

1-1-1982

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Recommended Citation

David S. King, *INCLUSIONARY ZONING: UNFAIR RESPONSE TO THE NEED FOR LOW COST HOUSING*, 4 W. New Eng. L. Rev. 597 (1982), <http://digitalcommons.law.wne.edu/lawreview/vol4/iss4/2>

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INCLUSIONARY ZONING: UNFAIR RESPONSE TO THE NEED FOR LOW COST HOUSING

DAVID S. KING*

[Editor's note: *This article was in the final stage of publication just as the Supreme Court of New Jersey issued its final ruling in Southern Burlington NAACP v. Township of Mount Laurel, Doc. No. A-35/36/172 (N.J. Jan. 21, 1983). It is the opinion of the author that in this ruling the court has undertaken to implement its original decision, and that inasmuch as it remains to be seen whether this can successfully be done, the comments and observations expressed in this article still stand.*]

I. INTRODUCTION: THE PROBLEM

The housing problem for low and moderate income families has two dimensions. First is the matter of cost. The poor must pay a high percentage of their income to obtain even unsatisfactory accommodations: homes that are in disrepair and lack basic amenities.¹ Second is the matter of location. The housing that low and moderate income families can afford usually is in an unsafe, dirty neighborhood poorly served by public and commercial facilities. Because of inadequate transportation, zoning restrictions, and an inability to obtain financing, a low and moderate income person's access to jobs, schools, and housing in suburbia is limited if not nonexistent.²

The legal system has dealt with the problem in the courts and in the local legislatures. The purpose of this article is to review both the judicial and legislative approaches to resolution of the housing problem for low and moderate income families. The courts have invalidated zoning ordinances that have the effect of excluding low and moderate income persons from a community, while local legislatures have enacted inclusionary zoning ordinances requiring that the

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1. W. GRIGSBY & L. ROSENBERG, URBAN HOUSING POLICY 31 (1975).
2. *Id.*

builder constructing more than a designated number of housing units to set aside a percentage of them for sale or rent to low and moderate income persons.

II. THE JUDICIAL SOLUTION

In the last decade, courts frequently have considered the problem of exclusionary zoning and its possible solutions.³ Typically, developers, alone or in combination with representatives of low income groups wishing to find affordable housing in the suburbs, have challenged the validity of ordinances that impede the construction of low cost, multifamily dwellings.⁴

The Pennsylvania Supreme Court, in *National Land and Investment Co. v. Easttown Township*⁵ determined that a zoning scheme with an exclusionary purpose or result was unacceptable as a violation of the state constitution.⁶ The same court, in *In re Concord Township*,⁷ held that prescribed minimum lot sizes of two acres on existing roads and three acres in the interior of a proposed 140 acre development were larger than necessary for the construction of a house.⁸ Therefore, the minimum lot sizes were not proper subjects of public regulation and were "completely unreasonable."⁹ The court based its decision on *National Land*, which struck down a zoning ordinance requiring a minimum lot size of four acres, the primary purpose of which was to avoid further economic burdens on the community in the provision of services and facilities by excluding newcomers.¹⁰ Such a requirement was not the proper subject of

3. See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977); *Southern Burlington County NAACP v. Township of Mount Laurel*, 119 N.J. Super. 164, 290 A.2d 465 (Law Div. 1972), modified, 67 N.J. 151, 336 A.2d 713, appeal dismissed, 423 U.S. 808 (1975); *Berenson v. Town of New Castle*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979); *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

4. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977) in which the plaintiffs comprised two groups: corporate developers and low income persons representing a class who resided outside of the defendant township and who had sought housing there unsuccessfully. *Id.* at 492, 371 A.2d at 1196.

5. 419 Pa. 504, 215 A.2d 597 (1965).

6. *Id.* at 532-33, 215 A.2d at 613.

7. 439 Pa. 466, 268 A.2d 765 (1970).

8. *Id.* at 471, 268 A.2d at 767.

9. *Id.*

10. 419 Pa. at 532-33, 215 A.2d at 612-13.

public regulation but, rather, was a matter of private preference.¹¹

Although the Pennsylvania Supreme Court was not explicit in either *National Land* or *In re Concord Township*, the basis for finding the ordinances unconstitutional was that any exercise of zoning authority which was not necessary to further the general welfare was not within the ambit of the police power.¹² In other words, the minimum lot sizes in each case were unreasonable because they had an exclusionary purpose. As excluding those wishing to live in the community is not a proper government purpose, an ordinance implementing such a purpose is unreasonable as an improper exercise of the police power.

Neither case, however, mandated an affirmative remedy for exclusionary zoning. Each afforded plaintiffs the usual judicial remedy of invalidating the existing ordinance. The most significant case providing an affirmative remedy is *Southern Burlington County NAACP v. Township of Mount Laurel*,¹³ in which representatives of those excluded by the town's zoning scheme joined as plaintiffs.¹⁴ Unlike the Pennsylvania court, the trial court specifically considered the problem of housing for low income families. The court directed the Mount Laurel authorities to determine the housing needs of three categories of low and moderate income persons: Those who resided in the township; those who were employed in the township; and those who were expected or projected to be employed in the township.¹⁵ Defendant was required to estimate the number of housing units that should be constructed each year to provide for the needs of those persons and then had to develop an affirmative program to fulfill those needs.¹⁶

The trial court invalidated the entire zoning ordinance because, by depriving the poor of adequate housing and of the opportunity to secure the construction of subsidized housing, it was economically discriminatory. As the ordinance failed to provide for the general welfare, it violated the state zoning act and the state constitution.¹⁷

On appeal, the Supreme Court of New Jersey concluded that

11. 439 Pa. at 470, 268 A.2d at 766 (quoting *National Land and Inv. Co. v. Easttown Township*, 419 Pa. at 524, 215 A.2d at 608 (1965)).

12. 439 Pa. 466 *passim*, 268 A.2d 765 *passim* (1970); 419 Pa. 504 *passim*, 215 A.2d 597 *passim* (1965).

13. 119 N.J. Super. 164, 290 A.2d 465 (Law Div. 1972), *modified*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

14. *Id.* at 166-67, 290 A.2d at 466-67.

15. *Id.* at 178, 290 A.2d at 473.

16. *Id.* at 179, 290 A.2d at 473-74.

17. *Id.*

when a developing municipality, through its system of land use regulations, precluded the provision of a variety and choice of housing, it violated the state constitutional requirements of due process and equal protection and bore the burden of justifying its action or non-action.¹⁸ The court, basing its decision on state law, reasoned that a zoning regulation, like any exercise of police power, must be in furtherance of the general welfare.¹⁹ In the court's view, the zoning power was a police power of the state, and a local government was a delegate of the state in the exercise of that power. Consequently, the municipality was obligated to exercise the zoning power so as to promote the general welfare of all state citizens affected by its actions, including those living beyond its borders.²⁰ The court imposed a duty on developing municipalities like Mount Laurel to consider the welfare of those who wished to live there and to provide, through land use regulations, a reasonable opportunity for the construction of all types of housing. The duty to provide the opportunity for low and moderate income housing extended to the municipality's fair share of the present and future regional needs.²¹

Significantly, the court was unwilling to affirm the trial court's mandate that Mount Laurel conduct studies of low and moderate income housing needs and develop an affirmative plan to fulfill those needs. Expressing a more restrictive view of the judiciary's role, the court held that, in the first instance, it was the responsibility of the local legislature to determine the manner of compliance with the court's requirement that it provide its fair share of regional housing needs.²² Thus, the trial court's invalidation of the zoning ordinance was limited only to the extent that it failed to promote the general welfare in the manner mandated by the supreme court.²³

The Supreme Court of New Jersey was unsure what the trial judge's order required Mount Laurel to do. In any event, it concluded that "courts do not build housing, nor do municipalities."²⁴ The municipality's function was merely to provide the opportunity for private builders and, in the case of public housing, the appropriate agencies. Thus, the court allowed the municipality to remedy the defects in its zoning ordinance without judicial supervision, although

18. 67 N.J. at 180-81, 336 A.2d at 728.

19. *Id.* at 175, 336 A.2d at 728.

20. *Id.* at 174-78, 336 A.2d at 725-27.

21. *Id.* at 187-88, 336 A.2d at 731-32.

22. *Id.* at 191, 336 A.2d at 734.

23. *Id.*

24. *Id.* at 192, 336 A.2d at 734.

it strongly suggested that affirmative action, in addition to amending its zoning ordinances, would be appropriate.²⁵ The court warned, however, that should Mount Laurel not perform as expected, plaintiffs were entitled to request further judicial action by supplemental pleading.²⁶

The court's concern with compliance was justified. In 1978, the trial court issued its opinion based on an amended complaint. In response to the supreme court, the township had rezoned twenty acres of its 22.4 square miles for higher density housing. Plaintiffs contended that this was woefully inadequate to fulfill Mount Laurel's fair share of the regional need for low and moderate income housing as determined by the regional planning agency.²⁷ The trial judge, accepting the township's contention that the 10,000 units completed or under construction in planned unit developments would be available at reasonable rents and prices, ruled in its favor.²⁸ The court declined to accept plaintiffs' invitation to require defendants to take affirmative action through the use of subsidies in an effort to increase the amount of low and moderate income housing available.²⁹

The Supreme Court of New Jersey has now consolidated *Mount Laurel* and other similar cases for review.³⁰ The principal question left unanswered by *Mount Laurel* and its progeny³¹ remains unresolved: Having imposed a duty to provide a fair share of regional need for low and moderate income housing, how does a court enforce the duty? The court's concern with the judicial role is evidenced in several of the twenty-four questions on exclusionary zoning that it propounded to the attorneys in the case:

[17] Should a trial court retain jurisdiction to rule on orders of compliance after the main case has been appealed?

[18] What function should a showing of good faith or *bona fide* efforts at compliance with existing principles of law play in these cases?

25. *Id.* The court opined that there was at least a moral obligation to establish a municipal housing agency to provide for the housing needs of the town's resident poor.

26. *Id.*

27. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 161 N.J. Super. 317, 321, 331-37, 391 A.2d 935, 937, 943-46 (Law Div. 1978).

28. *Id.* at 354, 391 A.2d at 954.

29. *Id.*

30. N.Y. Times, Oct. 13, 1980, at B2, col. 1.

31. *See, e.g.,* Berenson v. Town of New Castle, 67 A.D.2d 506, 415 N.Y.S.2d 669, 679 (1979) (modifying as to delete the trial court's order that the town provide for the construction of at least 3,500 units of multi-family housing by the end of 1987).

[19] Discuss the validity of a "trickling down" theory in the current housing market.

[20] Discuss the function of "phasing" in a fair share plan.

[21] Discuss the legal and practical implications of the following remedial devices a court might employ in exclusionary zoning cases:

—Total invalidation of an ordinance, accompanied by an order to draft a new ordinance within a certain time period [i.e., 90 days] or be unzoned. . . .

—Presumptive variances as suggested by Justice Pashman in *Pascack* and *Fobe*.

—An order for specific rezoning of plaintiffs' land for multi-family development [Builder's remedy].

—Orders to seek subsidies, provide density bonuses, institute rent-skewing.

—Specific rezoning for high-density development accompanied by automatic reverter if the development planned is not for low and moderate income units.

[22] Should all remedies developed in these cases be tracked to the level of need in the region and/or municipality, or does *Oakwood* suggest the possibility of "numberless" [as opposed to fair share/regional need] remedies?

[23] Discuss the function of expert planners in exclusionary zoning litigation:

—At what stage of such litigation should expert planners be utilized?

—Should a trial judge delegate rezoning authority to such expert, and embody the product of such rezoning in the trial court judgment?

—How should such expert be selected and paid?

[24] Should the trial judge assume a supervisory role over the implementation of his order? If so, how long should such role continue?³²

The essential difficulty in answering these questions is revealed when one learns that the case was argued before the Supreme Court of New Jersey in December, 1980, and as of this writing, the court has just ruled.³³

Nor have other jurisdictions prohibiting exclusionary zoning practices been successful in defining the extent of the role of the judi-

32. D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 94-95 (Supp. 1981).

33. N.Y. Times, Dec. 21, 1980, IV, at 6, col. 3; *Id.*, Jan. 21, 1983 at A1, col. 1.

ciary in cases similar to *Mount Laurel*. The Pennsylvania Supreme Court, following its earlier course,³⁴ adopted the *Mount Laurel* principle that each municipality must provide a fair-share of land for the needs of all people wishing to live within its boundaries.³⁵ Although the court held that the zoning ordinance permitting multifamily uses in only 1.14 percent of the town's acreage was exclusionary, the remedy it ordered was modest: a mandate that a building permit issue to plaintiff-developer.³⁶ Nevertheless, in his concurring opinion, Justice Roberts warned of the dangers inherent in adoption of the fair share doctrine: to do so would transform courts into "super boards of adjustment" and "planning commissions of last resort,"³⁷ a function for which courts are ill equipped and which properly belongs to legislative and administrative bodies.³⁸

The New York courts have fared no better. In *Berenson v. Town of New Castle*,³⁹ the court of appeals held that a zoning ordinance could not exclude multi-family dwellings if it failed to provide for a balanced and integrated community and to consider regional needs and requirements. In light of this ruling, the trial court later found that the town had ignored the needs of both its own residents and those of the region and, therefore, was not in compliance with the standards established by the court of appeals.⁴⁰ Believing it necessary to award plaintiffs affirmative relief, the trial court determined that 3,500 units of multifamily housing were needed over the next ten years and gave the town six months to amend its zoning ordinances and planning policies to facilitate construction of the needed housing.⁴¹

The appellate division held that the trial court had gone too far.⁴² It considered the multifamily housing quota of 3,500 units to be abstract, speculative, and only tenuously related to the evidence

34. See text accompanying notes 5-10 *supra*; see also, *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975), in which a plurality of the court adopted the fair share doctrine.

35. *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105 (1977).

36. *Id.* at 196, 382 A.2d at 112.

37. *Id.* at 200, 382 A.2d at 115 (Roberts, J., concurring) (quoting *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 452-53, 341 A.2d 466, 470 (1975) (Pomeroy, J., dissenting)).

38. *Surrick v. Zoning Hearing Bd.*, 476 Pa. at 200, 382 A.2d at 115 (Roberts, J., concurring).

39. 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975).

40. 67 A.D.2d 506, 512, 415 N.Y.S.2d 669, 673 (1979).

41. *Id.* at 512-13, 415 N.Y.S.2d at 673.

42. *Id.* at 520-22, 415 N.Y.S.2d at 678-79.

presented.⁴³ It found that the trial court's order did not require that the quota be attained by the construction of low and moderate income units,⁴⁴ an incongruous result considering that the fair share doctrine required a municipality to provide its fair share of housing for low and moderate income families. Concluding that it had no authority to remedy by judicial fiat a town's failure to provide for unmet local or regional needs, the court eliminated the 3,500 unit requirement and gave the town six months to remedy its zoning deficiencies.⁴⁵

State courts are not alone in their reluctance to mandate the construction of a minimum number of housing units as a component of a remedy for exclusionary zoning. Federal courts, in fashioning a remedy for a municipality's violation of title VIII of the Fair Housing Act of 1968 (The Act),⁴⁶ similarly have been averse to doing so, even when it has been found that the defendant city deliberately excluded low income housing in order to maintain a racially segregated community. In *United States v. City of Parma*,⁴⁷ the United States Court of Appeals for the Sixth Circuit agreed with the district court's finding that defendant had violated the Act in several ways, including the city's long-standing opposition to any form of low income housing.⁴⁸ As part of its remedial decree, however, the district court, *inter alia*, required the city to "make all efforts necessary to ensure that at least 133 units of low and moderate income housing are provided annually in Parma"⁴⁹ and appointed a special master to supervise the process.⁵⁰

The court of appeals found the order to ensure the provision of 133 units of low and moderate income housing units annually to be premature. As had the district court, it recognized that the ultimate burden of providing low income housing belonged to developers rather than to the city. Therefore, the court vacated the provision for a minimum number of units, preferring to establish a vague goal of meeting whatever need existed within a reasonable time.⁵¹ Thus, even when it is clear that racial prejudice has motivated a municipal-

43. *Id.* at 519-20, 415 N.Y.S.2d at 677-78.

44. *Id.* at 521, 415 N.Y.S.2d at 678.

45. *Id.* at 522-23, 415 N.Y.S.2d at 679.

46. 42 U.S.C. §§ 3601-3619 (1976).

47. 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1972 (1982).

48. 661 F.2d at 574-75.

49. *United States v. City of Parma*, 504 F. Supp. 913, 923 (N.D. Ohio 1980), *aff'd in part, rev'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 102 S. Ct. 1972 (1982).

50. *Id.* at 925-26.

51. 661 F.2d at 578.

ity to exclude low income housing, the courts are reluctant to require the construction of a specific number of housing units.

Similarly, commentators have expressed considerable doubt as to the capability of courts to enforce the *Mount Laurel* provision requiring that a municipality provide its fair share of the regional need for low income housing.⁵² At a minimum, it would be necessary for a court to retain jurisdiction to ensure that the municipality had revised its zoning ordinances and had taken the necessary steps to determine the regional need for low and moderate income housing, to determine the municipality's fair share of that need, and to see that the municipality provides that share. It may necessitate the court's appointment of expert consultants on urban planning to advise the court on the adequacy and efficiency of the municipality's actions.⁵³ This process may involve extensive judicial supervision over a number of years, as has occurred in school desegregation cases,⁵⁴ in order to enforce a decree against a reluctant municipality.

Thus, courts which have found exclusionary zoning to be invalid have imposed a duty on municipalities to provide their fair share of such need and have thereby created a right on the part of those excluded to have that need fulfilled. However, the judicial reluctance to define further a municipality's duty in terms of specific numbers of housing units, together with protracted litigation and the inherent difficulty of supervision, have made enforcement of that right problematical. Thus, a legislative solution to the problem appears to be more appropriate.

III. THE LEGISLATIVE SOLUTION

Proponents of a legislative solution to the problem of inadequate housing for low and moderate income families offer both economic and sociological arguments to support their position. They content, ultimately, that society will be economically more efficient and socially cohesive if zoning legislation is employed to promote, or at least not to hinder, reasonable housing opportunities for all.

52. See, e.g., Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 RUT.-CAM. L.J. 689 (1975); Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976); see also D. HOROWITZ, *THE COURTS AND SOCIAL POLICY passim* (1977).

53. See, e.g., *Pascaek Ass'n, Ltd. v. Mayor of Washington*, 131 N.J. Super. 195, 329 A.2d 89 (Law Div. 1974), *modified*, 74 N.J. 470, 379 A.2d 6 (1977).

54. See, e.g., the six year desegregation attempt in *Wright v. City Council of Emporia*, 407 U.S. 451 (1972).

The United States Housing Act of 1937⁵⁵ declared the national policy of providing decent, safe, and sanitary dwellings for low income families. The Housing Act of 1949⁵⁶ broadened the goal to include "a decent home and a suitable living environment for every American family."⁵⁷ Local zoning controls have hampered the attainment of these goals in several ways. It has been postulated that land use controls frequently have the effect of excluding from suburban communities anyone whose income is lower than that of the current residents by maintaining housing rents at an artificially high level.⁵⁸ Large lot, low density zoning contributes to a higher price per lot.⁵⁹ Minimum floor area requirements result in the construction of homes that are larger and more expensive than necessary to maintain minimum health standards.⁶⁰ Requirements that a subdivision developer provide basic improvements such as streets, sidewalks, and sewers,⁶¹ and even dedicate land for schools and parks or pay a fee in lieu of doing so,⁶² increase the cost of housing and place the burden of financing community amenities on new residents. Building code standards in many communities exceed those of the Federal Housing Administration and add significantly to the cost of a new home.⁶³ Administrative delays, including court proceedings, further increase the cost to the developer, who must continue to bear the financing charges on the undeveloped land while also paying legal fees.⁶⁴

Thus, the reasoning goes, elimination or reform of restrictive zoning laws will inure to the community's benefit. Increased density will increase consumer demand, thereby generating new employment opportunities. Most costs to the communities, resulting from

55. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888 (codified at 42 U.S.C. §§ 1401-1435 (1976)).

56. Act of July 15, 1949, ch. 338, 63 Stat. 413 (codified in scattered sections of 12, 42 U.S.C.).

57. 42 U.S.C. § 1441 (1976).

58. R. BABCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING* 3-6 (1973).

59. NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 214 (1968).

60. *Id.* at 215.

61. *See, e.g.,* Mefford v. City of Tulare, 102 Cal.App.2d 919, 228 P.2d 847 (Ct. App. 1951); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

62. *See, e.g.,* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); Cimmaron Corp. v. Board of County Comm'rs, 193 Colo. 164, 563 P.2d 946 (1977); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

63. R. BABCOCK & F. BOSSELMAN, *supra* note 41, at 257-307.

64. *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

higher density requirements in terms of fire, police, welfare, and school costs, would be outweighed by the increased revenues that they generated.⁶⁵

Claimed social advantages include the creation of a culturally diversified community; one where residents include young and old, poor and wealthy, black and white, and one in which the current residents will have the opportunity to live with persons from a wide variety of socioeconomic backgrounds.⁶⁶ Commentators have argued that economic integration will enhance efficiency by reducing social pathologies attendant upon separation of socioeconomic groups.⁶⁷

However, there are arguments to the contrary. A panel of experts assembled by the National Academy of Sciences at the request of the Department of Housing and Urban Development (HUD) concluded that the desirability of promoting socioeconomic integration in housing was questionable because of untested assumptions about interaction across socioeconomic lines.⁶⁸ The panel further concluded that there was no evidence to support the feasibility of such integration given the trend in movements of the urban population toward increased socioeconomic segregation.⁶⁹ One survey reported that low income families prefer to live in neighborhoods populated primarily by other low income families.⁷⁰

The ultimate justification, however, may be a moral one, in the sense that human suffering has been eased by helping to provide new housing in the suburbs for the urban poor.⁷¹

A. *Inclusionary Ordinances*

The Standard State Zoning Enabling Act,⁷² the model statute upon which are based most state enactments authorizing local gov-

65. R. BABCOCK & F. BOSSELMAN, *supra* note 41, at 53.

66. U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 108-13, 221-41 (1967).

67. *See, e.g.*, C. HAAR & D. IATRIDIS, HOUSING THE POOR IN SUBURBIA 14-17 (1974); L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES 9-25 (1974); REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 263 (Mar. 1, 1968).

68. Hawley & Rock, *Introduction*, in SEGREGATION IN RESIDENTIAL AREAS 20 (A. Hawley & V. Rock eds. 1973) [hereinafter cited as Hawley & Rock, *Introduction*]; *see also* W. GRIGSBY & L. ROSENBERG, *supra* note 1, at 113-27.

69. Hawley & Rock, *Introduction*, *supra* note 68.

70. W. GRIGSBY & L. ROSENBERG, *supra* note 1, at 103.

71. R. BABCOCK & F. BOSSELMAN, *supra* note 58, at 48.

72. UNITED STATES DEP'T OF COMMERCE, ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT (1926).

ernments to propound zoning regulations, expresses the traditional purposes of such regulations:

To lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.⁷³

In its legislative efforts to accomplish these purposes, a municipality is constrained by the limits of the police power: that inherent power of government to act in furtherance of the public health, safety, morals, and general welfare.⁷⁴ Division of a city into separate use districts and regulation of the uses within each district are the traditional methods for accomplishing the goals.⁷⁵ This practice reflects the similarity of zoning legislation to nuisance law, which separates uses that are incompatible with one another and excludes uses which are unacceptable in the community. Courts, however, were quick to accept the rationale that a zoning ordinance was valid so long as it promoted the general welfare, regardless of whether it restricted or excluded a particular use.⁷⁶ Courts have approved limitations on use, such as: Minimum lot sizes;⁷⁷ minimum setbacks;⁷⁸ front and side yards;⁷⁹ height and bulk restrictions;⁸⁰ and minimum floor areas.⁸¹ The result has been to add significant costs to the price of housing⁸² and to preclude many low and moderate income families from purchasing or renting a home in many suburban communities.⁸³

73. *Id.* § 3.

74. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

75. *See, e.g., id.* at 380-82.

76. *See Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

77. *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942); *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952).

78. *Gorieb v. Fox*, 274 U.S. 603 (1927).

79. *Garrity v. District of Columbia*, 86 F.2d 207 (D.C. Cir. 1936).

80. *Chicago City Bank & Trust Co. v. City of Highland Park*, 9 Ill. 2d 364, 137 N.E.2d 835 (1956), *cert. denied*, 353 U.S. 922 (1957).

81. *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

82. *R. BABCOCK & F. BOSSELMAN, supra* note 58, at 3-7.

83. *See Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975); *Simons, Home Rule and Exclusionary Zoning: An Impediment to Low and Moderate Income Housing*, 33 OHIO

One legislative response of local governments to the problem of inadequate housing for low and moderate income families has been the inclusionary zoning ordinance. The purposes of such an ordinance is typically twofold: To provide a necessary stimulus to the production of low cost housing in suburbs where the median cost of a dwelling is beyond the means of those with limited incomes,⁸⁴ and to assure that sufficient land within the community is allocated to the needs of all socioeconomic and racial groups.⁸⁵ There are basically two types of inclusionary ordinances: The mandatory ordinance, which requires the developer to include a certain percentage of low and moderate income units in his project;⁸⁶ and the voluntary ordinance, which encourages a developer to include such units by allowing him to increase the number of market priced units he may build on the site.⁸⁷

B. *Mandatory Inclusionary Ordinances*

The typical mandatory inclusionary ordinance requires a developer of more than a specified minimum number of units to reserve a certain percentage of them for sale or rent to lower income families.⁸⁸ For example, the Los Angeles, California ordinance requires a developer of a multifamily project consisting of five or more units to make a reasonable effort to set aside at least fifteen percent of them for persons of low or moderate income with six percent of the fifteen percent total specifically designated for persons of low income.⁸⁹ Developers must give the city housing authority a right of first re-

ST. L.J. 621 (1972). The foregoing would seem to support the prediction of one trial court judge that:

[t]he plain truth is that the true object of the ordinance in question [a comprehensive zoning ordinance] is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. . . . In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.

Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

84. See, e.g., Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432, 1452-53 (1974).

85. See, e.g., Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1023 (1976).

86. MONTGOMERY COUNTY, MD., CODE, ch. 25A (1974); LOS ANGELES, CAL., MUNICIPAL CODE, §§ 12.03, 12.39, 13.04 (1974).

87. HIGHLAND PARK, ILL., ZONING ORDINANCE § 150.130.9.2 (1978); NEWTON, MASS., REV. ORDINANCES, ch. 24, § 29(b) (1977).

88. LOS ANGELES, CAL., MUNICIPAL CODE § 12.39 (1974).

89. *Id.* § 12.39.A.1.

fusal to rent or buy the set-aside units,⁹⁰ but may rent or sell the required units at fair market value.⁹¹ The rental units are subsidized by the federal section 8 program for lower-income housing assistance.⁹² Units to be offered for sale may be subsidized by the federal section 235 program.⁹³ The developer is not required to market the units at a loss if it is financially impossible to develop subsidized units.⁹⁴ The developer, however, must make every reasonable effort to produce the set-aside units at prices that allow persons of low and moderate income to rent or buy them.⁹⁵ Therefore, it would seem that developers of luxurious projects would have to include some modestly priced dwellings in order to comply with the enactment.

Because the Los Angeles ordinance does not require that a builder sell or rent any units below market value, the ordinance should be able to withstand a claim by a developer that his property is being taken without compensation in violation of the fifth amendment.⁹⁶ If, however, the developer must sell or rent the set-aside units below the market rate, additional provisions are required to guard against such a claim.

For example, the Montgomery County, Maryland, moderately priced dwelling unit (MPDU) ordinance⁹⁷ requires that 12.5 percent of the units in new housing projects of fifty units or more be reserved for sale or lease to moderate income families at prices to be fixed by the county executive.⁹⁸ Eligible households may have an income no greater than 200 percent of the section 8 income limits for very low income households in Montgomery County.⁹⁹ The ordinance so provides

To insure that private developers constructing moderately priced dwelling units pursuant to the requirements of this chapter incur no loss or penalty as a result thereof, but rather, that they can, by virtue of the optional density bonus provision of this chapter . . .

90. *Id.*

91. *Id.*

92. 42 U.S.C.A. § 1437(f) (West Supp. 1982). "Section 8" is a subsidized housing program by which the Department of Housing and Urban Development (HUD) makes up the difference between what a low income household can afford to pay and the fair market rent established by HUD for an adequate housing unit. No eligible tenant need pay more than 25% of adjusted income toward rent. *Id.*

93. 12 U.S.C.A. § 1715z (West 1980 & Supp. 1982).

94. LOS ANGELES, CAL., MUNICIPAL CODE § 12.39.A.1 (1974).

95. *Id.*

96. U.S. CONST. amend. V.

97. MONTGOMERY COUNTY, MD., CODE, ch. 25A (1974).

98. *Id.* ch. 25A-4(a)(1) (1974 & amend. 1981).

99. *Id.* ch. 25A-6(a) (1974).

realize a reasonable profit from their endeavors in this regard.¹⁰⁰

If the applicant elects the optional density provision, construction of an increased number of moderately priced dwelling units is permitted.¹⁰¹ For example, a developer proposing to build 100 units would be required to set aside 12.5 percent of them for sale or lease at moderate prices as fixed by the county executive. Assuming that the maximum allowable density for the site is 100 units, under the density bonus provision of the ordinance, he would then be entitled to construct a total of 120 units, fifteen (12.5 percent) of which would have to be moderately priced units. The remaining units could be market-priced units. Thus, in return for building fifteen moderately priced units, the developer obtains a bonus authorizing five additional market-priced units.

To prevent speculation by persons who might purchase an MPDU and then resell it at the market price, the ordinance prohibits the sale of such a unit for a period of ten years from the date of the original sale for a price greater than the original sales price plus allowances for cost of living increases, improvements made to the unit, and closing costs.¹⁰² Further, the unit must first be offered for sixty days exclusively to persons determined by the department of community development to be of eligible income.¹⁰³

C. *Voluntary Inclusionary Ordinances*

The typical voluntary inclusionary ordinance allows a developer to apply for increased density on the site in return for providing a certain percentage of subsidized or below-market-priced units. For instance, the housing income mix program in Newton, Massachusetts, requires a developer who requests an increase in density to set aside approximately ten percent of the planned units for low and moderate income housing.¹⁰⁴

IV. LEGALITY OF INCLUSIONARY ZONING ORDINANCES

The principal legal challenge to an inclusionary zoning ordinance¹⁰⁵ is that such an enactment exceeds the limits of a legitimate

100. *Id.* ch. 25A-2(6) (1974).

101. *Id.* ch. 25A-5(a) (1974).

102. *Id.* ch. 25A-7(a) & (b) (1974 & amend. 1981).

103. *Id.*

104. NEWTON, MASS., REV. ORDINANCES ch. 24, § 29(b)(1) (1977).

105. The ordinance may also be challenged on the basis that its promulgation by the municipality exceeds the authority delegated to the municipality by the state's constitution or enabling act. *See, e.g., Board of Supervisors v. DeGroff Enterprises*, 214 Va.

exercise of the state's police power and effects a taking of the developer's property without just compensation in violation of the fifth amendment.¹⁰⁶ The traditional test used by the courts to determine whether a taking has occurred is that formulated by Justice Holmes: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁰⁷ The determination of what constitutes a taking is "a question of degree—and therefore cannot be disposed of by general propositions."¹⁰⁸ Nevertheless, courts have usually examined one or more of four factors in determining whether government action constitutes a taking: (1) Whether the government or its agents physically invaded or appropriated the claimant's property; (2) the diminution in value of the plaintiff's property resulting from the government's act; (3) a balancing of the public benefit obtained from the act against the private loss suffered by the plaintiff; and (4) the distinction between the creation of a public benefit and the prevention of harm.¹⁰⁹

A. *Physical Invasion*

When the government actually seizes or occupies property belonging to a claimant, it is almost certain that courts will require compensation to be paid.¹¹⁰ This is true even when the invasion is insubstantial.¹¹¹ Although this test has been criticized because it elevates form over substance and fails to explain why compensation should be required for physical invasions that inflict only minimal economic harms,¹¹² courts nevertheless have employed it. There-

235, 238, 198 S.E.2d 600, 602 (1973). This inquiry will be directed only toward the ordinance's validity under the federal constitution.

106. U.S. CONST. amend. V is made applicable to the states through the fourteenth amendment, U.S. CONST. amend. XIV. *See* *Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 226, 239, 241 (1897).

107. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

108. *Id.* at 416.

109. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-1201 (1967); *see also* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 46-60 (1964).

110. *E.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871). *But see* *National Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) (as physical occupation of the plaintiff's building was for the plaintiff's, rather than the public's benefit, no compensation was required). *See also* 2 P. NICHOLS' THE LAW OF EMINENT DOMAIN § 6.2 (J. Sackman rev. 3d ed. 1981).

111. *E.g.*, *Lovett v. West Virginia Cent. Gas Co.*, 65 W. Va. 739, 65 S.E. 196 (1909).

112. Sax, *supra* note 109, at 46-48.

fore, it may prove useful to hypothesize how it might be applied to determine the validity of an inclusionary zoning ordinance.

An inclusionary zoning ordinance requires the developer to set aside a certain number of housing units for occupancy by persons who are not necessarily of the developer's choosing.¹¹³ One might argue that the government has physically invaded those units: It has abrogated the developer's possessory interest in them by decreeing that they shall be occupied only by persons of low or moderate income. Therefore, one might conclude that a taking requiring just compensation has occurred.

The government, however, has not denied the developer all economic benefit from the set-aside units. He may structure the project so as to be eligible for federal subsidies, or the ordinance may allow him to sell or rent the property at a certain level, albeit below market.¹¹⁴ Because the developer has not been deprived of all reasonable use of his property, a court may prefer to apply the diminution of value test.¹¹⁵

B. *Diminution of Value*

When the effect of a zoning ordinance is to reduce severely the value of the property in question, the courts will frequently find that a taking has occurred.¹¹⁶ The test is often stated as follows: "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property."¹¹⁷ It is not a bright line test, and courts have sustained ordinances causing large reductions in value.¹¹⁸

The problem lies in defining the property the use of which is claimed to be unreasonably restricted.¹¹⁹ The developer who is sub-

113. *E.g.*, LOS ANGELES, CAL., MUNICIPAL CODE § 12.39 (1974).

114. *Id.*

115. *But see* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 150 (1979) (Rehnquist, J., dissenting).

116. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); Dooley v. Planning & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

117. Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938) (original emphasis).

118. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (75% diminution in value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% diminution in value).

119. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 419-20 (1922) (Brandeis, J., dissenting); Michelman, *supra* note 109, at 1192-93; Sax, *supra* note 109, at 36, 60.

ject to a mandatory inclusionary ordinance may claim that because his right to use the set-aside units has been abrogated, a taking has occurred. That he receives some remuneration in the form of below-market rent or purchase price should not be determinative of *whether* there has been a taking but, rather, only of *how much compensation* he is entitled to if there has been a taking.¹²⁰ Nevertheless, it is likely that in evaluating an inclusionary ordinance lower courts will follow the lead of the United States Supreme Court in *Penn Central Transportation Co. v. New York City*.¹²¹ In *Penn Central*, the Court held that prohibiting plaintiff from constructing a fifty-five story tower over Grand Central Station did not constitute a taking of the air rights to the parcel.¹²² The Court reasoned that the air rights were transferable and, therefore, still valuable.¹²³ Moreover, the restrictions allowed plaintiff not only to use the site in a gainful manner, but also to enhance the value of its other properties.¹²⁴

Similarly, a court could uphold a mandatory inclusionary zoning ordinance on the theory that even if a developer suffers a loss on the units required to be set aside, the development considered as a whole, including the market-priced units, still is profitable. The court could, therefore, hold that there has been no taking.

A close analogy can be found in ordinances requiring a developer, as a precondition for approval of a subdivision, to dedicate and improve land for streets, parks, schools, and other facilities necessitated by his project. These mandatory dedications are called subdivision exactions. Courts have upheld exactions requiring the developer to build streets and storm sewers,¹²⁵ as well as to pay fees in lieu of dedications.¹²⁶ Several courts that have found exactions to be unlawful have done so on the basis that they were not authorized by the state enabling statute.¹²⁷ When the ordinance is not *ultra*

120. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 150-51 (1978) (Rehnquist, J., dissenting).

121. 438 U.S. 104 (1978).

122. *Id.*

123. *Id.* at 137.

124. *Id.* at 138 & n.36.

125. *See* *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); *see also* *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

126. *Associated Homebuilders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

127. *Rosen v. Village of Downers Grove*, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); *Coronado Development Co. v. City of McPherson*, 189 Kan. 174, 368 P.2d 51 (1962); *Haugen v. Gleason*, 226 Or. 99, 359 P.2d 108 (1961).

vires, courts have usually framed the test of validity as follows: “[I]f the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulations under the police power.”¹²⁸ Courts requiring a close nexus between the activity the subdivision will generate and the required exaction or fee are more prone to striking down subdivision exactions.¹²⁹ On the other hand, courts considering the cumulative effect of a number of subdivisions on the community are more willing to uphold the exactions.¹³⁰

Some commentators believe that analogizing the inclusionary zoning ordinances to subdivision exactions is appropriate on the theory that new residential developments create a need for low cost housing for the lower-income persons drawn into the community by the employment prospects resulting from increased economic activity.¹³¹ Others, however, believe the analogy to be disingenuous.¹³² It seems strained, at best, to contend that a subdivision of market-priced homes or apartments creates a need for low-cost housing in the same way that it creates a need for roads, schools, and parks. New residents may increase the burden on existing facilities and thereby justify a municipality’s requirement that the developer compensate by dedicating land to augment the existing facilities or by paying a fee to improve or maintain them. It can hardly be said, however, that the increased construction of new residences increases the burden on existing low-income housing, thereby justifying a municipality’s demand that the developer provide more.

The principal case to consider the validity of a mandatory inclusionary zoning ordinance is *Board of Supervisors v. DeGroff Enterprises, Inc.*¹³³ Fairfax County had passed an amendment to its zoning ordinance requiring a developer of fifty or more dwelling

128. *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965), *appeal dismissed*, 385 U.S. 4 (1966) (quoting *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961)).

129. *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *see Berg Dev. Co. v. City of Missouri City*, 603 S.W.2d 273 (Tex. Civ. App. 1980); *see also City of Montgomery v. Crossroads Land Co.*, 355 So.2d 363 (Ala. 1978); *Sanchez v. City of Santa Fe*, 82 N.M. 322, 481 P.2d 401 (1971).

130. *See Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

131. *See Kleven, supra* note 84, at 1495.

132. *See Ellickson, The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1212 (1981).

133. 214 Va. 235, 198 S.E.2d 600 (1973).

units to set aside, prior to rezoning or site plan approval, at least fifteen percent of the units for low and moderate income housing. The units could be sold or rented only to low and moderate income persons as defined by the Fairfax County Housing and Redevelopment Authority and HUD. Those agencies fixed the maximum prices at which the units could be sold or rented.¹³⁴ The court held that these requirements violated the provisions of the Virginia Constitution that property not be taken or damaged for public purposes without just compensation.¹³⁵ The case, however, provides little guidance for other courts confronted with the problem.¹³⁶

C. *Balancing Test*

In view of the difficulty of determining the point at which a diminution in value resulting from a legislative act changes from an uncompensable exercise of police power into a compensable taking, an application of another traditional test may be appropriate. Courts may wish to balance the social gains the measure produces against the private losses it inflicts.¹³⁷ If the benefit to society outweighs the injury to the individual, then no taking is deemed to have occurred.

Applying the test to an inclusionary zoning ordinance, one could conclude that the loss of expected profit the developer suffers is justified by the gain to society of increased housing opportunities for low and moderate income persons. As noted previously,¹³⁸ the balancing test may be used appropriately to determine whether a measure ought to be enacted, but not to determine whether the one whom it disadvantages ought to be compensated. If the measure does produce gains for many, particularly low and moderate income home seekers, far outweighing the individual developer's losses, it

134. *Id.* at 235-36, 198 S.E.2d at 601.

135. *Id.* at 238, 198 S.E.2d at 602.

136. The *DeGross* court based its decision on Virginia precedent, reciting three cases and their respective holdings without attempting to analogize those cases to the case at bar. *Id.* at 238, 198 S.E.2d at 602 (1973). After viewing the holdings of those cases, the court concluded that "[w]hen the amendment is measured by these legal standards, we find it deficient." *Id.* The Virginia court noted that the amendment was unconstitutional "because it [was] socio-economic zoning and attempt[ed] to control the compensation for the use of land and the improvements thereon." *Id.* This explanation constituted the extent of the court's analysis.

137. See Michelman, *supra* note 87, at 1193; see also *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wash.2d 203, 207-12, 571 P.2d 196, 198-201 (1977) (court acknowledged criticism of the balancing test but applied it nonetheless).

138. Michelman, *supra* note 109, at 1193-96.

seems reasonable that the latter be compensated out of that excess of gains.

D. *Prevention of Harm or Creation of Benefit*

Another test traditionally employed to decide whether economic harm brought about by the government is compensable asks whether the regulation prohibits conduct that is harmful to others or whether the regulation exacts a public benefit at the expense of the private property owner. "The idea is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself."¹³⁹

The Supreme Court of the United States has held that prohibiting the use of property for purposes the legislature found to be injurious to the community's health, safety, or morals is not a taking for the benefit of the public and therefore is not compensable.¹⁴⁰ The difficulty with this test is that its outcome depends on the definition of preventing a harm and appropriating a benefit. For instance, because the use of property for prostitution generally is considered to be noxious, prohibiting such use is not compensable.¹⁴¹ In contrast, a prohibition against the commercial development of wetlands, for example, is considered an act appropriating to the public the benefit of leaving the property in its natural state.¹⁴² Therefore, the landowner ought to be entitled to compensation. At least one court, however, has found that prohibiting the filling of wetlands does not constitute a taking on the ground that such a prohibition merely constitutes "a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property."¹⁴³

On the other hand, in *Devines v. Maier*,¹⁴⁴ in which tenants contested the actions of the city of Milwaukee in evicting them from substandard housing pursuant to its housing code, the Seventh Cir-

139. *Id.* at 1196 (footnote omitted); see also E. FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 546 (1904); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958).

140. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

141. See *L'Hote v. City of New Orleans*, 177 U.S. 587 (1900); see also *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (gasoline storage facilities); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (fertilizer operations).

142. See *Dooley v. Planning & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964).

143. *Just v. Marinette County*, 56 Wis.2d 7, 16, 201 N.W.2d 761, 767-68 (1972).

144. 665 F.2d 138 (7th Cir. 1981).

cuit rejected the city's contention that "the enforcement of building codes is the legitimate exercise of a police power to forbid uses of private property which effect public nuisances that cause a detriment to public health and safety."¹⁴⁵ The court of appeals also rejected the conclusion of the district court that "[h]ousing code enforcement is . . . not designed to appropriate property for public use at private expense, . . . but rather . . . [is] designed to prevent the injury and disease which are so often the by-products of substandard housing."¹⁴⁶ The court of appeals instead found that the city had evicted the tenants in order to promote the public's interest in health, safety, and general welfare.¹⁴⁷ Because the city destroyed the tenants' leasehold rights, the court held that a taking under the fifth amendment had occurred.¹⁴⁸

In effect, the *Devines* court stood the prevention of "harm-creation of benefit test" on its head and applied the diminution of value test. Under this analysis, any government regulation seeking to prevent a property owner from "making a nuisance of himself" also can be seen as securing a public benefit requiring compensation. As Justice Brennan stated, it is axiomatic that the public benefit from any police power regulation; otherwise it is unlawful.¹⁴⁹ Such a regulation can be defined either as preventing harm or creating a benefit, as the court chooses, because prevention of the harm is the means adopted to secure the benefit. Similarly, an inclusionary zoning ordinance might be viewed as securing a public benefit or as preventing a harm. Requiring a developer to set aside a certain number of units for low and moderate income housing secures for the public the benefit of increasing the supply of affordable housing. In the alternative, the ordinance prevents the harm of forcing people to live in substandard housing because of an inadequate supply of decent housing. The test is no test at all; it allows a court to rationalize either a conclusion that a government regulation requires compensation to the affected property owner or that it does not.

V. FAIRNESS OF INCLUSIONARY ORDINANCES

In the last few years, the Supreme Court has decided three cases that raise the issue of the degree to which a government regulation

145. *Id.* at 145.

146. *Id.* at 142.

147. *Id.* at 146.

148. *Id.*

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

becomes a taking requiring just compensation. In *Penn Central*, a local landmark law prohibited plaintiff from building a high-rise office tower over Grand Central Terminal.¹⁵⁰ In *Agins v. City of Tiburon*,¹⁵¹ the municipality down-zoned plaintiff's five-acre residential site, thereby reducing the allowable density.¹⁵² In *San Diego Gas and Electric Co. v. City of San Diego*,¹⁵³ the city designated plaintiff's property as open space, an action which plaintiff contended deprived it of all beneficial use of the site.¹⁵⁴

In all three cases, the Court considered the regulation's economic impact on the property owner to be a relevant factor,¹⁵⁵ but "reject[ed] the proposition that diminution in property value, standing alone, can establish a 'taking'. . . ." ¹⁵⁶ Thus, that a developer earns a lower return on his investment because an inclusionary zoning ordinance requires him to rent or sell some units at below-market rates will not, alone, support a claim that the ordinance effects a taking.

Both *Penn Central* and *San Diego* focused on another relevant consideration: that the just compensation clause is " 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . . ' " ¹⁵⁷ Justice Brennan, however, conceded that the "Court . . . has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." ¹⁵⁸ One suggested test for determining fairness provides:

A decision not to compensate is not unfair as long as the disap-

150. 438 U.S. at 116-17.

151. 447 U.S. 255 (1980).

152. *Id.* at 257.

153. 450 U.S. 621 (1981).

154. *Id.* at 626.

155. "The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." 438 U.S. at 124. "The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land. . . ." 447 U.S. at 260. "It is only logical, then, that government action . . . can be a 'taking' . . . where the effects completely deprive the owner of all or most of his interest in the property." 450 U.S. at 653 (Brennan, J., dissenting).

156. 438 U.S. at 131.

157. *Id.* at 123; 450 U.S. at 656 (both cases citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

158. 438 U.S. at 124.

pointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.¹⁵⁹

Two phrases in the test need further definition when applied to the problem of inclusionary zoning: "Such decisions" and "people like him." The decision involved here to compel a developer to set aside a certain number of units for low and moderate income persons can be accurately characterized as one placing on the provider the burden of making certain goods or services more affordable to those who do not have the means to purchase such goods at market rates. It follows that the definition of "people like him" refers to others who produce goods or render services. Thus, if the government could require a developer to bear the economic burden of providing low cost housing to those who do not have the means to buy his product at the market rate, it follows that the government, for example, could require physicians to provide low cost medical care and supermarkets to provide low cost food to those who need it. Indeed, it would require any producer of goods or services to furnish them at below-market rates to those in need. Unless society is prepared to generalize the denial of compensation to the developer in the case of inclusionary zoning to all other providers of goods and services, the decision not to compensate the developer is patently unfair.

At least two objections may be raised to this argument. First, if the developer is awarded a sufficient density bonus in return for complying with inclusionary requirements, he suffers no economic harm. Thus, there would be no compensable taking. At least two economic analyses of the problem, however, indicate that both in theory and in practice the density bonus will not offset the economic harm an inclusionary ordinance causes.¹⁶⁰ The analyses further indicate that the burden ultimately must be borne by the owner of undeveloped land, either the developer who purchases such land, or the consumer of market-rate units in the development.¹⁶¹

Second, it may be argued that, as in the case of subdivision exactions, the developer obtains development permission from the local government in return for providing low cost units.¹⁶² The

159. Michelman, *supra* note 109, at 1223.

160. See Ellickson, *supra* note 132, at 1188; Kleven, *supra* note 84, at 1476-79.

161. Ellickson, *supra* note 132, at 1187-92; Kleven, *supra* note 84, at 1474-83.

162. See text accompanying notes 125-133 *supra*.

subdivision exaction and inclusionary zoning situations, however, are not analogous. The justification for subdivision exactions rests in part on the fact that the increased population brought into the community by the new subdivision has created the need for additional roads, utilities, schools, or parks. Requiring the developer to contribute to the cost of those amenities therefore does not constitute a taking. But the nexus between a developer's activities and the need for low cost housing is much less clear than that between the construction of a new subdivision and the need for facilities to support it.

Further, if the analogy is applied to "people like him," it would seem that a license to practice medicine could be conditioned on the holder providing a certain amount of low cost medical care and that the issuance of whatever licenses are necessary to operate a supermarket could be conditioned on providing a certain amount of low cost food. Of course, society already provides for those who cannot afford medical care with Medicare and Medicaid, and for those who cannot afford food with the food stamp program. The problem is that the budget proposed by the Reagan Administration has made large reductions in those benefits.¹⁶³ In particular, severe cuts in the section 8 program for the construction of low and moderate income housing have been proposed.¹⁶⁴

VI. CONCLUSION

If society wishes to keep its promise of a decent home for all, society as a whole should bear the cost of doing so. It is manifestly unfair to place the burden on those in the housing industry. Although courts can prohibit exclusionary zoning practices and ensure that land is available for low cost housing, they are ill-equipped to mandate or monitor ongoing inclusionary programs. The legislature, by enacting inclusionary zoning ordinances or otherwise, is better suited to performing that function, so long as the cost of such programs is shared by all. Because federal funds for housing are diminishing, it is convenient and tempting to look to the housing industry to take up the slack, but it is a flagrant violation of the taking clause of the fifth amendment.

163. N.Y. Times, Feb. 14, 1982, at 1, col. 6.

164. *Id.* at 43, col. 1.