glendale v. County of Los*

3. *Do Growth Controls Matter?*, *supra* note 2, at 35-40.

4. *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

5. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 n.22 (1981) (Brennan, J., dissenting).

6. *Id.*

7. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 373 (1979).

Angeles.[8] Given that the APA brief is directed towards the New Hampshire Supreme Court, it is interesting to note that New Hampshire did not wait for the United States Supreme Court to rule as to what many saw as an obvious implication of the just compensation clause. The New Hampshire court held in *Burrows v. City of Keene*[9] that damages are an appropriate remedy for an unfair downzoning.

The reader willing to grant the foregoing might still ask, why not pursue both goals? Let the open suburbs advocates pursue construction of low-income housing via the *Mount Laurel* approach, and let the supply-side advocates pursue overall construction by the landowner-damages approach. The problem with this live-and-let-litigate approach is that both remedies cannot usually be pursued at the same time.[10] The *Mount Laurel* remedy depends upon landowner/developers not having any general right to develop normal, market-rate housing. In the following discussion of this proposition, I assume for the sake of argument that the *Mount Laurel* remedy actually works as it is supposed to. There is little evidence that it does.[11] Indeed, the New Jersey Supreme Court's opinion in *Mount Laurel III*[12] which upheld the legislative response that actually subverts much of *Mount Laurel I* and *II*, seems to have taken its cue from the late Senator George Aiken of Vermont, who proposed that the solution to the quagmire of the Vietnam War was to declare we'd won and get out.

The linchpin of the *Mount Laurel* approach is to require that local governments impose a special charge on developers of normal, market-rate housing. The charge's revenues are earmarked for low-income housing.[13] In order to be able to collect the charge, however, it is necessary that the developer not be able to develop as much market rate housing as he would like.

If a developer could go into Princeton Township and build more houses just like those already there, then he would have no reason to

8. 482 U.S. 304 (1987).

9. 121 N.H. 590, 432 A.2d 15 (1981).

10. The economic analysis of inclusionary zoning is based on W. FISCHEL, *supra* note 1, at 316-38; Clapp, *The Impact of Inclusionary Zoning on the Location and Type of Construction Activity*, 9 AM. REAL. EST. & URB. ECON. A. J. 436 (1981); and Ellickson, *The Irony of Inclusionary Zoning*, 54 S.C.L. REV. 1167 (1981).

11. *See* Briffault, *Our Localism: Part I - The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 35-58 (1990) (examining the *Mount Laurel* doctrine).

12. Hills Dev. Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986).

13. The charge is a tax in all but name, but the name is avoided by the courts, for only the legislature can enact a tax.

subsidize low-income housing. He would tell the township that if it had to comply with the court's order, it should raise its property taxes and pay someone to build the necessary low-income units. Because the court apparently thought it could not require suburban governments to tax themselves to do something they did not want to do, it found a tax base — restrictive zoning already in place — that would be more acceptable. In effect, the court required local governments to sell rezonings, with the proceeds going exclusively to low-income housing.[14]

Thus the remedy of inclusionary zoning, which the APA brief embraces with only trivial qualifications, requires that suburban zoning laws must be excessively restrictive, compared to Ellickson's proposed restrictions that would meet the harm-prevention test.[15] Suburbs cannot sell exceptions unless they have binding restrictions. Indeed, it may be necessary for local governments to become more restrictive over time. If a developer anticipated that next year the community would play (or be required to play) the same inclusionary zoning game with another developer, thus adding to local housing supply and lowering its price, he might decline to participate on the grounds that the profitability of his present plans would not be great enough to provide the required subsidy. Fortunately for the would-be monopolist, the New Jersey court and the APA brief assure him that once a predetermined fair-share goal is met, the community can be as exclusionary as it likes, as long as it democratically excludes people of all income classes and is careful to rationalize it in acceptable subterfuges like farmland preservation and environmental protection.[16]

The only question is whether the community will actually want to become exclusive after satisfying its fair-share housing obligation. Given the fiscal concerns and the anxiety about undesirables that motivate suburban zoning, a community that has met its *Mount Laurel* goals will most probably want to adopt an anti-growth policy. If it tried to grow by permitting only market-rate housing, it would then be subject to more fair-share low-income housing requirements, as they are invariably calculated as a percentage of current population.

---

14. *See* W. FISCHEL, *supra* note 1, at 328; Rubin, Seneca & Stotsky, *Affordable Housing and Municipal Choice*, 66 LAND ECON. 325 (1990).

15. *See* Ellickson, *supra* note 4.

16. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 219-20, 456 A.2d 390, 421 (1983) (*Mount Laurel II*) ("Once a community has satisfied its fair-share obligation, the *Mount Laurel* doctrine will not restrict other measures, including large-lot and open area zoning, that would maintain its beauty and communal character.").

An example of what this leads to is described in an article by Bob Narus.[17] The town of Lincoln, Massachusetts, one of the richest and most exclusively zoned in the state, is also one of the few to have met the state's affordable housing goal, which is expressed as a percentage of a community's current population. I learned from the town clerk that its population is now about 5000, down from about 7000 in 1980, apparently because of smaller households.

To meet the state's affordable housing goal, Lincoln made a developer pay for subsidized housing as a condition for building a commercial structure. (Many of the pleasant-looking townhouses had late-model cars in front of them when I visited, causing me to wonder whether the town had invented inclusionary auto sales). Lincoln meets the usual fair-share formula and need not grow at all, and its zoning laws indicate that it plans not to grow. The supply effect is not trivial. The town borders Route 128, the circumferential highway that is the locus of suburban jobs in the Boston area. If Lincoln were developed at the densities of nearby Wellesley, which is not regarded as overcrowded, it would have about 35,000 people.

Given that an anti-growth policy is necessary to make the *Mount Laurel* inclusionary remedy work and that most suburbs will eagerly embrace anti-growth policies once they meet their fair-share quota, I submit that a legal remedy that entitles landowners to construct normal, market-rate housing cannot coexist with the *Mount Laurel* remedy. One exception to the foregoing conclusion might be to permit only landowner/developers who proposed to build low-income housing to collect a damages remedy for a regulatory taking. Aside from raising a constitutional doctrine that seemingly does not discriminate by income class (imagine the highway department compensating only low-income owners), the difficulty is that inverse condemnation can compensate only for the value of what the landowner lost. Because most landowners lose little by being prevented from doing what is not usually profitable for them to do, the amount of the damages would be small, and the motivation for landowners to pursue their remedy is slight. Such a claim should not be disallowed, of course; I only argue that it would not help much.

Because the supply-side policy of landowner rights is incompatible with *Mount Laurel*'s inclusionary zoning policy, one must choose between opening the suburbs to the poor and increasing supply of hous-

17. Narus, *Evolution of Growth Management in Lincoln, Massachusetts*, 49 URB. LAND. 16 (1990).

ing generally. I previously have argued that many of the supposed benefits of opening up the suburbs are overstated.[18] Furthermore, I have found that restrictions on aggregate supply of housing from growth controls hurt the poor by staunching the flow of used housing normally made available by new construction.[19] Because much of the nation's housing stock is already in the suburbs, the much maligned filtering process offers the best hope of enabling significant numbers of the poor to move to the suburbs. Thus, even if one is concerned only about the welfare of the poor, it is not obvious that one would want to pursue the *Mount Laurel* policy.

But suppose the reader would opt for the open-suburbs policy for other reasons and accept the growth limitations that accompany the *Mount Laurel* remedy. One might argue that developers shut out of the suburbs by growth controls just go to other jurisdictions. Not all places have growth controls, after all. Maybe, in fact, the developers will head back to the central cities and revitalize those places. Suburban exclusion might be just the thing to help them out.

This issue is on the frontiers of research on land use controls. We do not have much evidence about where development that is foreclosed in the suburbs actually ends up. I have argued that it most probably forces development into rural communities just beyond the exclusionary suburbs. This happens until they, too, become exclusionary in outlook, and the process proceeds all over again.[20] This leads to excessive decentralization of urban areas and its attendant social and economic costs.

If I am right about this, there is a special irony in the case that occasioned the APA brief. Land use controls by towns more convenient to urban and transportation centers in southern New Hampshire and eastern Massachusetts may have led to growth pressures in Chester, the town accused of exclusionary zoning. The town is, I suspect, under development pressure largely because the more conveniently located towns in southern New Hampshire and eastern Massachusetts such as Lincoln, Massachusetts, decided that they wanted to retain their

18. *See* W. FISCHEL, *supra* note 1, at 316-38.

19. *See* Weicher & Thibodeau, *Filtering and Housing Markets: An Empirical Analysis*, 23 J. URB. ECON. 21 (1988) (evidence that a high aggregate construction rate lowers the price of all housing and improves the quality of low-income units).

20. *See* W. FISCHEL, *supra* note 1, at 252-68; Fischel, *Growth Management: Good for the Town, Bad for the Nation? A Comment* (1990) (available at Dartmouth College Economics Department).

"small town character" while at the same time enjoying the economic benefits of location in the greater Boston metropolitan area. For those who want real small town ambiance, I can recommend scores of lovely towns in northern and western New England. You just have to learn to live on rural incomes.