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ADVOCATING AFFORDABLE HOUSING IN NEW HAMPSHIRE: THE *AMICUS CURIAE* BRIEF OF THE AMERICAN PLANNING ASSOCIATION IN *WAYNE BRITTON v. TOWN OF CHESTER*

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INTRODUCTION

In June 1990, The American Planning Association, a national Washington, D.C. based non-profit association of 27,000 professional planners, elected and appointed planning officials, and citizens interested in improving urban and rural planning filed this *amicus curiae* brief with the New Hampshire Supreme Court. The case on appeal is *Wayne Britton v. Town of Chester*, No. 85-E-342 (N.H. Super. Ct. June 27, 1989), brought by a builder/developer and low-income plaintiffs in need of affordable housing in Chester, New Hampshire.

In that case, the trial court, aided by a special master, found the entire zoning ordinance of the Town of Chester to violate the New Hampshire Constitution because of its exclusionary characteristics which made the construction of affordable housing for low- and moderate-income families impossible. In invalidating the Chester zoning ordinance, the trial court imposed a "builder's remedy" which allowed the builder/developer to construct forty-eight units of multi-family townhouse units, ten of which would be set aside for low- and moderate-income families for a period of at least twenty years without interference by the town. The trial court applied the principles originated by the New Jersey Supreme Court in the famous *Mount Laurel* cases, a series of anti-exclusionary zoning decisions in the 1970s and 1980s which held that municipalities which enact land use regulations have an affirmative obligation under the state constitution to provide realistic opportunities in their zoning ordinances for moderate- and low-income housing on a regional fair share basis.

The *amicus* brief was a group effort, written over a period of three months by a national committee of attorneys and planners. It describes the problem of exclusionary zoning to the New Hampshire Supreme Court—particularly why it is so intractable—and analyzes the Town of Chester's regional setting, planning context and regulatory framework. It next reviews New Hampshire land use decisions and statutes and traces the development of anti-exclusionary zoning rulings in other states. It exposes the court to the regional general welfare theory which underpins anti-exclusionary zoning litigation: when a zoning ordinance strongly influences the supply and distribution of housing over a region, a court must consider the welfare of that region in gauging the constitutionality of the ordinance. Finally, it suggests to the court how to shape the "builder's remedy" to insure that moderate- and low-income families are benefitted and housing for them actually gets built.

As of this writing (April 1991), a decision is pending by the New Hampshire Supreme Court.

Stuart Meck

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SUMMARY OF ARGUMENT

1. The exclusionary zoning challenged in this matter is a nationwide problem shared by municipalities in high growth areas such as southeastern New Hampshire. These municipalities use their planning and zoning powers in such a way that discrimination against low-income and sometimes minority households is the direct result. The primary causes are dislike of the poor, racial prejudice and dependence on the local property tax. The practice is almost wholly created by "state" action. Studies of state and local political systems indicate that legislative solutions will not be forthcoming without judicial intervention. Chester is an exclusionary municipality.

2. The New Hampshire Legislature has begun to address the problem, through statutes encouraging regional planning and "innovative" land use measures, and by addressing the problem of manufactured

housing. This court has limited the power of towns to exclude the "unwanted," be they mentally, physically or economically disadvantaged. The relief sought by the plaintiffs in this matter is consistent with the precedents of this court and the policies articulated by the legislature.

3. Other states have also recognized this problem and have crafted solutions, most notably the *Mount Laurel* doctrine. The New Hampshire legislature and courts have taken note of these solutions. The *Chester* case presents an opportunity to draw on the experience of other states to fashion an effective judicial remedy that is appropriate to New Hampshire.

4. Once it is understood that state action is the source of the problem, it follows that the constitutional concept of regional general welfare, accepted in New Hampshire and other states, requires each community to provide for its fair share of the needed low-income housing. This approach is entirely consistent with protection of environmentally sensitive land.

5. The ultimate solutions are legislative, not judicial, but the courts must rule forcefully so that legislators will respond.

6. Total invalidation of the ordinance is usually not appropriate. Ordinance revision, supervised by a master, may be sufficient. Fair share methodologies are readily available, and inclusionary zoning will attract builders willing to provide lower income units, but the "builder's remedy" can cause difficulties. The best planning solutions will occur if litigation by public interest groups is encouraged, with the "builder's remedy" awarded only sparingly. Award of attorney's fees and costs should be given careful consideration.

ARGUMENT

I. INTRODUCTION: THE INTEREST OF APA

The American Planning Association (APA), a national, non-profit association of 27,000 practicing city planners, elected and appointed planning officials, and citizens (including a northern New England chapter, which endorses the filing of this brief), has developed a special research expertise in the relationship of sound land use planning to the availability of low- and moderate-income housing.[1] In 1986, APA's

1. One of APA's predecessor organizations, the American Institute of Planners, published the country's first monograph on fair share regional housing planning. *See* Southern Burlington County NAACP v. Township of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 216, 336 A.2d 713, 747 n.17 (Pashman, J., concurring) (citing BERTSCH &

Board of Directors specifically directed that it take legislative and legal action in state courts to establish and enforce fair share housing and land use programs at the state and local levels. As a result of that policy, an APA committee has carefully studied individual controversies raising fair share issues and has entered three significant cases since 1986.[2]

APA believes that *Britton v. Chester* is potentially a "landmark" case. Building on existing New Hampshire law, there is a clear opportunity for the court to take the next step and mandate a fair share approach that will permit low- and moderate-income persons to live in communities from which they are now unfairly and unconstitutionally excluded. Other states which have acted, with the exception of New Jersey, have chosen formulations which have proven ineffective to deal with this deeply rooted problem. Drawing on its national perspective, APA seeks to assist the court in rethinking the proper nature of a remedy for exclusionary zoning, a remedy that, with appropriate constitutional guidance, can be implemented by the New Hampshire legislature and serve as a model for the many other states with similar problems.

II. THE ORIGINS OF EXCLUSIONARY ZONING

A. *Chester's Land Use Pattern Must Be Evaluated in the Context of National Demographic Trends*

Chester is situated at the northern edge of a continuous urban region sometimes called "Megalopolis" or the "Bos-Wash Corridor," which extends 500 miles from southern New Hampshire through the Virginia suburbs of Washington, D.C. While the population of the United States as a whole has been growing rapidly since 1945, growth in the Northeast has been concentrated in a few areas — notably the New

SHAFOR, A REGIONAL HOUSING PLAN: THE MIAMI VALLEY REGIONAL PLANNING COMMISSION EXPERIENCE (Washington: AIP, Apr. 1971), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975)). Other more recent publications include: AFFORDABLE SINGLE-FAMILY HOUSING: A REVIEW OF DEVELOPMENT STANDARDS (Planning Advisory Service Report No. 385, 1984); CHANGING DEVELOPMENT STANDARDS FOR AFFORDABLE HOUSING (Planning Advisory Service Report No. 371, 1982); INCLUSIONARY ZONING MOVES DOWNTOWN (D. Merriam, D. Brower & P. Tegeler eds. 1985).

2. The American Planning Association has been involved as an *amicus curiae* at the appellate level in three cases involving exclusionary zoning: Bonan v. City of Boston, 398 Mass. 315, 496 N.E.2d 640 (1986); Asian Americans for Equality v. Koch, 128 A.D.2d 99 (1st Dept. 1987), 514 N.Y.S.2d 939, *aff'd*, 72 N.Y.2d 121, 531 N.Y.S.2d 782, 527 N.E.2d 265 (1988); Suffolk Housing Serv. v. Town of Brookhaven, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 511 N.E.2d 67 (1987).

York metropolitan area's western edge (the suburban fringe of New Jersey) and the Boston metropolitan area's northern fringe. This latter area includes most of southeastern New Hampshire, particularly Hillsborough and Rockingham Counties. In 1980, Metropolitan Statistical Areas (MSAs) comprised less than one-sixth of the total land area of the United States but contained three-fourths of the American people. Moreover, the land area occupied by these urbanized areas increased by an extremely rapid forty percent during the 1970s, continuously expanding to encompass communities on the periphery of urban development.[3] Accordingly, most of the growth has been in suburban, rather than in urban or rural areas. This growth pattern holds true for housing as well as employment.

With rapid population growth has come an expansion of land use controls. In general, the land planning process has contributed substantially to maintaining a livable environment. There is no doubt, however, that an indirect, but not always unintended, effect of suburban land use controls has been to increase housing development costs, thereby limiting suburban migration mostly to upper- and upper middle-income people. The result, for disfavored economic and racial groups, has been loss of access to decent housing, to the better new jobs in the suburbs, and to the vastly superior educational facilities that train the middle class. This distortion of the spatial distribution of population by income groups is in sharp contrast to the traditional New England pattern of settlement, where most towns have included a broad range of income groups and, therefore, a more democratic pattern of living.[4]

Chester is at the heart of the southeastern New Hampshire growth area. Since 1960, the Manchester MSA has grown into western Rockingham County to include Derry, the town immediately to the south of Chester. The Towns of Hamstead, Kingston, and Windham — all

3. U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, U.S. SUMMARY, TABLE 35 (1973); U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF THE POPULATION, CHARACTERISTICS OF THE POPULATION, U.S. SUMMARY, TABLES 1 & 30 (1983). For a discussion of the enormous growth in the metropolitan areas of the United States since the end of World War II, particularly the Northeast corridor, see M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 191-223 (1971). Stimulated by the completion of the interstate highway system, that growth has not only shifted residences, but also businesses—manufacturing, office, distribution, and retail—to suburban areas.

4. *See generally* Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317 (1955).

within a few miles of Chester — have become part of the Lawrence-Haverhill MSA. The Nashua and Lowell MSAs have both expanded to include towns south and west of Chester. The recently designated Portsmouth-Dover-Rochester MSA encompasses several Rockingham County towns to the east and north of Chester.[5]

According to responses to a 1984 questionnaire administered by the town's Planning Board, Chester's residents overwhelmingly prefer to discourage growth and maintain a rural atmosphere.[6] The strategy for doing so, as in other exclusionary communities, is to emphasize a land use plan based on large houses built on large lots. In reality, however, Chester is integrated into a metropolitan-centered regional economy. Contradicting the town's rural self-image, only 3.8% of Chester's employed population actually worked in farming, forestry, and fishing as of 1980. Instead, 25.7% worked in managerial or professional positions, 25.1% in sales and administration, and the remaining 45.4% in services, manufacturing and other nonfarm jobs.[7]

Further demonstrating the town's integration into the regional economy, only 15.3% of Chester's employed residents worked in the town, while the remaining 84.7% commuted to jobs elsewhere in the region. According to the 1980 Census, 30.9% held jobs in other Rockingham County communities, 31.8% in other New Hampshire counties, and 22.0% outside the state.[8] This pattern of metropolitan growth from Boston northward into southern New Hampshire bears a strong parallel to the extension of the New York area into northeastern New Jersey and of the Philadelphia/Camden area into southwestern New Jersey.[9]

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5. *See infra* app. A (map illustrating changes).

6. Master Plan for Town of Chester, N.H., app. I, questions 1-4 (May 1986) [hereinafter Master Plan].

7. *Id.* at 76. Not only are few people in Chester engaged in farming, the town's landscape is not, in reality, agricultural. Only 5.2% of Chester's land area is actively used for agriculture. Another 10.2% of the land is devoted to housing, commercial, recreational, transportation and other urban uses, while approximately 24.5% comprises environmentally sensitive wetlands, areas of steep slopes and special flood hazard areas. That leaves approximately 60% of the town, or 10,000 acres, which is neither urban, agricultural, nor environmentally sensitive. *Id.* at 8-9, 14, 18-23. This land could be developed for a variety of activities, including low- and moderate-income housing, if the impediments were removed from Chester's zoning ordinance.

8. *Id.* at 75.

9. For a comparison with housing regions in New Jersey and the application of those regions to the *Mount Laurel* decisions, see R. BURCHELL, P. BEATON & D. LISTOKIN, MT. LAUREL II: CHALLENGE AND DELIVERY OF LOW-COST HOUSING 33-73 (1983).

As the New Jersey Supreme Court recognized in *Southern Burlington County NAACP v. Township of Mount Laurel* (*Mount Laurel I*),[10] it is these communities "in the path of inevitable future residential, commercial and industrial demand and growth" that are most tempted to use exclusionary land use practices.[11]

The towns of western Rockingham County are, like Chester, surrounded on all sides by expanding MSAs. Unlike Chester, these towns experienced rapid population growth. Between 1980 and 1988, Census Bureau estimates reveal that five of the six towns contiguous to Chester—Auburn, Candia, Derry, Freemont, and Raymond—increased by 40% to 47%. Sandown, the sixth town, grew by an estimated 77.4%. In contrast to its neighbors, Chester's population growth rate sharply declined from its 45.2% during the 1970s to only 27.1% between 1980 and 1988.[12] Chester's lower rate of growth can only be explained by regulatory restrictions on otherwise "inevitable" population increases.

B. *Chester's Zoning Is Exclusionary*

Legal commentators have defined exclusionary zoning as land use regulation which raises the price of residential access to a particular area and thereby denies that access to members of low-income groups.[13] Communities that employ exclusionary zoning do so to preserve themselves as enclaves of one social or economic class. The use of land use controls to segregate or exclude large groups of low- and moderate-income persons from decent housing has been well documented.[14] The communities that have employed exclusionary zoning tend to be those on the ex-urban or suburban fringe of metropolitan

10. 67 N.J. 151, 160, 336 A.2d 713, 717 (1975) (*Mount Laurel I*).

11. The Chester Master Plan recognizes that the town is currently a "bedroom community" in southern New Hampshire and that "light, non-polluting industry and commercial enterprises" are to be encouraged. Master Plan, *supra* note 6, at 77.

12. *See infra* app. B.

13. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969). *See also* Annotation, *Exclusionary Zoning*, 48 A.L.R. 3D 1210, 1212 (1973).

14. *See, e.g.*, M. DANIELSON, THE POLITICS OF EXCLUSION (1976); L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES (1974); Branfman, Cohen & Trubeck, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973); Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971).

areas.[15]

Exclusionary zoning is particularly pernicious because lower income individuals are unable to find affordable housing near suburban places of work, necessitating lengthy commuting trips. As these areas typically have limited, if any, mass transit, the journey to work must be by automobile, creating additional economic hardship for lower income individuals.[16]

Williams and Norman, in their analysis of four New Jersey counties comprising the outer ring around the New York City metropolitan area's western edge, described six major exclusionary devices that, apart from market considerations, impose extraordinary additional costs for new housing.[17] These devices, all six of which Chester uses in varying degrees to erect a series of barriers to developers or potential residents of affordable housing, are: (1) Excluding multiple-family dwellings totally or making them subject to a more onerous approval process; (2) restrictions on the number of bedrooms to discourage low-income families; (3) prohibiting or severely limiting inexpensive factory-built (mobile) homes; (4) minimum lot size requirements much larger than justified by any legitimate health or safety concerns; (5) large lot width requirements, which drive up site development costs; and (6) large minimum building size requirements, which in effect mandate expensive buildings where cheaper ones could provide safe, decent housing for poor families.[18] Appendix C sets forth in tabular form a more detailed analysis of Chester's ordinance according to the Williams and Norman criteria.[19] Suffice it to reiterate here that the land use pattern encouraged by Chester's ordinance is completely at odds with the long tradition in New England of compact town centers

15. M. DANIELSON, *supra* note 14, at 27-49.

16. *See generally* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S 114-15 (1973).

17. Williams & Norman, *supra* note 14, at 481, 484.

18. *Id.* The Connecticut Supreme Court has recently struck down zoning code provisions which established minimum building size requirements irrespective of the dwelling's number of occupants since they do not serve any legitimate zoning objective. Builders Serv. Corp. v. Planning & Zoning Comm'n, 208 Conn. 267, 545 A.2d 530 (1988). *See also* Home Builders League of South Jersey, Inc. v. Berlin Township, 81 N.J. 127, 405 A.2d 381 (1979).

19. For a discussion of the consequences of these six exclusionary devices on housing prices, see L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS: THE IMPACT OF LAND-USE CONTROLS ON HOUSING PRICE 16-19, 48-58 (1973); S. SEIDEL, HOUSING COSTS AND GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE 119-94 (1978).

in which all classes and income groups could find a place to live and work.

C. *There Is a Well-Understood Political Dynamic that Encourages Municipalities Such as Chester to Practice Exclusionary Zoning*

Because of the complex and highly discretionary nature of most land planning decisions, it is obviously attractive to seek political solutions to the problem of exclusionary zoning. The APA submits that effective political solutions are obtainable, but not without an initial application of the strong hand of the judiciary. To see why this is so, the political dynamics of exclusionary zoning must be appreciated.

Exclusionary practices on the periphery of urban development stem from two principal political motivations: fear of outsiders or "undesirables," and the search for tax ratables.

1. Fear of Outsiders/Exclusion of "Undesirables"

Exclusionary zoning is often motivated by fear and prejudice against outsiders, particularly those of other social, economic, and racial groups. These fears may often take the form that new immigrants, particularly if they are low-income, will have different lifestyles and not "fit in," thus threatening the status of existing residents.[20]

Chester's residents overwhelmingly oppose construction which would serve to increase the diversity of the town's housing stock. According to the Planning Board's survey, 74% oppose permitting multi-family dwellings which could accommodate more than two families; 70.2% oppose permitting planned unit developments which could include a mix of single-family, multi-family and commercial uses; 66.5% oppose permitting dwellings to be clustered close together even if the overall density within the project remained consistent with the town's two acre minimum lot size.[21]

In the landmark opinion, *Beck v. Town of Raymond*, the New Hampshire Supreme Court recognized that towns may not employ zoning devices "simply to exclude outsiders, . . . especially outsiders of any disadvantaged social or economic group."[22] However, the contin-

20. *See* C. PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 163-209 (1977).

21. Master Plan, *supra* note 6.

22. 118 N.H. 793, 801, 394 A.2d 847, 852 (1978) (citing *Mount Laurel I*, 67 N.J. 151, 336 A.2d 713 (1975)).

ued existence of exclusionary practices in New Hampshire, such as seen in the Chester ordinance, demonstrates that the social and political impetus to be exclusionary has overpowered the existing legal remedies. This case offers an opportunity to redress the imbalance.

2. Low-cost Housing as a Bad Ratable

Chester's residents oppose population growth in part because they fear that increased demand for services and infrastructure would result in higher taxes for them.[23] A town like Chester derives most of its revenue from property taxes. Opposition to constructing affordable housing can be especially vehement because some residents believe that the owners of housing with low assessed values may require the outlay of more expenditures for services than they contribute to the tax base. Consequently, towns often impose limitations on the number of bedrooms in apartments to insure that families with children, who will presumably increase educational costs, will find it difficult to reside in the school district.

This court disapproved "fiscal zoning" in the *Beck* decision.[24] However, given New Hampshire's heavy reliance on the property tax to fund locally-provided services, as is also true in many other states, it is unrealistic to anticipate that fiscal zoning will fade from the municipal consciousness unless strong steps are taken to prohibit it.

3. Overuse of the Environmental Defense

The desire to preserve the environment is often cited as a reason for imposing severe restrictions on land development. Chester's Master Plan, for instance, carefully documents environmentally sensitive areas, including flood hazards, wetlands, and steep slopes, where the town has a legitimate interest in restricting development. But the extensive restrictions imposed on the development of land in Chester are not reasonably justified by the limited acreage which may require careful environmental management, as depicted in the town's plan. Ecological concerns may mask exclusionary motives:

> [A] locality's justifications often relate to the supposedly inevitable consequences of middle-and high-density development. . . . In most cases, these negative impacts can be reduced significantly or avoided entirely by sensitive site selection and design. Unwilling-

23. Master Plan, *supra* note 6.

24. *Beck*, 118 N.J. at 801, 394 A.2d at 851.

ness on the part of a community to even attempt this reconciliation indicates that other motives are probably operating.[25]

Rather than an "environmental defense," which sets environmental protection against affordable housing and the environment should be seen as complementary aspects of an overall goal of serving the public interest. A well thought out affordable housing policy can actually enhance environmental protection strategies, by insuring that needed housing is built in the right place (near existing centers of population) and at high enough densities to use land efficiently (leaving unbuilt land in its natural state). Sprawl produces neither affordable housing nor environmental protection.

D. *The Problem of Exclusionary Zoning is the Direct Result of State Action Which Delegates State Constitutional Authority to Zone Without Placing Controls on the Substantive Exercise of the Delegated Powers*

The statutory basis for planning and zoning in the United States derives from the Standard Planning and Zoning Enabling Acts, drafted by an advisory committee of the United States Department of Commerce in the 1920s under then Secretary Herbert Hoover. The Standard Acts were adopted by virtually all the states, including New Hampshire.[26] Despite many amendments, the Standard Acts still provide the framework for planning and land use regulation throughout most of the nation.

The Standard Acts treated land use as a local problem and an urban problem with no consequences that extended beyond the city boundary. Absent the state's subsequent articulation of a state interest in the

25. L. RUBINOWITZ, *supra* note 14, at 30. *See also* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 279-80, 456 A.2d 390, 452 (1983) (*Mount Laurel II*) (environmental concerns to be taken into account in locating low- and moderate-income housing).

26. New Hampshire adopted the Standard Acts early: the Zoning Enabling Act in 1925 and the Planning/Subdivision Enabling Act in 1935. Although zoning ordinances were quickly adopted by some of the major cities (Manchester and Portsmouth in 1927; Concord and Nashua in 1930), most of the smaller municipalities did not utilize these land use controls until after 1960. Of New Hampshire's 234 municipalities, 30 municipalities had adopted zoning by 1950, 111 had done so by 1960, and 208 had done so by 1990. NEW HAMPSHIRE OFFICE OF STATE PLANNING, SUMMARY OF PLANNING ACTIVITIES (rev. May 21, 1990). By 1970, however, all but two of the most northerly municipalities in the Southern New Hampshire Planning Region had adopted zoning ordinances and subdivision regulations. *Id.*

legislation, the Standard Acts delegated virtually total control of land use to the local level, "historically the city level where the problems which called zoning into being first arose."[27]

The Standard Acts were process oriented, concentrating on the mechanics of making decisions rather than the substantive content of those decisions.[28] Communities were to exercise their land use powers for the broad purposes of "health, safety, morals or general welfare of the community,"[29] with no recognition of extra-jurisdictional impact — either regional or statewide. Armed with this ambiguous authority, the "general welfare" objective to be achieved by the enactment of land use regulations became purely local and insular. Courts recognized this flaw and the potential for exclusionary mischief in some of the earliest zoning cases, even though they generally upheld the zoning restrictions. For instance, in *Brett v. Building Commissioner of Brookline*,[30] the Supreme Judicial Court of Massachusetts found Brookline's single family zoning to be valid. The court, however, carefully noted:

> [T]here is nothing on the face of this by-law to indicate that it will not operate indifferently for the general benefit. It is a matter of common knowledge that there are in numerous districts plans for real estate developments involving modest single-family dwellings within the reach as to price of the thrifty and economical of moderate wage earning capacity.[31]

Under the modern conditions of burgeoning urbanized populations filling ever-expanding metropolitan regions tied together by high speed transportation and communications networks, the simplistic localism of the Standard Acts is clearly inadequate as a delegation of land use powers. Ideally, the legislature should update the delegation framework through regionally-oriented statutory changes, as this court urged in the *Beck* case.[32] If this were done, it would be a simple and

27. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 3 (1972). *Cf.* A. BETTMAN, Brief in *Euclid v. Ambler, City and Regional Planning Papers*, 174-83 (1946); S. TOLL, ZONED AMERICAN (1969) (discussion of the early development of zoning).

28. *See* D. MANDELKER, LAND USE LAW 76 (2d ed. 1988).

29. U.S. DEP'T OF COMMERCE, A STANDARD ZONING ENABLING ACT § 1 (1926). *Cf.* N.H. REV. STAT. ANN. §§ 674:16, :17(c) (1986).

30. 250 Mass. 73, 145 N.E. 269 (1924).

31. *Id.* at 79, 145 N.E. 269. *See also* Euclid v. Ambler, 272 U.S. 365, 390 (1926); Simon v. Town of Needham, 311 Mass. 560, 565-66, 42 N.E.2d 516, 519 (1942) (the "general interests of the public at large" includes opportunity for families to purchase "low cost houses").

32. *See* Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847 (1978). *See gener-*

appropriate matter for the judiciary to maintain the traditional deference accorded governmental actions, because the decision-making would occur at a level where all those affected would have an opportunity to participate and influence those actions.[33]

With very limited exceptions, however,[34] the legislature has chosen to keep substantive decision-making at the local level. Moreover, it is highly unlikely, given the nature of the state legislative process, that this local focus will be altered. Consequently, the lower income person's constitutional right of fair access to communities such as Chester will lie fallow until this court acts. By acting carefully but forcefully, this court can give the legislature a constitutional choice: maintain full local control of land use, but with constitutionally mandated, judicially enforced substantive protections against local parochialism, or, as the New Jersey legislature chose to do after the second *Mount Laurel* decision, restructure the system to provide for state and regional inputs that will justify judicial deference.

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ally Williams, *Planning Law in the 1980's: What Do We Know About It?*, 7 VT. L. REV. 205 (1982).

33. *Cf.* N.H. CONST., pt. I, art. 12: "Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent." *Id.* On the question of matching decision-making levels with those affected by the decisions, see generally Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976).

34. New Hampshire's planning and land use statutes, which underwent extensive revision in 1983, indicate that a town's master plan may include a "housing section which analyzes existing housing resources and addresses current and future housing needs of residents of all levels of income of the municipality and the region in which it is located." N.H. REV. STAT. ANN. § 674:2:III (1986 & Supp. 1990). Additionally, the statutes authorize a series of "innovative land use controls" which permit incentives or benefits to landowners to develop housing for low- and moderate-income housing. *Id.* § 674:21. But the statutes do not mandate any clear connection between the analysis of housing needs, on the one hand, and the preparation of regulations to assure the availability of sufficiently zoned land for housing low- and moderate-income persons. *See id.* § 674:18 (statement of objectives and land use section of master plan only requirements for adoption of zoning ordinance); *cf.* N.J. STAT. ANN. § 40:55D-62(a) (West 1986 & Supp. 1990) (to zone, master plan must include housing element). The real issue, however, is not whether New Hampshire communities may facilitate lower income housing, but whether they must. The state statutes are gentle exhortations which, in context, are little more than window dressing.

N.H. REV. STAT. ANN. § 674:17-I(c) (1986) expands the "community welfare" purposes of the zoning code to include "promot[ing] health and the general welfare," arguably a broader set of purposes that could include both regional and statewide concerns. *Id.* In context, however, this language can just as readily be limited to *local* general welfare.

E. *State Legislative Mechanisms Are Inadequate to Solve the Problem of Exclusionary Zoning*

The inability of legislatures to deal with the exclusionary zoning problem should not be found surprising. With the rapid expansion of suburban populations[35] and "the reapportionment revolution which has insured equitable representation of suburbanites in every state capital,"[36] the political attitudes which result in exclusionary zoning at the local level[37] also dominate the state legislatures.

Professor Danielson's study of the politics of exclusionary zoning remains as valid today as when it was written immediately after the *Mount Laurel I* decision.[38] Danielson notes that it is hard to build political coalitions in support of affordable housing, particularly by those who most need it. The poor who need affordable housing in suburban areas often lack political power.[39] In addition, other groups — home builders, real estate brokers, business groups, particularly large suburban employers — who might advocate for affordable housing at the national or state level are politically constrained in asserting themselves at the local level by their roles in maintaining effective relations with local governments.[40] These groups cannot rock the boat. Inner-city politicians, in addition to being outnumbered by their suburban counterparts, are often unenthusiastic about encouraging dispersal of their own political base to distant suburban communities.[41]

Danielson also provides evidence of these political theories in practice. Specifically, Danielson cited affordable housing initiatives by

35. *See supra* Point II(A).

36. M. DANIELSON, *supra* note 14, at 281.

37. *See supra* Point II(C).

38. *See also* P. COOPER, HARD JUDICIAL CHOICES 30-31, 32, 42-44 (1988).

39. As Danielson correctly observed,

> [The poor] commonly lack influence in most suburban political arenas. The spatial differentiation of the suburban population leaves many jurisdictions with few lower-income residents. In the communities where poor suburbanites live, those with modest incomes typically participate less than the more affluent. They tend to be poorly informed, to fail to perceive their stake in local public policies, and to lack the time, resources, skills, and organizational capabilities to promote and defend their interests effectively. Further limiting the influence of lower-income groups is the small scale of most suburbs, which makes it difficult for minority interests to overcome their political weaknesses by the strength of numbers, as is possible in larger jurisdictions.

M. DANIELSON, *supra* note 14, at 124.

40. *Id.* at 131-48.

41. *Id.* at 149-58.

state-level politicians in Wisconsin, Illinois, and Connecticut, with detailed attention to pre-*Mount Laurel* efforts in New Jersey and the Urban Development Corporation debacle in New York. In each instance, Danielson recorded a history of dismal failures, with the proponents of building low-income housing in the suburbs almost always meeting defeat because of local opposition expressed through their state legislatures.[42]

Danielson notes two principal "aberrations" of this pattern, in Massachusetts and in Dayton, Ohio, where fair housing programs were adopted. He attributes success in each case, however, to unique situations which, while not wholly incapable of repetition, are obviously exceptions to the general pattern, and which are not immediately applicable in New Hampshire.[43] The constitutional rights of New Hampshire's poor citizens cannot be deferred on such a slender chance of success in the political arena.

III. JUDICIAL INTERVENTION TO ERADICATE EXCLUSIONARY ZONING IS APPROPRIATE IF IT IS CAREFULLY CRAFTED TO INSURE REMEDIAL ACTION BY THE STATE LEGISLATURE

A. *The New Hampshire Legislature and Courts Have Begun to Recognize the Seriousness of the Problem*

The 1970s saw an increased use of local planning and zoning ordinances for exclusionary purposes, and a resulting increase in such techniques as the use of larger lot sizes and other density limitations,[44] limitations on mobile homes,[45] and limitations on the numbers and locations of multi-family dwellings. Additionally, the 1970s saw the beginnings of growth limiting ordinances controlling the number of

42. *Id.* at 289-322.

43. Danielson attributes success to the relatively modest scope of each proposal. In Massachusetts, he also found key support from white Boston legislators who were determined to retaliate against the suburbs for their support of school desegregation legislation that primarily affected Boston. *Id.* at 300-06. In Dayton, he found an unusually homogeneous small urbanized region with unusually effective political leadership on the housing issue. *Id.* at 250-62.

44. *See* Steel Hill Dev. Inc. v. Town of Sanbornton, 338 F. Supp. 301 (D.N.H.), *aff'd*, 469 F.2d 956 (1st Cir. 1972); Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847 (1978); Town of Durham v. White Enters., Inc., 115 N.H. 645, 348 A.2d 706 (1975).

45. *See* Cloutier v. Epping Sewer & Water Comm'n, 116 N.H. 276, 360 A.2d 892 (1976); Village House, Inc. v. Town of Loudon, 114 N.H. 76, 314 A.2d 635 (1974).

building permits issued per year.[46] Finally, the 1970s witnessed the imposition of environmental protection ordinances and regulations which further decreased density by, for example, increasing setbacks from wetlands and limiting building on aquifer recharge areas.

The legislature tried to counter these exclusionary trends with three basic measures. First, the legislature placed successively more stringent limitations on a municipality's ability to zone out manufactured housing.[47] Second, it has put limitations on the use of planning and zoning, especially growth timing ordinances, by legislating that such ordinances must be a part of, and a direct result of, a comprehensive planning process and not arbitrary.[48] Third, it has enunciated policies that mitigate the discrimination against low-income people, resulting from planning and zoning misuse.[49] As previously noted, the legislature has also given its explicit approval to "innovative land use controls," one of which is "inclusionary zoning."[50]

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46. *See* Stoney-Brook Dev. Corp. v. Town of Fremont, 124 N.H. 583, 474 A.2d 561 (1984); Conway v. Town of Stratham, 120 N.H. 257, 414 A.2d 539 (1980); Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847 (1978).

47. *See* N.H. REV. STAT. ANN. § 31:118-:119 (1981), *repealed and readopted*, 1983 with revisions as *Id.* § 674:31-:32 (1986) and amended again in 1985.

48. *See* N.H. REV. STAT. ANN. tit. LXIV, *Planning and Zoning*, Note re "History" (conforming master plan and zoning ordinances within two years); N.H. REV. STAT. ANN. § 674:18 (1986) (requiring adoption of statement of objectives and land use section of master plan before adopting zoning ordinance); *Id.* § 674:22 (growth management control "may be adopted only after preparation and adoption by a planning board of a master plan and capital and improvement program and shall be based on a growth management process intended to access and balance community development needs and consider regional development needs").

49. In particular, see N.H. REV. STAT. ANN. ch. 204-C (1989):

> It is hereby declared that . . . there continues to exist within the state a serious shortage of safe and sanitary dwelling accommodations at rents which elderly and low income persons can afford and that such persons are forced to occupy substandard dwelling accommodations; that the result and conditions of insecurity, overcrowding, use of unsound and unsanitary buildings and dislocation of family life are injurious to health and safety and detrimental to morale and constitute a dangerous threat to the well-being of the entire state . . . .

Id. See also the Declaration of Purpose in Chapter 406 of the Laws of 1981 and the "Findings and Statement of Intent" of Chapter 240 of the Laws of 1988.

50. N.H. REV. STAT. ANN. § 674:21(k) (1986 & Supp. 1990). It should also be noted that, pursuant to state planning procedures, the Southern New Hampshire Planning Commission (SNHPC) prepared the Housing Element of the Land Use Plan 2010 for the Southern New Hampshire Planning Commission Region in June 1988. Table 24 of that Housing Element identified a total low- and moderate-income housing need for the region of 8322 units as of the 1980 Census. Chester's adjusted fair share allocation of low- and moderate-income housing under the SNHPC plan was 90 units. Under

The New Hampshire Supreme Court has, likewise, reviewed the use of municipal planning and zoning to restrict growth. Beginning in 1978, the court began to receive challenges to local land use regulations alleging an exclusionary result. In *Beck v. Town of Raymond*,[51] the court acknowledged the existence of municipal power to control the timing of growth (this predated N.H. REV. STAT. ANN. 674:22 (1986)) but warned such controls could not be adopted lightly.[52] The court stated that growth controls must be accompanied by good faith efforts to increase the capacity of municipal services,[53] and it emphasized that such measures may not be used simply to exclude outsiders of any disadvantaged social or economic group.[54] Likewise, in *Stoney-Brook Development Corp. v. Town of Freemont*, the court stated that growth controls are intended to "regulate and control the timing of development, . . . not the prevention of development."[55] These cases, which are based squarely on New Hampshire law but which recognize and cite with approval the analogous decision of the New Jersey Supreme Court in the first *Mount Laurel* case, establish the basis for a non-exclusionary obligation on the part of New Hampshire municipalities.[56]

Two later decisions of this court implicitly expand the non-exclusionary premise of *Beck* by mandating the inclusion of "undesirables"

Chester's Master Plan, which assumed the region to be Rockingham County, Chester had a "fair share" allocation of 67 low- and moderate-income households. Master Plan, *supra* note 6, at 49.

51. 118 N.H. 793, 394 A.2d 847 (1978).

52. Specifically, the court stated:

> Growth controls must, however, be reasonable and nondiscriminatory. . . . Good faith efforts to increase the capacity of municipal services should accompany growth controls. They must not be parochial; that is, controls must not be imposed simply to exclude outsiders, especially outsiders of any disadvantaged social or economic group.

Id. at 800-01, 394 A.2d at 852 (citations omitted).

53. *Id.*

54. *Id.* The court added:

> Towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge. They must develop plans to insure that municipal services, which normal growth will require, will be provided for in an orderly and rational manner. Any limitations on the expansion must not unreasonably restrict normal growth.

Id. at 801, 394 A.2d at 852.

55. 124 N.H. 583, 589, 474 A.2d 561, 564 (1984) (citing N.H. REV. STAT. ANN. § 31:62-a (Supp. 1983)).

56. *See* Beck v. Town of Raymond, 118 N.H. 793, 801, 394 A.2d 847, 851 (1978).

in a single-family residential zone on the basis of a broad reading of legislative policy. In *Region 10 Client Management, Inc. v. Town of Hampstead*,[57] a half-way house for retarded persons was deemed a permitted use which overrode local "single-family" zoning, because it was state "sponsored," even though not state owned or operated. The court found that the statutory scheme embodied a state policy that local zoning ordinances may not circumvent.[58] As indicated above, there is ample evidence in the New Hampshire Revised Statutes that the legislature also recognizes the parochial tendency of municipalities with respect to low-income housing, analogous to the policies recognized in *Region 10*.

Most recently, in *Soares v. Town of Atkinson*,[59] the New Hampshire court was called upon to consider the cumulative effect of large lot sizes, restrictions on mobile homes and multi-family dwellings, growth timing ordinances, and environmental protection provisions on the affordability of housing, and, in turn, upon the ability of people of low- and moderate-incomes to live in that housing. The court was also, for the first time, called upon to decide the appropriateness of the "builder's remedy."

In *Soares*, the lower court voided the ordinance on the basis of *Beck* and the *Mount Laurel* doctrine. While the municipality's appeal was pending, Atkinson revised the challenged ordinance, and the supreme court remanded the matter to the lower court to examine the case in light of the new ordinance. Significantly, both this court and the Master saw the issue on remand to be whether the revised ordinance satisfied the constitutional standard; both ultimately concluded that it did.[60] The *Chester* case now before the court affords an appropriate opportunity to make explicit what is implicit in the *Soares* case: that the exclusionary effects of local land use controls violate the

57. 120 N.H. 885, 424 A.2d 207 (1980).

58. *Id.* at 888, 424 A.2d at 209. *Accord* Northern N.H. Mental Health Hous., Inc. v. Town of Conway, 121 N.H. 811, 435 A.2d 131 (1981) (half-way house for mentally ill persons).

59. 128 N.H. 350, 512 A.2d 436 (1986), *appeal after remand*, 129 N.H. 313, 529 A.2d 867 (1987).

60. In the second *Soares* appeal, the supreme court also ruled on subsidiary issues, which included the builder's remedy, attorney's fees and costs, and damages. The court upheld the Master's finding that the builder's remedy was inappropriate under the specific circumstances and that, given the particular facts of the case, neither attorney's fees, costs, nor damages, were appropriately awarded. The opinion does not indicate that these remedies could never be considered appropriate.

constitution.[61]

In the progression from *Beck* to *Soares*, the courts have considered increasingly stringent remedies for exclusionary practices. The APA submits that this progression to a strong remedy is necessary if constitutional rights to non-exclusionary zoning are to be vindicated, but will suggest in Point IV some important modifications of the Master's approach. By way of summary, however, we emphasize that if this court takes the next logical step, as requested in the *Chester* case, it will be acting squarely within its own precedents and the articulated policies of the State of New Hampshire.

B. *The New Hampshire Developments are Part of a Nationwide Trend, Especially Experienced in States Having Rapid Population Growth*

The *Chester* litigation also comes within the context of a rapidly evolving concern about exclusionary land use controls in other states.

1. New Jersey

In the *Mount Laurel* doctrine, New Jersey has taken one possible next step, that of mandating systematic, affirmative measures to encourage production of low- and moderate-income housing. The most important lesson of the New Jersey experience, however, is that without a firm judicial hand, articulation of a constitutional obligation will be little more than empty rhetoric. The first *Mount Laurel* opinion, in 1975, concluded with an optimistic statement by the court that "[t]he municipality should first have full opportunity to itself act without judicial supervision. We trust it will do so in the spirit we have suggested."[62] Mount Laurel Township, however, did not comply.[63] Nor did any significant number of other municipalities, nor did the state.[64]

With its dramatically expanded remedies, *Mount Laurel II* success-

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61. Despite the outcome of the *Soares* case, the APA notes that ordinance revisions can be used by recalcitrant municipalities to delay compliance with their constitutional obligation. Because of such abuses, the New Jersey Supreme Court eventually decided that it would not remand to consider post-trial revisions to a challenged ordinance and that it would not hear a municipality's appeal until it had been adjudged in full compliance by the trial judge. *See Mount Laurel II*, 92 N.J. 158, 290, 456 A.2d 390, 458 (1983).

62. 67 N.J. 151, 192, 336 A.2d 713, 734 (1975).

63. *Mount Laurel II*, 92 N.J. at 198-99, 456 A.2d at 410.

64. *Id. See also* Payne, *Housing Rights and Remedies: A "Legislative History" of Mount Laurel II*, 14 SETON HALL L. REV. 889 (1984).

fully put "steel" into the *Mount Laurel* doctrine.[65] Even under the threat of these sanctions, however, most municipalities waited to be sued rather than coming into compliance voluntarily. It was fierce opposition to this volume of litigation which eventually convinced a reluctant legislature and governor that a "political" solution, the New Jersey Fair Housing Act of 1985,[66] was a preferable solution. In the so-called *Mount Laurel III* decision, *Hills Development Co. v. Township of Bernards*,[67] the New Jersey Supreme Court swept aside objections to some of the political compromises contained in the Act and announced that it would give the new administrative mechanisms time to mature before entertaining any further *Mount Laurel* challenges.[68]

The New Jersey experience confirms Professor Danielson's earlier analysis, summarized in Point II, of the necessity for judicial intervention if the exclusionary zoning problem is to be solved. A recent study found that the *Mount Laurel* approach worked well, providing more than 22,000 units of affordable housing either built or planned between 1983 and 1988.[69] Other states, those that have attempted to address affordable housing issues without an active judicial role, provide further examples of both the evolving national trend towards recognition of the exclusionary zoning problem and the crucial role of an enforceable judicial interpretation of the state constitution.

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65. *Mount Laurel II*, 92 N.J. at 200, 456 A.2d at 410.

66. N.J. STAT. ANN. § 52:27D-301 to 329 (West 1986)

67. 103 N.J. 1, 510 A.2d 621 (1986).

68. In the words of one account of the New Jersey experience:

> The lesson of New Jersey is that the legislature will not act without pressure from the judiciary. . . . Criticism of judicial activism in exclusionary zoning cases arises from a belief that since judges are ordinarily not elected, courts should defer to the legislature. Yet such wisdom is most persuasive only in a vacuum; in New Jersey, the state legislature was immobilized on the exclusionary zoning issue due to opposition by suburban lawmakers, who worked closely with the local officials elected in their towns. The New Jersey State legislature thus avoided the problem of exclusionary zoning until the New Jersey Supreme Court's rulings forced it to act. The court's action resulted in the forming of a political consensus which was required for the legislation to pass. . . . The lesson in the New Jersey experience is the vital role a court can play in publicizing important yet complex issues about which citizens might otherwise be ambivalent.

McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, in LAND USE & ENVTL. L. REV. 203, 204-05, 239-41 (1988) (citations omitted). *See* M. DANIELSON, *supra* note 14, at 289-300.

69. *See* Lamar, Mallach & Payne, *Mount Laurel at Work: Affordable Housing in New Jersey 1983-1988*, 41 RUTGERS L. REV. 1197 (1989); *see also infra* app. D for full tabulation of study data.

2. New York

In *Berenson v. Town of New Castle*,[70] an early growth management case, the New York Court of Appeals invalidated a town's refusal to zone for multiple family dwellings. The court effectively adopted the *Mount Laurel I* rationale of "regional general welfare" and suggested two tests for evaluating restrictive zoning: first, whether the ordinance provided a "balanced and well ordered plan," and second, whether there was "consideration . . . given to regional needs and requirements."[71] While adhering to the *Berenson* doctrine, the New York court has had difficulty making it into an effective mechanism for meeting the needs of low- and moderate-income households.[72]

The most recent New York decision, *Suffolk Housing Services v. Town of Brookhaven*,[73] illustrates both the strengths and the weaknesses of that state's approach. While reiterating in stirring language its regional approach and constitutional commitment to "breaking down . . . barriers that frustrate the deep human yearnings of low-income and minority groups for decent housing they can afford in decent surroundings,"[74] the court of appeals denied town-wide relief.

The court held that the plaintiffs must come forward with a specific housing site and developer before relief can be granted.[75] We submit that it is unreasonable to expect general vindication of constitutional

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70. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

71. *Id.* at 110-11, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 681. The court continued:

> [I]t must be recognized that zoning often has substantial impact beyond the boundaries of the municipality. Thus, the court, in examining the ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on neighboring communities.

Id.

72. In the words of one knowledgeable commentator, the New York courts

> have not only failed to clarify the doctrine . . . but have gradually restructured it in such a way that today it appears to be in serious danger of disappearing entirely — not through explicit re-evaluation or reversal, but through a process of judicial erosion.

Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics and the Future of the Berenson Doctrine*, 4 PACE ENVTL. L. REV. 37, 42 (1986). *See also* Rice, *Survey of New York Law: Zoning and Land Use*, 37 SYRACUSE L. REV. 747, 755 (1986) ("the lack of low-income housing which has resulted from . . . the *Berenson* standard of review").

73. 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987).

74. *Id.* at 131, 511 N.E.2d at 71, 517 N.Y.S.2d at 927 (quoting Warth v. Seldin, 422 U.S. 490, 528-29 (1975) (Brennan, J., dissenting)).

75. *Id.*

rights if the plaintiffs in each site-specific battle must endure the length, complexity and expense that the New York court imposed on the *Brookhaven* plaintiffs.

3. California

In *Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore*,[76] the California Supreme Court similarly embraced the view that a municipality may not zone without regard to the regional effect of its regulations. Although reaffirming deference to the legislative process such that a local land use regulation would be upheld if it "reasonably relates to the public welfare," the court explained that its analysis "should begin by asking whose welfare must the ordinance serve."[77] The supreme court then remanded the case, instructing the lower court to determine whether a municipality's regulation influenced the supply and distribution of housing beyond the municipality. If so, "judicial inquiry must consider the welfare of that region."[78] Citing *Mount Laurel* and several law reviews, the court concluded:

> To hold . . . that defendant city may zone the land within its border without any concern for [nonresidents] would indeed make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning.[79]

Unlike the ambiguous quasi-standing requirement of New York's *Suffolk Housing* decision, the California courts have rejected the *Warth v. Seldin* model and have held that standing to challenge exclusionary practices does not depend on a showing of "substantial probability" that the alleged injury would not exist but for those practices. As the California Supreme Court recognized,

> [a]pplying the *Warth* standard in California would have the effect of putting the most restrictive zoning ordinances beyond judicial

76. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

77. *Id.* at 605, 557 P.2d at 487, 135 Cal. Rptr. at 55. The court explained:

> In past cases . . . we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus, an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.

Id.

78. *Id.*

79. *Id.* at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56 (citing Scott v. City of Indian Wells, 6 Cal. 3d 541, 548, 492 P.2d 1137, 1141, 99 Cal. Rptr. 745, 749 (1972)).

review. The more restrictive the city's zoning becomes, the less likely it will be that a builder will propose a housing project that would satisfy the needs of the excluded group. Such an act by a builder becomes an increasingly futile gesture.[80]

4. Pennsylvania

A line of early Pennsylvania cases preceded the *Mount Laurel* doctrine. The leading decision is *Appeal of Girsh*.[81] In that case, the Pennsylvania Supreme Court held unconstitutional a total exclusion of apartments from a relatively small, but largely built-up wealthy community outside Philadelphia.[82]

Later Pennsylvania cases quoted with approval the *Mount Laurel* doctrine, including *Willistown Township v. Chesterdale Farms, Inc.*,[83] and *Surrick v. Zoning Hearing Board of Upper Providence Township*.[84] In *Surrick*, the Pennsylvania Court explicitly rejected the United States Supreme Court's view in *Metropolitan Housing Development Co. v. Village of Arlington Heights*,[85] that proof of discriminatory intent was necessary in housing cases. The court emphasized that, at least in Pennsylvania, evidence of exclusionary effect was more important. As in New York, however, Pennsylvania's results have fallen short of its expansive doctrinal language.[86] This is because Pennsylvania has focused on requiring a diversity of building types rather than a diversity of affordability levels. The plaintiff in *Girsh*, for instance, wanted to build two nine-story luxury buildings.[87] As Justice Hall aptly noted in

80. Stocks v. City of Irvine, 114 Cal. App. 3d 520, 533, 170 Cal. Rptr. 724, 731 (1981).

81. 437 Pa. 237, 263 A.2d 395 (1970).

82. *Id.* at 242-43, 263 A.2d at 397-98. The decision contains ringing language about the evils of exclusion:

> 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. . . . [I]f Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden.

Id. at 244-45, 263 A.2d at 398-99.

83. 462 Pa. 445, 341 A.2d 466 (1975).

84. 476 Pa. 182, 382 A.2d 105 (1977).

85. 429 U.S. 252 (1977).

86. *See generally* Note, *The Pennsylvania Supreme Court and the Exclusionary Zoning Dilemma*, 29 VILL. L. REV. 477 (1984).

87. *See* 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 50.18 (rev. ed. 1987).

Mount Laurel I, zoning should be for the living welfare of the people, not for abstractions such as building types.[88]

5. Other States

New Hampshire, New Jersey, New York, California and Pennsylvania claim the leading decisions on the regional welfare approach to local land use controls. Several other states have also recognized and condemned exclusionary zoning, including Washington, Massachusetts and Michigan.[89] Several states, including New Hampshire, have used legislative initiative to recognize and condemn exclusionary zoning, but these tend to be either loosely worded or permissive. This reflects the pressures on legislatures to stop short of effective enforcement.[90]

This recitation has included only incidental mention of federal law because, apart from statute,[91] there is no federal right to shelter.[92] This places the responsibility squarely before the states and their individual constitutional systems, for shelter is amongst the most basic of human needs and regulation of land uses to provide shelter is one of the most basic functions of state law. In simpler times, simple forms of regulation and simpler levels of judicial review sufficed. As the foregoing survey of legal developments demonstrates, however, states with differing characteristics are increasingly alert to the problem of exclusionary zoning and have dealt with it with varying degrees of success. At a minimum there can be no question that judicial action is warranted.

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88. *Mount Laurel I*, 67 N.J. 151, 188, 336 A.2d 713, 732 (1975).

89. *See* Sturges v. Town of Chilmark, 380 Mass. 246, 402 N.E.2d 1346 (1980) (significance of regional considerations); Smookler v. Wheatfield Township, 394 Mich. 574, 232 N.W.2d 616 (1975) (exclusion of trailer homes); Bristow v. City of Woodhaven, 35 Mich. Ct. App. 205, 192 N.W.2d 322 (1971) (same); Save a Neighborhood Env't v. City of Seattle, 101 Wash. 2d 280, 676 P.2d 1006 (1984) (rezoning for affordable housing serves general welfare). *See generally* 3 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 66.62-.81 (rev. ed. 1985).

90. *See generally* 3 N. WILLIAMS, supra note 89, § 66.83.

91. Under many circumstances, exclusionary zoning may violate the Fair Housing Act of 1968, tit. VIII, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)), because of the disproportionate need minority groups have for low- and moderate-income housing. *See* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

92. Lindsey v. Normet, 405 U.S. 56 (1972).

C. *There Is a Consistent Constitutional Theme which Ties Together These Factual and Legal Developments Around the Nation*

As indicated in Point III(B) above, in the 1970s the courts in many states — including most of the major states with the most experience in land use controls — have taken a strong position against exclusionary land use devices. The basic reason for this striking change of position is simple enough: it finally became quite clear that under the judicial laissez-faire policies so prevalent in the 1950s and 1960s, the function of land use controls had been transformed. The system began as a device to protect residential and natural resource areas from the hustle and bustle of commercial and industrial activity; now it was also being used as a means of excluding large groups of the population from many of the benefits of modern civilization — access to good affordable housing, the best new jobs, and good schools.

The rules prevailing in the large body of anti-exclusionary zoning law of the 1970s and 1980s may be summarized as follows:

1. Housing is, of course, one of the prime necessities of life, along with food and clothing. Moreover, with the ubiquity of state-imposed land use controls in modern times (208 of 234 municipalities in New Hampshire) the state controls access to housing to a greater extent than any other basic need.[93] Any legal rule whose intent and/or effect is to exclude large groups of the population from access to good housing does not deserve, and has not been granted, the presumption of validity normally accorded to public regulations of private activity.

2. By universal agreement, documented in innumerable studies all over the world, the provision of affordable housing normally requires some access to land for mobile or manufactured homes and/or some form of multiple housing. Merely raising the permitted density for new housing may be a prerequisite to success in this respect, but taken by itself it does not insure success unless simultaneous controls are placed on affordability. The result otherwise may be merely the enrichment of the builder (and it is the builder who gets to choose).

3. Most land use controls are concerned with problems of purely local concern — what use on which block — and are properly evaluated in that context. However, some land use controls affect the availa-

93. *See Mount Laurel II*, 92 N.J. 158, 209, 456 A.2d 390, 415 (1983) ("The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land.") (emphasis by the court).

bility of facilities which serve an entire region or subregion, or where the market is regional in scope.

4. In the case of the latter type of controls, their validity must be evaluated in terms of their contribution to the regional general welfare.

The considerations involved in such an analysis are similar to those involved in equal protection cases. The underlying basic principles are the same: if a governmental body decides to use public regulations such as planning and zoning, it must employ them on behalf of the welfare of all sectors of the population.[94] The state courts, however, true to their long tradition of keeping tight control over land use law, have phrased the leading decisions in the framework of "regional general welfare" rather than equal protection. By doing so, the general proposition in American law on police power regulation of private activity — that to be valid, such restrictions must promote the public health, safety and general welfare — has been transformed to impose responsibilities on towns as well as to give them more power.

This doctrine finds textual support in various constitutional phrasings in different states. In New Jersey, the lead state at present, the source was the "general welfare" requirement of the New Jersey Constitution, article I, paragraph 1.[95] In New Hampshire, it is part II, article 5 of the Constitution (power "to make . . . all manner of wholesome and reasonable . . . laws . . . for the benefit and welfare of this state").[96] At base, however, the regional general welfare doctrine is derived from the inherent nature of the constitutional order. Justice Tobriner of the California Supreme Court best expressed the "general welfare" doctrine when he stated:

> [I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region. The present ordinance . . . significantly affects the interests of non-residents who are not represented in the city legislative body and cannot vote on a city initiative. [Justice Tobriner then criticized the traditional view of the general welfare approach, quoted *supra* note

94. *See* Southern Alameda County Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 295-96 (9th Cir. 1970); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 696-97 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

95. *See Mount Laurel I*, 67 N.J. 151, 174-75, 336 A.2d 713, 725 (1975).

96. *See* Soucy v. State, 127 N.H. 451, 506 A.2d 288 (1985) (source of the police power).

> 77.] These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the city boundaries, the inquiry may be limited accordingly; if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region.[97]

5. Estimating future regional need for various levels and types of housing is a standard and quite familiar practice for trained housing economists. The practice involves consideration of demographic trends, projections of future employment, and so forth. The more difficult job, involving assumptions on major questions of public policy, comes in the allocation of regional need to specific municipalities. Yet in devising an effective remedy for a violation of constitutional rights, some mechanism is necessary to carry out the "fair share" principle, as adopted in other states.[98]

A numerical fair share is obviously necessary to inform a town of what it must do. It also serves the equally important need of informing the town what it need not do. Under the fair share approach, each community knows the maximum limit on the local duty to accept inexpensive, higher-density housing. Consequently, a town which provides for a substantial amount of higher density affordable housing will not, just for that reason, be forced to continue permitting much more such housing indefinitely.[99] This approach is of crucial importance not only because it is fair, but because in doctrinal terms it sharply limits the involvement of the courts in what might otherwise be regarded as "legislative" matters, and because in practical terms it makes compliance easier to "sell" to reluctant municipalities.

6. Experience with anti-exclusionary judicial policy has gone furthest in New Jersey, which was originally the most overtly exclusion-

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97. Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 607, 557 P.2d 473, 487, 135 Cal. Rptr. 41, 55 (1976).

98. *See, e.g.*, AMG Realty Co. v. Township of Warren, 207 N.J. Super. 388, 504 A.2d 692 (Law Div. 1984).

99. As Chief Justice Wilentz observed:

> *Mount Laurel* is not an indiscriminate broom designed to sweep away all distinctions in the use of land. Municipalities may continue to reserve areas for upper income housing, may continue to require certain community amenities in certain areas, may continue to zone with some regard to their fiscal obligations . . . provided that they have otherwise complied with their *Mount Laurel* obligations.

Mount Laurel II, 92 N.J. 158, 260, 456 A.2d 390, 442 (1983).

ary state. As a result of the court's firm stand, and of the near chaos resulting from wholesale reliance on the "builder's remedy," the New Jersey Legislature finally took charge and created a new state agency to handle the problem on a fair share basis.[100] There have, of course, been compromises, but the result is that the critical decisions are now made by a new state agency staffed by competent professionals — just what the court had urged in the two *Mount Laurel* decisions. While the New Hampshire situation is of course different, the court should nevertheless handle the *Chester* case in a manner which encourages the legislature to take charge.

8. Exclusionary towns often point to the fiscal system as the reason for their anti-social policies. Specifically, these towns argue that the heavy dependence on local real property taxes to fund public services, particularly education, drives them directly to exclusionary action in order to prevent "bad ratables," or those which are thought to require a lot of services without bringing in much taxes. Indeed, it is sometimes argued that if public action in effect subsidizes a course of action, as it does here, then such action really could not possibly violate constitutional norms. Actually, to the extent that the alleged relationships do exist, the argument proves just the opposite. The reliance on local real property taxes is clearly another form of what is unmistakably governmental action, and in the real world contributes directly to unconstitutional discrimination.

IV. IT IS POSSIBLE FOR THE COURT TO FASHION AN EFFECTIVE REMEDY THAT WILL VINDICATE THE CONSTITUTIONAL RIGHTS OF LOWER INCOME PLAINTIFFS AND ENCOURAGE AN APPROPRIATE LEGISLATIVE RESPONSE

A. *The Solution to the Exclusionary Zoning Problem Is Rightfully a Legislative One*

Ideally, this court should encourage state and local legislative bodies to find a solution to the exclusionary zoning problem because these bodies have the constitutional power to make discretionary policy choices that are beyond the competence of the court. By the same token, however, plaintiffs are entitled to immediate vindication of their

100. N.J. STAT. ANN. §§ 52:27D-301 to 329 (West 1986). *See* Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988).

constitutional rights, and the APA's study of the experience to date confirms that voluntary compliance will come only after a period of vigorous judicial enforcement.

We do not seek to understate the herculean proportions of this task. As explained in Point II above, the fixed structure of state and local government, in New Hampshire as elsewhere, magnifies local exclusionary preferences and neutralizes the state's ability to impose a broader perspective. Judicial enforcement of constitutional principles is the only way that this stalemate can be broken. As the *Mount Laurel II* court put it:

> [W]hile we have always preferred legislative to judicial action in this field, we shall continue — until the Legislature acts — to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine. That is our duty. We may not build houses, but we do enforce the constitution.[101]

Faced with inevitable legislative inaction, however, the courts find themselves an infelicitous forum. Because judges are not empowered to make policy, they must rely on the "objective" testimony presented to them by planners and other experts, searching for "truth" when wisdom is the more salient quality. The necessary trial-type proceedings threaten to bog down in complexity and it is almost impossible to achieve the flexible give and take which characterizes legislative proceedings.

The New Jersey Supreme Court's approach to this dilemma has two aspects and merits careful study. First, the court utilized existing policy-oriented plans, so that any necessary judicial orders implemented rather than usurped the political process. New Jersey's use of the State Development Guide Plan eliminated a vast amount of difficulty the courts had in deciding which municipalities had to comply under *Mount Laurel I*.[102] New Hampshire's regional planning process, discussed in Part III(A), is well established at this point, and has already resulted in the development of fair share plans. Subject to review for constitutional adequacy, this court should give all feasible deference to these plans.

The second aspect of the *Mount Laurel II* approach was to fashion relatively stringent remedies that transferred a significant amount of discretionary control from municipalities to courts and builder-plain-

101. *Mount Laurel II*, 92 N.J. at 352, 456 A.2d at 490.

102. *Id.* at 223, 456 A.2d at 422.

tiffs because of the failure of voluntary compliance.[103] Voluntary compliance should be encouraged and it is possible, of course, that compliance will be more readily forthcoming in New Hampshire than in New Jersey. Should that not be the case, however, the court must make clear that strong, judicially enforced remedies will be used.

B. *There Are a Number of Remedies Available to the Courts which Remain within the Competence of the Judiciary but which Will Encourage a More Comprehensive Legislative Solution*

Given the likelihood that a strong remedy will be necessary in a number of New Hampshire communities, the court should modify the remedies ordered in this case to insure that housing progress does not inadvertently harm other planning values.

1. Total Invalidation of the Ordinance is Rarely Appropriate

Totally enjoining the operation of the zoning ordinance may be an effective threat that would induce compliance with the constitutional obligation, not only in Chester but in other exclusionary municipalities. The cost of achieving compliance this way will almost always be too great. However, if individual New Hampshire communities were to remain unzoned for even brief periods, inappropriate uses would gain vested rights that could not be undone, thereby saddling future generations with the costs of this generation's folly.[104]

Moreover, as Justice Brennan stated in *San Diego Gas & Electric Co. v. City of San Diego,*[105] "[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity."[106] Justice Brennan quoted a California city attorney giving vivid professional advice to colleagues at a conference:

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103. *See supra* Point III(C)(6).

104. This solution also employs what might be called the "candy store fallacy." A parent who sends a five-year-old into a grocery store with a five dollar bill to buy breakfast, with a clear admonishment not to buy candy, may be enormously surprised at the number of things in the store that are not candy but that mom or dad would not want to eat for breakfast. Similarly, a court simply striking down one action of a local government may, if it observes the continuing process, be astonished at the candy store full of equally unacceptable alternatives available to a creative local government.

105. 450 U.S. 621 (1981) (Brennan, J., dissenting).

106. *Id.* at 655 n.22.

IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

> If . . . you try the case and lose, don't worry about it. All is not lost. . . . [C]hange the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.[107]

Mount Laurel II held that ordinance invalidation was a possible remedy, but it has never been used. Instead, the courts have on a number of occasions issued a temporary injunction against approval of unvested land use applications such as preliminary subdivision approval, and in at least one particularly flagrant instance against issuance of any building permits. This procedure is now embodied in Section 5:91-11.1 of New Jersey's Administrative Code. Because this approach prevents rather than permits land development, it does not have the same potential for creating permanent harm to the community.

2. Fair Share Methodologies Are Readily Available but Should Be Used Flexibly

Fair share methodologies are readily available and all quite similar, although seemingly small statistical changes can produce quite different results.[108] The advantage of the formulaic approach is that it tells municipalities the exact limit of their constitutional obligation. The disadvantage is that the formula cannot be expected to incorporate all the tiny variables that make each town different, and it sometimes produces inappropriate results that engender widespread municipal hostility and fear.[109]

Fair share numbers should be used as a guide, but the court should make clear that the formulaic result is to be adjusted, up or down,

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107. *Id.* (quoting Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations Including Inverse Condemnation*, 38B NIMLO MUN. L. REV. 192-93 (1975)).

108. *Compare* AMG Realty Co. v. Township of Warren, 207 N.J. Super. 388, 504 A.2d 692 (Law Div. 1984) *with* N.J. ADMIN. CODE tit. 5, § 5:92 (Supp. 1986) (Technical Appendix). *See generally* D. LISTOKIN, FAIR SHARE HOUSING ALLOCATION (Rutgers Center for Urban Policy Research 1976) for a discussion of fairshare allocation methodologies.

109. For one such New Jersey example, see Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987) (fair share of 816 in a town with less than 800 existing dwelling units).

upon an individualized examination of each municipality's capacity to absorb new affordable housing or rehabilitate existing substandard housing. This added flexibility should make the formulaic approach, and hence the court's constitutional doctrine, more acceptable to municipalities, without falling into the unenforceable "numberless" approach of the *Oakwood* case.[110] The court should rely on existing New Hampshire fair share methodologies, such as the one developed by the Office of State Planning.[111] It should also encourage, as did the New Jersey court, the use of masters to work with the parties in a non-adjudicative setting to formulate compliance plans.[112] This approach can significantly reduce the procedural formalism of trial-type proceedings that often frustrates efforts to reach sensible compromise.[113]

3. The "Builder's Remedy" Should Be Retained but Subordinated to Mechanisms That Encourage Primary Litigation by Public Interest Plaintiffs

The "builder's remedy" is typically the most controversial aspect of an exclusionary zoning case.

a. *Distinguishing the Substantive and Procedural Dimensions of the "Builder's Remedy"*

In its substantive dimension, the "builder's remedy" refers to a technique for providing lower income housing by allowing development at

110. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977). If specific fair share numbers are not developed, the court would have to provide some other guidelines in its order. At a minimum, it should find:

> in general, a community in this area offering a diversity of housing types would be expected to have at least X% of its residential land zoned for apartments, at least another X% zoned for residences on lots of one-quarter acre or less, and at least another X% zoned for residences on half-acre or less lots.

This form of order that would provide more specific guidance than a simple invalidation of the ordinance without placing the court in the position of a super-legislature. *But see supra* Point III(B)(4).

111. *See* Letter from David G. Scott to Regional Planning Directors (Apr. 19, 1988) (discussing regional housing needs and fairshare housing proposals).

112. New Jersey's administrative approach now includes a pre-hearing mediation phase. *See* N.J. STAT. ANN. § 52:27D-315 (West 1986).

113. For one example of successful use of a master by a *Mount Laurel* trial judge, see AMG Realty Co. v. Township of Warren, 207 N.J. Super 388, 394-97, 504 A.2d 692, 695-96 (Law Div. 1984) (master-supervised planners conference to develop "consensus" on fair share methodology). *See also* Rice, *Exclusionary Zoning: Mount Laurel in New York?*, 6 PACE L. REV. 135 (1986).

relatively high densities (eight units per acre or more, in the typical case) in exchange for a commitment from the builder to set aside at least twenty percent of the resulting units at affordable prices, usually well below market levels. It is a "builder's remedy" in the sense that the builder's provision of the low cost units pursuant to a municipal ordinance provides the remedy for the town's violation of the constitution. The "builder's remedy" in this substantive context is often referred to as "inclusionary zoning."[114]

There is an alternate procedural dimension, however, in which the "builder's remedy" refers to a successful builder-plaintiff's right to build a specific development with low-income housing in it, by court order and without regard to whether the site chosen has been zoned by the municipality for such housing. This "remedy" is really a reward that provides developers an incentive to undergo the trouble and expense of litigation that vindicates the rights of poor people. Absent this provision, the town could come into compliance with the constitution by zoning other sites, thus cutting the builder-plaintiff out of the fruits of its labor.[115]

b. *Overreliance on the "Builder's Remedy" Can Cause Problems*

Both dimensions of the "builder's remedy" are necessary components of an exclusionary zoning remedy, but each must be used with care. Substantively, "inclusionary zoning" may often be the only practical way to develop new affordable housing, given the paucity of state and federal subsidy money available.[116] At a ratio of four market rate

114. *See generally* A. MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES (Rutgers Center for Urban Policy Research 1984).

115. The "builder's remedy" has been most thoroughly developed in the New Jersey courts. In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977), the New Jersey high court held that a local ordinance was clearly exclusionary, based on overly large minimum lot sizes (one acre and two acre), excessive fees and other regulatory limitations. The court acknowledged the enormous burden of costs and time assumed by the developer in pursuing the case through five years of litigation and ordered that the developer's project be approved as submitted. The court's approach to the issue was as much a way of compensating a private party for pursuing the public good (a private attorney general theory) as a method of directly righting the wrong, although the order was designed to accomplish both. The other significant case, of course, is *Mount Laurel II*. Reflecting the court's enormous frustration with the town's dismal "progress" in correcting the exclusionary effects of its ordinance, the opinion squarely adopted, and basically ordered lower courts to use, the "builder's remedy" as part of a package of remedies.

116. *See, e.g.*, Lamar, Mallach & Payne, *supra* note 69, at 1210.

units to each affordable unit, however, this approach risks overbuilding that may be inappropriate from a planning perspective in some locations or communities.

This risk is reinforced by the procedural dimension of the "builder's remedy." There can be no doubt that it provides an effective incentive which stimulates constitutional litigation on behalf of the poor.[117] This spectacular success, however, contains the seeds of its difficulties. As more and more builders come forward, inclusionary zoning increasingly becomes the only remedy that a municipality or a court can consider, because it is the only one that satisfies the builder-plaintiff's claim. This costs the municipality the opportunity to choose other remedial approaches, such as rehabilitations, municipal-sponsored developments, linkage programs, and so forth. In the extreme case, it can overwhelm even the best efforts to preserve a rational planning process.[118]

117. *See* Mallach, *supra* note 72, at 119 (140 builder suits in New Jersey).

118. *See* J.W. Field Co. v. Franklin Township, 204 N.J. Super. 445, 499 A.2d 251 (Law Div. 1985) (11 builder's remedy-plaintiffs in one municipality).

Other state courts have embraced the policy of project-specific relief. In the famous Pennsylvania case, *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970), the court had held that the lack of zoning for new apartments in the township was invalid exclusionary zoning, but it did not order site-specific relief. The town rezoned a quarry for apartments rather than plaintiff's land. In the subsequent case of Willistown Township v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975) the town sought to avoid *Girsh* by rezoning land other than the plaintiffs' while the litigation was pending. The Pennsylvania Supreme Court ultimately ordered approval of the developer's specific proposal.

The New York Court of Appeals also approved very specific remedies in *Berenson*: approval of multi-family housing on the Berenson property at a specified density; a specific numerical goal for the total number of multi-family units to be permitted by the town by a specified date; and a holding that the presumption of validity would be suspended if the specific remedies were not fulfilled by the town, thus allowing the courts to award specific relief for each proposed development. *See* Comment, 31 LAND USE L. & ZONING DIG. No. 7, at 5 (July 1979); *cf.* Charles v. Diamond, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977), where the technical evidence justified the town's sewer moratorium but the court was frustrated by the obviously dilatory approach of the town toward curing the problem. It fashioned an ingenious equitable remedy, exempting the developer from the requirement that it connect to public sewer, thus leaving it with the option of proposing a package plant or devising some other alternative treatment system.

c. *Encouraging Public Interest Litigation Can Avoid Over-Reliance on the "Builder's Remedy"*

These tangles can be eased by careful judicial management,[119] but a better way, we submit, is to encourage direct representation of low-income households by private counsel or public interest offices such as legal services. This way, the litigation will not be tied to any particular site and the court and all the parties will have much more flexibility to seek the *best* solution from a planning perspective, not merely a tolerable one. This is not to say, of course, that builders should be frozen out of the process. Where the builder genuinely carries the burden of litigation in the absence of, or in substantial cooperation with, a direct representative of the plaintiff poor, and there are adequate assurances that the "builder's remedy" will include a significant amount of affordable housing for low- and moderate-income families on a site that meets satisfactory planning and environmental standards, the "builder's remedy" should be considered on a case-by-case basis.

Because it is an *amicus curiae*, APA as a matter of policy expresses no opinion on whether the builder in this case would meet the criteria for a "builder's remedy." We note, however, that as a form of equitable relief, the egregiousness of the town's actions is an important consideration in determining whether to grant a "builder's remedy;" the less egregious, the more equity the builder ought to show to prevail in a request for a builder's remedy.

Even when formal award of a "builder's remedy" is not appropriate, it is important to understand that the willingness of a builder to undertake a development containing low- and moderate-income units may still be a crucial part of an exclusionary zoning suit. To be in constitutional compliance, a municipality must have a realistic plan for low- and moderate-income housing.[120] Normally, the municipality should be required to rezone suitable sites that it knows are controlled by a ready, willing and able developer. Moreover, this developer should more often than not participate in compliance negotiations, even without formal party status. The developer still has a profit motivation to participate in the process, but does not incur the full financial burden of the litigation and, most importantly, does not tie the hands of the parties if a better solution is available to them.

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119. *See* J.W. Field Co. v. Franklin Township, 204 N.J. Super. 445, 499 A.2d 251 (Law Div. 1985).

120. *See Mount Laurel II*, 92 N.J. 158, 214, 456 A.2d 390, 418 (1983).

4. Attorney's Fees and Other Remedies

To make this suggested approach work, recovery of attorney's fees and costs must be available to the public interest parties. Neither private attorneys nor underfunded public agencies can be expected to tackle complicated exclusionary zoning cases without such a recovery. Keeping in mind that the "builder's remedy" incentive is essentially a method of compensating (indeed, often over-compensating) the builder-plaintiff, there is nothing extraordinary about compensating non-builder plaintiffs directly. The municipality concerned about these costs can avoid them, of course, by immediate voluntary compliance. Indeed, payment out of current revenues is a more effective chastisement of recalcitrant officials than is an award of a building permit for an awkward location that may affect the community for years to come.

To the same end, the court should reconsider the implication of *Soares*, that attorney's fees and costs are not appropriate where the satisfactory revision of the ordinance occurs without formal court order. Borrowing from federal law, the rule should be that the party is entitled to a reasonable recovery if its efforts produced the favorable result, whether by settlement, court order or other mechanism.[121]

Finally, we note other parts of the package of remedies that were employed in *Mount Laurel II*, in addition to the "builder's remedy:" (1) appointing special masters to help revise the regulations; (2) setting a general time goal of ninety days for compliance; and (3) retaining jurisdiction to ensure that effective remedies are implemented. Communities that are inadvertently exclusionary will comply readily; those which actively seek to be exclusionary will exhaust these gentle remedies quickly and justify more stringent intervention by the court.

V. CONCLUSION

For all of the above reasons, the *amicus curiae* American Planning Association urges this court to:

1. REVERSE the trial court's decision that the whole ordinance shall be voided;
2. REMAND to the trial court for reconsideration under the reasoning set forth above of the appropriate remedy, possibly to include:

A. invalidating a portion of the ordinances and regulations;

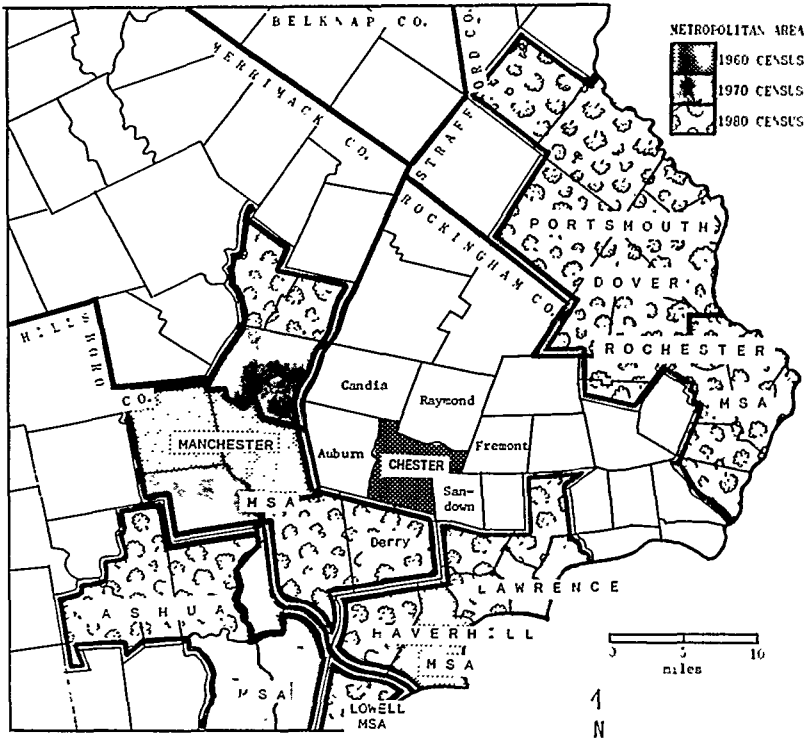
B. granting a "builder's remedy," if appropriate under the guidelines set forth above; and

121. *See* Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979).

C. awarding attorney's fees and costs to the low-income plaintiffs and, if appropriate, the builder-plaintiff.

APPENDIX A

THE EXPANSION OF METROPOLITAN STATISTICAL CASES IN SOUTHERN NEW HAMPSHIRE 1960-80



Source: 1960, 1970 and 1980 Censuses of Population.

APPENDIX B

PERCENT GROWTH 1970-88
CHESTER AND NEIGHBORING TOWNS

Town	1970-80	1980-88
Chester	**45.2**	**27.1**
Auburn	41.7	40.6
Candia	49.7	45.1
Derry	61.2	42.1
Fremont	34.2	47.0
Raymond	81.6	46.6
Sandown	177.6	77.4

Source: U.S. Census Bureau, 1980 Census of Population, Characteristics of Population, New Hampshire, PC 80-1-A-31, Table 5a; *id.*, 1988 Population and 1987 Per Capita Income Estimates for Counties and Incorporated Places, Current Population Reports, Series P-26, 88-NE-SC, Table 1 (1990).

APPENDIX C

ANALYSIS OF CHESTER LAND USE ORDINANCES ACCORDING TO EXCLUSIONARY ZONING CRITERIA

Williams & Norman Criteria	Chester Ordinances
1. **Exclusion of multiple-family dwellings.** For lower income householders, apartments are the major source of affordable shelter. Exclusion devices: * total prohibition * permitted, but only after discretionary rezoning * permitted, but only as a special exception or conditional use. These discretionary devices create a series of impassable hurdles—what has been called "maximum amplified delay"—to wear down developers by whipsawing them through the application of subjective decision-making criteria.	1. **Multi-family dwellings not permitted as a matter of right;** no land has been zoned anywhere in the town for them. * Permitted only as part of a Planned Residential District which also includes other uses, such as single-family housing. Chester Zoning Ordinance, § 6.2.2.2. * Obtaining a permit for a mixed use project which includes multifamily is a lengthy, subjective special use permit approval process. Chester Zoning Ordinance, § 6. See Master's Report, 185-88, June 20, 1989. * Prohibition on conversion of a single-family dwelling to a duplex structure if both units are designed to be occupied by renters. One unit must be owner-occupied. Chester Zoning Ordinance, § 9.2.5.-Residency.
2. **Restrictions on the number of bedrooms.** The practice of restricting the maximum number of bedrooms per dwelling to one or two typically applies only to apartments and stands in stark contrast to the policy of encouraging large, single-family dwellings. Poorer families are assumed to make relatively small property tax contributions but have larger number of children who will burden school budgets.	2. **Maximum bedroom average is 1.5 for multi-family units.** Chester Zoning Ordinance, § 6.2.5. * Planned Residential Development provisions explicitly discourage apartments with more than this average. Chester Zoning Ordinance, § 6.4.7. * No restrictions are placed on the maximum number of bedrooms in single-family houses. * See Note, *infra*.
3. **Prohibition of Mobile Homes.** The most inexpensive	3. **Mobile home parks are not permitted.** Master's Report,

APPENDIX C (cont'd)

Analysis of Chester Ordinances

housing available in many communities in the path of urbanization is mobile/manufactured housing. Ordinances either totally prohibit or severe limit the locations where such housing is permitted.	*supra*, at 191. * Manufactured housing permitted only in the MH-1 and MH-2 Districts; in the entire 26 square miles of developable land, only 23 mobile homes were in place in 1986, an increase of only 3 since 1970. Master's Report, *supra*, at 157, 159.
4. **Lot area requirements.** Very large minimum sizes for various property dimensions result in substantially higher total housing costs. Extraordinary lot size requirements, particularly when coupled with excessive frontages, may result in a considerable addition to housing costs.	4. **Minimum lot size of two acres on conventional single-family developments.** * A Planned Residential Development (PRD) may have smaller individual lots, as long as the overall density within the area is consistent with the two-acre minimum. But * The minimum size for a PRD is 20 acres in single ownership, a very large amount of land for a developer to assemble. Chester Zoning Ordinance, Table of Dimensional and Area Requirements, 26; § 6.2.3.1. * No provision for reduction of minimum lot sizes where septic percolation is adequate or package plants available, making large lots unnecessary. Chester Zoning Ordinance, § 4.3.
5. **Minimum lot width requirements.** An owner typically incurs the costs of site development based on the length of the property along the street. The larger the minimum lot width or frontage requirement, the greater the cost to the property owner for sidewalks, curbs, gutters, street pavement, water lines, san-	5. **The minimum frontage requirement is 430 feet for a PRD.** Chester Zoning Ordinance, § 6.2.3.2. * The principle dwelling unit to set at least 300 feet from the front property line (necessitating the construction of a lengthy driveway to reach the main building) and 75 feet from the

APPENDIX C (cont'd)

Analysis of Chester Ordinances

itary and storm sewers, and other elements of site development.	side lot lines. * The side yards must include a 50 foot wide planted buffer area; no provision for reducing the size of the side yard depending on the density of the plantings or the provision of other types of visual screens. Chester Zoning Ordinance, § 6.2.6.3-.4.
6. **Minimum building size requirements.** Since the cost of housing is directly related to size, requirements for a larger house—independent of the number of occupants—have an obvious and direct impact on housing costs.	6. **Dwelling unit size must be at least 600 square feet,** regardless of the number of occupants and the size of the basement. No distinction among room types in the allocation of floor area within the dwelling, particularly to bedrooms. Chester Zoning Ordinance, § 4.12.
Source: William & Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey*, 22 SYRACUSE L. REV. 475, 481-84.	**Sources:** Chester Zoning Ordinance; Master's Report, *Britton v. Town of Chester*, No. 85-3-352 (New Hampshire Superior Court, June 20, 1989). **Note:** Paradoxically, since a purpose of zoning in New Hampshire is to relieve or prevent overcrowding, restrictions on the number of bedrooms in an apartment serve to compel low- and moderate-income families, who may have limited rental housing choices, to live in overcrowded conditions. Thus, such restrictions may violate enabling legislation. See RSA 674:17(e), (f).

APPENDIX D

TABLE I. TOTAL NUMBER OF UNITS IN AFFORDABLE HOUSING ELEMENTS: UNITS COMPLETED, UNDER DEVELOPMENT OR PROPOSED SET-ASIDE DEVELOPMENTS AND OTHER METHODS

Totals Included in Housing Elements *	*Number*	*Percent* **
Set-Aside Developments	16,819	74.2
Other Methods	5,854	25.8
Subtotal:	22,703	100.0
Regional Contribution Agreements	813	n/a
TOTAL	23,516	n/a
Total Completed or Under Development *		
In Set-Aside Developments		
Completed	2,101	9.2
Under Construction	2,123	9.3
Approved	2,981	13.1
Pending	4,512	19.8
Total Set-Aside	11,717	51.6
Other Methods		
Completed	729	3.2
Under Construction	134	0.5
Approved	275	1.2
Pending	1,108	4.8
Total Other Methods	2,246	9.8
All Methods Combined		
Completed	2,830	12.5
Under Construction	2,257	9.9
Approved	3,256	14.3
Pending	5,620	24.7
TOTAL COMBINED	13,963	61.6
Total Proposed		
In Set-Aside Developments	5,132	22.6
Other Methods	3,608	15.8
TOTAL PROPOSED	8,740	38.4

* The questionnaire design reported only the total number of rehabilitated units included in affordable housing elements and does not permit allocation of these units between completed, under development, and proposed. Because of omissions in reporting, the total number of units accounted for in the allocation between

APPENDIX D (cont'd)
Table I. (cont'd)

completed, under development, and proposed is slightly less than the total number of units included in housing elements.

** All percentages based upon the total count of 22,703 units, which excludes the 813 units transferred under RCAs to other communities. Excluding them from the percentage calculations gives a more realistic picture of the housing strategies municipalities pursue within their own boundaries.

Source: Lamar, Mallach & Payne, *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1210 (1989).