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### EXCLUSIONARY ZONING: *MOUNT LAUREL*—SEMINAL OR TEMPEST-IN-A- TEAPOT

OLAN B. LOWREY\*

[Author's note: *On Thursday, January 20, 1983, only a few days prior to press time and better than two years after the second Mount Laurel case had been argued, the Supreme Court of New Jersey, in a unanimous 270 page opinion, reaffirmed the principles of the original Mount Laurel decision in Southern Burlington County NAACP v. Township of Mount Laurel, Doc. No. A-35/36/172 (N.J. Jan. 21, 1983).*

*It appears that in order to reach the desired unanimity, the justices of the court agreed to defer to the New Jersey State Development Guideplan, an executive branch document, to determine whether a local government unit has an obligation to deal through its zoning laws or otherwise to provide for low-income housing. The "otherwise" that had previously only been hinted at was spelled out forcibly by the court's suggestions of tax rebate, density bonus, or expert assistance in the seeking of government financing. In addition, judicial expertise is to be gained by an internal court reorganization in which certain judges will be assigned to exclusionary zoning cases. This effort is to be supplemented by special masters who will presumably have planning expertise.*

*It is not anticipated that this, the latest chapter in the Mount Laurel saga, will have any more significant impact than the original Mount Laurel decision. It is, however, a step in the direction toward*

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*the court's acceptance of assistance from branches of the government that are better suited to cope with the problem as perceived.]*

## I. INTRODUCTION

This article is dedicated to the principle, simply stated, that I cannot tell you what it is but I know it when I see it.<sup>1</sup> This philosophy, perhaps more consonant with pornography litigation than land use law, might well be related to the concept of what exclusionary zoning is, but would even more appropriately be addressed to the highly abstract and related question of what constitutes fair-share. Alternatively, the article might be dedicated to the concept: "Rus mihi dulce sub urbe est"—"To me, the country on the outskirts of the city is sweet."<sup>2</sup>

The catalyst for this effort was a suggestion that the impact of *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>3</sup> be assessed and if not followed extensively that the possible reasons should be explored. Though *Mount Laurel* has probably received more press and legal publication coverage than any other exclusionary zoning case, the short answer as to impact is that it has thus far had only moderate impact at best on the decisional process outside the State of New Jersey.

Once the confusion of exclusionary zoning is delineated sufficiently to adequately address it, focus will be on the reasons for less rather than more impact. It should be acknowledged that interspersed with the reasons as to why the multifarious doctrines have not been followed more than they have been, will be reasons why in the opinion of the author or others, they should not be followed. Henceforth, liberty will be taken with reality, and exclusionary zoning will be referred to in the singular in spite of its multifarious nature.

The focus will be primarily on the most common variety, large lot exclusionary zoning. Mobile homes and the uniquely related Pennsylvania law calling for all expectable types of housing is included. Control of group homes, and the multitude of other land control mechanisms such as stringent utility codes and permit and subdivision fees as well as other direct assessments or exactions are not generally addressed because they do not comprise the main

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1. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2. *State ex rel. Grant v. Kiefaber*, 114 Ohio App. 279, 287, 181 N.E.2d 905, 912 (1960) (quoting Marcus Valerius Martialis (Martial), Epigrams).

3. 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

thrust of the *Mount Laurel* doctrine or the focal point of exclusionary zoning litigation. Likewise, exclusion of business, minimum floor space cases, and those decisions based on just compensation under the fifth amendment or police power considerations having no relevance to regional responsibilities or people of lesser income that are sometimes cited as exclusionary zoning decisions,<sup>4</sup> are not generally dealt with.

Some judgment, easily subject to difference of opinion, has to be exercised in determining whether many decisions are concerned with exclusion of people or housing types within the context of this article. The later decisions do tend more towards recognition of regional responsibilities and interests of those of lesser income. Either

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4. There is some minimal dissimilarity at least between minimal floor space cases and exclusion of business as opposed to exclusion of people. And it is probable that some jurisdictions will permit large lot zoning while proscribing exclusion of legitimate businesses.

The exclusion of businesses where there is adequate commercial service available in nearby municipalities has been sustained. *See, e.g.*, *Valley View Village, Inc. v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Cadoux v. Planning & Zoning Comm'n*, 162 Conn. 425, 294 A.2d 582, *cert. denied*, 408 U.S. 924 (1972); *McDermott v. Village of Calverton Park*, 454 S.W.2d 577 (Mo. 1970); *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963). As in *Blank v. Town of Lake Clarke Shores*, 161 So.2d 683 (Dist. Ct. App. Fla. 1964) and *Gautier v. Town of Jupiter Island*, 142 So. 2d 321 (Dist. Ct. App. Fla. 1962) it has been recognized that exclusion of businesses can be unconstitutional. Exclusion of trailer parks has been voided because they constitute a lawful business enterprise as well as on egalitarian and other grounds discussed herein. *See, e.g.*, *High Meadows Park, Inc. v. City of Aurora*, 112 Ill. App. 2d 220, 250 N.E.2d 517 (1969).

Many cases which have been cited as exclusionary zoning decisions, though relevant, are insufficiently so as to be classified as such. *See, e.g.*, *Buchanan v. Warley*, 245 U.S. 60 (1917) (purely racial); *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972); *English v. Town of Huntington*, 335 F. Supp. 1369 (E.D.N.Y. 1970) (urban renewal); *Kavanewsky v. Zoning Bd. of Appeals*, 160 Conn. 397, 279 A.2d 567 (1971); *Honeck v. County of Cook*, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); *Warren v. Municipal Officers*, 431 A.2d 624 (Me. 1981); *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964); *Wilson v. Town of Sherborn*, 3 Mass. App. Ct. 237, 326 N.E.2d 922 (1975); *Fischer v. Township of Bedminster*, 11 N.J. 194, 93 A.2d 378 (1952); *Levitt v. Incorporated Village of Sands Point*, 6 A.D.2d 701, 174 N.Y.S.2d 283 (1958); *Franmor Realty Corp. v. Village of Old Westbury*, 280 A.D. 945, 116 N.Y.S.2d 68 (1952); *Dilliard v. Village of North Hills*, 195 Misc. 875, 91 N.Y.S.2d 542 (Sup. Ct. 1949); *Mayfield-Dorsh, Inc. v. City of South Euclid*, 68 Ohio St. 2d 156, 429 N.E.2d 159 (1981); *State ex rel. Grant v. Kiefaber*, 114 Ohio App. 279, 181 N.E.2d 905 (1960).

Typical of closely related large lot decisions that do not quite reach the exclusion issue is *Aronson v. Town of Sharon*, 346 Mass. 598, 602, 195 N.E.2d 341, 344 (1964) (citing *Simon v. Needham*, 311 Mass. 560, 564, 42 N.E.2d 516, 518 (1942)), in which the court invalidated a 100,000 sq. ft. minimum lot size as not being a valid exercise of the police power where the only justification was enhancement of "living and recreational amenities." *Id.* at 604, 195 N.E.2d at 345. The court's decision was based on the rights of the owners, and not on those of third parties.

consideration relates to exclusion. It matters little for definitional purposes whether the poor within or those from without are being excluded.

No effort will be made to place in perspective relevant legislation almost all of which has followed the handing down of the *Mount Laurel* decision. It is noted that the cities of Los Angeles and Palo Alto and Orange County, California, Fairfax County, Virginia, and the states of California, Massachusetts, New York, Oregon and New Jersey have all passed relevant legislation.<sup>5</sup> To some limited extent the 1977 amendment to the Community Development Act<sup>6</sup> is also relevant insofar as it mandates that housing assistance plans for recipients of community development funding give consideration only to those from outside the community who might desire to work there. This is a retreat from the initial act which implicitly at least required consideration of those who might want to live there for whatever reason.<sup>7</sup>

## II. THE DOCTRINE OF EXCLUSIONARY ZONING—PROBLEMS OF DEFINITION

The analytical framework for any definition must involve an understanding of exclusionary zoning as handled by the courts, because it is a court made doctrine. An understanding of the definition involves the interrelationship of at least three factors. First, attention has to be given to the type of facts that give rise to a legal conclusion of exclusionary zoning. Second, the legal theory applied to those facts to reach a conclusion of exclusionary zoning has to be addressed. Third, a reasonable understanding of the phenomena requires a recognition of the different remedies flowing, whether logically or not, from the different facts and theories. It may well be that the last factor could be better described as a recognition of different results flowing from different jurisdictions because the difference in results can be measured more by the sociological perspective of each state's judiciary than by any legal theory utilized.

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5. Coverage of the subject of legislative intervention in California is found in Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981). The article reflects the idea that exclusionary legislative zoning has been counterproductive there. A broader perspective is found in Rose, *From the Legislatures*, 3 REAL ESTATE L.J. 176 (1974).

6. 42 U.S.C. § 5304 (Supp. IV 1980).

7. The employment amendment inserted after the phrase, "expected to reside in the community," the phrase, "as a result of existing or projected employment opportunities in the community." 42 U.S.C. § 5304 (Supp. IV 1980).

### A. *Facts*

Fact patterns resulting in findings of exclusionary zoning such as those addressed here can with reasonable accuracy be classified under two categories. The first is exclusion of people and the second exclusion of types of housing. The latter, excepting perhaps mobile homes, is unique to the Commonwealth of Pennsylvania. The two interrelate to some degree. Exclusion of people is found primarily through large lot zoning. Exclusion of mobile homes or of types of housing may or may not relate to exclusion of people. Types of housing that might be protected are twins, townhouses, atrium houses and mobile homes.

### B. *Theory*

It is clear that no single theory of recovery has been relied on exclusively. But the basis for relief has almost always revolved around a state constitution or the police power, primarily the latter. The just compensation clause of the fifth amendment to the federal constitution is often intermingled, as well as a vaguely articulated concept of substantive due process.

The police power, of course, is that power retained by the states rather than delegated to the federal government; any action pursuant to it must bear some substantial relationship to health, safety, welfare, or morals.<sup>8</sup> If the court concludes that the requisite relationship does not exist, then the conclusion is often articulated in terms of unreasonableness. The power is also often couched in terms of unconstitutionality without recitation of a controlling constitutional provision, almost as if to exceed the police power is to exceed the constitution.<sup>9</sup> The finding may be that the restriction on the use of private property is so unreasonable that it is beyond the police power, though the restriction does not rise to the level of a violation of the fifth amendment as a taking. The courts often find that the exercise of the power in an exclusionary manner is unreasonable because it does not relate to the welfare of the poor.<sup>10</sup> In some instances it is not clear which poor are being spoken of and sometimes, most often of late, the category includes those poor from outside the municipality who might choose to live there for whatever reason. In Pennsylvania especially, it is very probable that none of the plaintiffs are poor or even cited as such.

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8. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

9. *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 328 A.2d 464 (1974).

10. 67 N.J. at 179-80, 336 A.2d at 727-28 (1975).

In other situations, the taking provision of the fifth amendment is successfully invoked to defeat a zoning ordinance. Though the rationale of the court may or may not relate to exclusion, such decisions still invalidate large lot zoning. Most often the cases reflect considerations germane to all three principles without clearly delineating which, if any, is the dominant or controlling consideration.

Perhaps the most common combination in recent years is a consideration of unreasonableness based on restraint of private property rights and of regional interests that have not been considered or provided for. The word "poor" is used, and must be read, with the understanding that it relates to those of lesser income who may or may not be technically poor. In Pennsylvania it could, if regarded as encompassing only the plaintiffs, even refer to wealthy individuals who desire to live in multiunit housing in a given township as opposed to a single-family detached dwelling on a large plot of ground. But, developers bring virtually all Pennsylvania actions.

### C. *Remedy*

There have been two basic approaches to remedy. One involves only site-specific relief for the developer. This approach requires the municipality to respond to a successful exclusionary challenge by revising its zoning ordinance to permit the developer to build the type of housing proposed by him at the density proposed by him. Most states, including Pennsylvania, have gone no further.<sup>11</sup> The second approach is to require the municipality to revise its entire zoning ordinance so as to correct all exclusionary defects. This probably involves, as well, site-specific relief for the plaintiff. New Jersey has adopted the second approach.<sup>12</sup>

In Pennsylvania, site-specific relief is the entire remedy. The courts do not direct revision of zoning ordinances in the general public interest except to the extent, if any, that relief to the plaintiff can be said to coincide with public welfare.<sup>13</sup> After a given developer is allowed to build largely as he sees fit, there is nothing in the court decree to force any other response from the municipality. It can otherwise remain exclusionary until the next challenge. Whether a number of challenges will be sufficient to make an ordinance impregnable against further attack is not clear, though it is assumed

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

12. *See, e.g.*, 67 N.J. at 191-92, 336 A.2d at 734 (1975).

13. *See, e.g.*, *National Land and Inv. Co. v. Easttown Township*, 419 Pa. 504, 533, 215 A.2d 597, 612-13 (1965).

that if the township has adopted a number of curative amendments sufficient to purge its ordinance of judicially proscribed exclusion, no further challenges will be successful.

A shorthand definition of the substantive violation offered by one recognized authority is: "The term 'exclusionary zoning' as it is used herein means land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality."<sup>14</sup> If the words "and commonly accepted housing types" were added to "persons of low or moderate income" the definition would also be adequate for Pennsylvania. But, regardless of how the substantive law is perceived, impact can only be adequately assessed in terms of remedy.

The problem remaining, as with almost all definitions, is that it does not recognize that virtually all land use controls "tend to exclude persons of low or moderate income" no matter what the nature of the limitation. This is because zoning, subdivision regulations, health standards and safety measures tend to make an area or a home more desirable and therefore more expensive. The cost of living in a desirable home or area is determined by the degree of desirability. The quality and the price interrelate and escalate together. Perhaps the only totally accurate definition of exclusionary zoning would be that zoning which has been found by the judiciary to be so. Or, an equally unhelpful definition might be formed by putting the word "unduly" before the word "tend" in the definition quoted above.

It might be worth bearing in mind that by either public or private device everyone but the most wealthy are excluded on the basis of wealth from some place and even the wealthy are sometimes excluded for social reasons.

However defined, there remain problems of definition or understanding as to what exclusionary zoning is and as to what *Mount Laurel* stands for that might account for the widespread assumption as to the significance of the case. The problem appears to be that of perception of the remedy provided for in *Mount Laurel*.

The case has often been credited with an affirmative action stance beyond its express language. For instance, one commentator has stated that "[p]robably the most significant attempt to formulate a new standard of review was the New Jersey Supreme Court's decision in *Mount Laurel*, which required a suburban community to provide adequate housing for a judicially determined percentage of the

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14. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 8.02 (1968).



region's low-income population."<sup>15</sup> Of course, though there was strong affirmative action language<sup>16</sup> easily susceptible to such a reading, it is now clear that *Mount Laurel* did not require the township to provide any housing at all, only to rezone for multiunit housing.

So, when a definition is used in order to give some sense of clarity in determining what may have been followed, it must be done with the understanding that the *Mount Laurel* model differs from the Pennsylvania model, that both may differ in significant respects from all others, and that numerous analytical strands are involved.

### III. IMPACT OF *MOUNT LAUREL*

Although the impact of *Mount Laurel* may be somewhat uncertain, it is clear that not only was it not seminal, but its 1975 date makes New Jersey one of the last states to recognize the doctrine.

When *Mount Laurel* was decided in 1975, at least ten jurisdictions had already expressed some concept of exclusionary zoning involving large lot zoning or mobile homes: New York, Massachusetts, Illinois, Connecticut, Virginia, Pennsylvania, Mary-

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15. Note, *Exclusionary Zoning in California: A Statutory Mechanism for Judicial Non-deference*, 67 CALIF. L. REV. 1155 (1979).

16. *Mount Laurel's* affirmative action language may have been misleading:

It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.

67 N.J. at 179, 336 A.2d at 728.

By way of summary, what we have said comes down to this. As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.

*Id.* at 187, 336 A.2d at 731-32. "We have in mind that there is at least a moral obligation in a municipality to establish a local housing agency pursuant to state law to provide housing for its resident poor now living in dilapidated, unhealthy quarters." *Id.* at 192, 336 A.2d at 734.

We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.

*Id.* at 174, 336 A.2d at 724.

land, California, Michigan, and New Hampshire.<sup>17</sup> Though the zealousness and fervor with which the decisions were rendered were not the same and the outcomes differed, there was, excepting Pennsylvania's housing approach, no essential difference in broad abstract principle. A common bond has been that neither then nor now does there appear to have been any court willing to acknowledge the right of a municipality under the police power to exclude people without limitation.<sup>18</sup>

#### A. *Prior Decisions*

Probably the first state to recognize a doctrine of exclusionary zoning was New York in the 1931 decision *Fox Meadow Estates, Inc. v. Culley*.<sup>19</sup> Exclusion of apartment buildings from one residential sector was sustained where apartments were permitted in another sector and the municipality had "provided for future development as far as could reasonably be foreseen."<sup>20</sup> A close reading of the case leaves the impression that the primary focus was on reasonableness in general rather than exclusion of people. It may barely qualify as an exclusionary zoning case, but it was some forty-four years before *Mount Laurel* was decided in 1975. The issue of exclusion was squarely raised by a dissent in a 1952 New Jersey minimum floor

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17. See, e.g., *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972); *Confederacion de la Raza Unida v. City of Morgan Hill*, 324 F. Supp. 895 (N.D. Cal. 1971); *Senior v. Zoning Comm'n*, 146 Conn. 531, 153 A.2d 415 (1959), *appeal dismissed*, 363 U.S. 143 (1960); *Honeck v. County of Cook*, 12 Ill. 2d 257, 146 N.E.2d 35 (1957); *County Commissioners v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *Simon v. Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942); *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (Ct. App. 1971); *Fox Meadow Estates, Inc. v. Culley*, 233 A.D. 250, 252 N.Y.S. 178 (App. Div. 1931), *aff'd*, 261 N.Y. 506, 185 N.E. 714 (1933); *National Land and Inv. Co. v. Easttown Township*, 419 Pa. 504, 215 A.2d 597 (1965); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

18. In *Berenson v. Town of Newcastle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), the court stated "Florida courts have upheld the validity of exclusionary zoning provisions without any qualifications. (*Blank v. Town of Lake Clarke Shores*, 161 So.2d 683 [Fla. App.]; *Gautier v. Town of Jupiter Is.*, 142 So. 2d 321 [Fla. App.])" *Id.* at 109, 341 N.E.2d at 241, 378 N.Y.S.2d at 680. The author's reading of these cases does not support the assertion that exclusionary zoning provisions were sustained without any qualification. Rather, the courts simply refused to supplant the legislative judgment. They did not sustain the power to absolutely exclude, but rather sustained exclusion under the facts of the case. There is no doubt that the perspective as to judicial deference is different, but there is no expressed difference of black letter law.

19. 233 A.D. 250, 252 N.Y.S. 178 (1931), *aff'd*, 261 N.Y. 506, 185 N.E. 714 (1933).

20. *Id.* at 250, 252 N.Y.S. at 179.

area case entitled *Lionshead Lake, Inc. v. Township of Wayne*.<sup>21</sup>

Perhaps the first decision to precisely address an exclusionary doctrine, including regional considerations, was the 1942 Massachusetts decision of *Simon v. Town of Needham*.<sup>22</sup> One-acre zoning was sustained as a legitimate exercise of the police power against charges that it unduly excluded persons of more limited income from the township:

A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district. The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large, and in such instances the interests "of the municipality would not be allowed to stand in the way."<sup>23</sup>

Although it might be urged that the language "thrifty and respectable citizens" restricts the scope of the decision, it is not believed that the language detracts from the clear pronouncement of regional responsibility, as in *Mount Laurel*, to zone in relation to the general welfare.

In the 1957 Illinois decision, *Honeck v. County of Cook*,<sup>24</sup> five-acre zoning was sustained on the ground that there was room for a fair difference of opinion against charges that the zoning was confiscatory and unreasonable. Twenty 1000 square-foot lots were available. There were strong overtones of elitist zoning considerations.

The Supreme Court of Connecticut in 1959, though finding a legitimate exercise of the police power in up-zoning over 4,000 acres from two to four acres per unit of housing, recognized the principle

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21. 10 N.J. 165, 89 A.2d 693 (1952) (Oliphant, J., dissenting), *appeal dismissed*, 344 U.S. 919 (1953).

Following close on the heels of *Lionshead Lake* the court sanctioned against charges that it exceeded the police power, the right to establish a minimum lot area of five acres in what was then a rural municipality. *Fischer v. Township of Bedminster*, 11 N.J. 194, 93 A.2d 378 (1952). One-half acre lots were available in the township. Neither outsiders nor the poor were mentioned, and seemingly the availability of one-half acre lots was not a foundation of the decision.

22. 311 Mass. 560, 42 N.E.2d 516 (1942).

23. *Id.* at 565-66, 42 N.E.2d at 519 (quoting *Euclid v. Amber Realty Co.*, 272 U.S. 365, 390 (1926)).

24. 12 Ill. 2d 257, 146 N.E.2d 35 (1957).

of exclusionary zoning in *Senior v. Zoning Commission*.<sup>25</sup> The court held the fact that New Canaan was the wealthiest per capita community in the nation to be a proper consideration "in deciding whether the establishment of a superior residential district would be the most appropriate use of [the] unspoiled area."<sup>26</sup> Directly addressing the exclusionary concept, the court recited that in addition to zoning for the wealthy there were some 625 four-acre sites, 1,879 two-acre sites, 753 one-acre sites and eighty-seven half-acre sites as well as some 1,100 sites requiring less than one-half acre to erect a single-family dwelling.<sup>27</sup>

Virginia entered the field in 1959 with a purely egalitarian decision when its Supreme Court in *Board of County Supervisors v. Carper*<sup>28</sup> invalidated Fairfax County's two-acre zoning plan. In a county where ninety percent of the people lived in the eastern one-third and the population had doubled in the past seven years, two acre zoning in the western two-thirds of the county was held unlawful on the grounds that it forced low-income people to live in the eastern area. The court stated:

The practical effect of the amendment is to prevent people in the low income bracket from living in the western area and forcing them into the eastern area, thereby reserving the western area for those who could afford to build houses on two acres or more. This would serve private rather than public interests. Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare.<sup>29</sup>

This case appears to represent a rejection of the regional planning called for by New Jersey, Pennsylvania and New York.

In 1965 Pennsylvania initiated a landslide of exclusionary zoning cases with *National Land and Investment Co. v. Easttown Township*.<sup>30</sup> A township, determined by the state supreme court to stand in the path of progress, had zoned thirty percent of the township for one unit of housing per four acres, seventeen percent for one unit per two acres and some thirty-five percent for one unit per acre. The court ruled that the four-acre zoning was exclusionary at the behest of a developer seeking the right to utilize his land in the four-acre zone for the erection of one house on one acre. There was no gen-

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25. 146 Conn. 531, 153 A.2d 415 (1959), *appeal dismissed*, 363 U.S. 143 (1960).

26. *Id.* at 535, 153 A.2d at 418.

27. *Id.*

28. 200 Va. 653, 107 S.E.2d 390 (1959).

29. *Id.* at 661, 107 S.E.2d at 396.

30. 419 Pa. 504, 215 A.2d 597.

eral development scheme proposed to the court. The court apparently regarded the thirty-five percent of the township zoned for one house per acre to be an inadequate provision for smaller lot zoning though not yet developed without holding that four acres was unlawful per se. The court addressed the general issues of expanding population, a natural place for development, and the need for housing opportunity in the suburbs. No plaintiff seeking better housing from outside or inside the township, poor or otherwise, was involved. Nevertheless, the court characterized the zoning as exclusionary, in effect protecting private property rights based in part at least on social considerations unrelated to those property rights.

The basis of the finding of unconstitutionality appears to be a combination of exceeding the police power and interference with private property rights. Though noting the greater value of land zoned for more density, the court did not find a taking.

Exclusionary zoning charges were met directly in a 1967 Maryland case, *County Commissioners v. Miles*,<sup>31</sup> wherein it was alleged that five-acre zoning to protect the wealthy was beyond the police power because there was no public purpose. Though agreeing that a public purpose was necessary the court found such a purpose in the "distinctive nature of the water-front county and the many historic sites" and because the "ordinance makes fair and reasonable provision for all the different kinds of housing required in the County."<sup>32</sup> Whether the different kinds of housing language of the decision heralds a recognition of the Pennsylvania role on types of housing is not clear. Though the word "required" needs definition, the holding would sustain a plausible argument that any reasonable type of housing must be permitted by zoning in Maryland.

The judiciary in California recognized the exclusionary zoning doctrine at least as early as 1971 in the case of *Confederacion de la Raza Unida v. City of Morgan Hill*.<sup>33</sup> An action was brought to place government-sponsored low-income housing in a specific sector of the city on the grounds that the inability to do so under the zoning code constituted a violation of the fourteenth amendment and the supremacy clause of the National Housing Act.<sup>34</sup> The claim was rejected on the grounds that there were other sectors of the city zoned so as to permit the density proposed.

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31. 246 Md. 355, 228 A.2d 450 (1967).

32. *Id.* at 371, 228 A.2d at 458.

33. 324 F. Supp. 895 (N.D. Cal. 1971).

34. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888.

Michigan also invalidated exclusion in 1971 in *Bristow v. City of Woodhaven*.<sup>35</sup> In *Bristow* the focus was on the class of people who might live in the mobile homes that were being excluded:

Such zoning may never stand where its primary purpose is . . . the exclusion of a certain element of residential dwellers. [I]t becomes incumbent upon the municipality to establish or substantiate the existence of a relationship between the exclusion of this legitimate use and public health, safety, morals, or general welfare.<sup>36</sup>

It is not clear whether other housing styles far less commonly discriminated against, such as townhouses, twins, and others would be given similar treatment. If the purpose, or perhaps the result, were to exclude a certain element of residential dwellers it would be logical to include townhouses and other types of multiunit housing.

However, because mobile homes are the type of housing available to the lowest economic level of home-buying American citizens it would not be surprising to see develop a special deference to such housing under one theory or another.

In 1972 in *Steel Hill Development, Inc. v. Town of Sanbornton*<sup>37</sup> a federal court in New Hampshire in dictum acknowledged that it could be beyond the police power to zone with exclusionary intent but ruled out the existence of an exclusionary zoning issue where a developer challenged a change in zoning from 35,000 square feet to three and six-acre lots.<sup>38</sup> The specific charges were: no substantial relation to health, safety and welfare, taking under the fifth amendment, and discrimination under the fourteenth amendment. No poor parties were involved. The court sustained the zoning change on the grounds that the municipality was very sparsely settled, the land proposed to be used had special scenic and open space value, the development primarily was for second homes and the proposed development would drastically alter not only the landscape but the population balance in the municipality. Irrespective of the court's recognition of the issue, the ingredients of exclusionary zoning were present.

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35. 35 Mich. App. 205, 192 N.W.2d 322 (1971). Exclusion of mobile homes is sometimes precluded solely because it is a rejection of a legitimate business use.

36. *Id.* at 217-18, 192 N.W.2d at 328.

37. 469 F.2d 956 (1st Cir. 1972).

38. *Id.* at 958-59.

## B. Mount Laurel

Then, in 1975 *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>39</sup> was decided. As improbable as it might seem, a decision from a state very late, if not last, to the table has seemingly become synonymous nationwide with the concept of exclusionary zoning. The action was initiated by a developer, the NAACP, and several named individual poor, black and white plaintiffs from inside and outside the township of Mount Laurel. It sought a change in zoning because no provision had been made for multiunit housing. The township had almost quadrupled in population between 1950 and 1970. In 1964, it had enacted an ordinance permitting only single-family residential units primarily on acreage of one-half acre per unit. The New Jersey Supreme Court held that in a developing township the regulations were incompatible with the New Jersey Constitution because they failed to promote the general welfare.

The developing township concept required: (1) Sizable land area; (2) lying outside the central cities and older built-up suburbs; (3) that the township must have substantially shed its rural characteristics; (4) must either have undergone great population increases since World War II or must now be in the process of doing so; (5) must not be completely developed; and (6) must be in the path of inevitable future residential, commercial and industrial demand and growth.<sup>40</sup>

Not only has *Mount Laurel* followed rather than initiated, it has probably not contributed any totally new conceptual element to the substantive doctrine, not even the concept of the developing township. In substantially less doctrinaire form, the concept that exclusion could take place only where there was a demand for a certain use, that is, where the municipality was developing, had been at least an inherent factor in every decision rendered. For example, in *National Land* the Pennsylvania Supreme Court had spoken of the town being in "the path of a population expansion . . ."<sup>41</sup> and in *In re Girsh*,<sup>42</sup> the court assumed a demand for apartments because a developer desired to build them.<sup>43</sup> It plausibly could be argued that to the extent *Mount Laurel* exempts nondeveloping townships even though there is a demand to build there, a new element has been

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39. 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

40. *Id.* at 160, 336 A.2d at 717.

41. 419 Pa. at 519, 215 A.2d at 605.

42. 437 Pa. 237, 263 A.2d 395 (1970).

43. *Id.* at 245, 263 A.2d at 399.

added. But it would appear that *Mount Laurel* did introduce a new remedial concept in relation to the doctrine, that is, judicial supervision of the rezoning of a township in favor of regional interests, including those of the poor. This is probably the salient feature of the decision.

Perhaps the ultimate appraisal of the impact of *Mount Laurel* is that it would appear that no state has adopted an exclusionary zoning doctrine citing *Mount Laurel* as authority. *Mount Laurel* was cited in a dissent<sup>44</sup> in Minnesota, a state that does not appear to have adopted exclusionary zoning. The majority had sustained a moratorium imposing a ten-acre minimum in an area formerly zoned for one-unit for two and one-half acres.

### C. *Subsequent Decisions*

The status of the law after *Mount Laurel* is what it was before. Those decisions listed hereinabove and the basic expressions therein represent a rather complete picture of the state of exclusionary zoning decisions before and after *Mount Laurel*.

Even to the extent that *Mount Laurel* has been cited, it does not appear that the basic rationale adopted has related any more to *Mount Laurel* than to the decisional process in other jurisdictions. Typical treatment given *Mount Laurel* is found in the significant New York decision, *Berenson v. Town of New Castle*.<sup>45</sup> *Mount Laurel* was relegated to a terse reference along with decisions from other states with at least a suggestion that it was only of academic interest because New York had long had its own exclusionary zoning decisions.<sup>46</sup>

Perhaps most important is assessing the impact and desirability of the doctrine itself rather than *Mount Laurel* per se. In doing that the single most important factor may be not whether the doctrine has been specifically followed but the fact that, as noted, the doctrine itself has never been rejected. The courts have uniformly assumed the power to review charges of zoning exclusion. Any assessment of recognition would have to be based on a report of one hundred percent success for the theory as opposed to success for the litigants.

Though both Pennsylvania and New Jersey are relative latecomers, within the past seven years the vast majority of exclu-

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44. *Almquist v. Town of Marshan*, 308 Minn. 52, 85-86, 245 N.W.2d 819, 836 (1976) (Kelly, J., dissenting).

45. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672.

46. *Id.* at 108-09, 341 N.E.2d at 241, 378 N.Y.S.2d at 679.



sionary zoning decisions have come from the two states.<sup>47</sup> The only other state having even a handful of cases is New York.<sup>48</sup> For this reason, an assessment of the impact of the doctrine means, primarily, closely scrutinizing the law in New Jersey and Pennsylvania.

The clearly definable doctrinal differences between the New Jersey and Pennsylvania approach are twofold. First, in Pennsylvania, housing types, such as townhouses, atrium, and twins, among others, must be provided for.<sup>49</sup> No such status for types of housing has been recognized in the state of New Jersey. In Pennsylvania even though there may be adequate provision for multiunit housing to meet the expected increase in population in the foreseeable future, the township has still zoned in an impermissibly exclusionary manner if it fails to provide for every reasonable type of housing that might logically be built in the township.<sup>50</sup>

The second obvious distinction, as noted, is remedial. It is the willingness of the New Jersey judiciary to supervise revision of an entire zoning ordinance in favor of the general welfare rather than grant only site specific relief to a plaintiff developer.<sup>51</sup>

But if the decisions are viewed collectively, without reliance on enunciated doctrine alone, other significant differences appear. New Jersey decisions often directly involve the poor as plaintiffs or as projected occupants.<sup>52</sup> They are definitely egalitarian. Pennsylvania's litigation has primarily involved developers seeking to make money by securing the rezoning of land to a greater density.<sup>53</sup> Though de-

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47. 2 R. ANDERSON, *supra* note 6, §§ 8.01-8.14.

48. *See, e.g.*, *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

49. 437 Pa. at 237, 263 A.2d at 395 (apartments); *Camp Hill Dev. Co. v. Zoning Bd. of Adjustment*, 13 Pa. Commw. Ct. 519, 319 A.2d 197 (1974) (townhouses).

50. 437 Pa. at 237, 263 A.2d at 395.

51. *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977).

52. *See, e.g.*, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975).

53. *See, e.g.*, *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land and Inv. Co. v. Easttown Township*, 419 Pa. 504, 215 A.2d 597 (1965).

The poor have clearly been involved in two actions in Pennsylvania. The first was an action by the Commonwealth, twelve individuals of low and middle-income (black and white) and two corporations allegedly desiring to build low and moderate income housing in Bucks County, Pennsylvania. *Commonwealth v. Bucks County*, 8 Pa. Commw. Ct. 295, 302 A.2d 897 (1973). Plaintiffs sought to enjoin all Bucks County municipalities from "allegedly discriminatory exercise of the zoning function and requiring them either to legislate in the zoning field or to require special exceptions by local zoning hearing boards so that low and moderate income housing would be permitted" 302 A.2d at 899. Plaintiff sought similar relief against the County Planning Commission and Housing Authority. *Id.* On appeal the case was summarily disposed of by the Common-

velopers and the courts give lip service to the poor, the real poor have rarely, and never successfully, been the plaintiffs and housing has not been seriously proposed for them by the developers except perhaps in the case of mobile homes. As stated by the Pennsylvania Supreme Court in *Surrick v. Zoning Hearing Board*,<sup>54</sup> the zoning concept is not an egalitarian one but rather a type of substantive due process analysis.<sup>55</sup> In the New Jersey decision, *Glenview Development Co. v. Franklin Township*,<sup>56</sup> three- and five-acre zoning was sustained as valid against a challenge as exclusionary in part on the grounds that what the developer had proposed would not serve the interest of the poor.<sup>57</sup> No Pennsylvania decision has ever cited lack of aid to the poor as an exclusionary zoning challenge.

In New Jersey, the developing township doctrine and the six considerations set forth in *Mount Laurel* to determine whether the township is developing have become a somewhat rigid formula to be seriously applied. New Jersey courts have now repeatedly held on varying evidence that a given township is not developing and therefore need not zone for multiunit housing.<sup>58</sup> Pennsylvania talks of a logical place for developing but gives only cursory attention at best to relevant demographic factors and though giving some lip service to demand has not given any realistic recognition to the developing township concept.<sup>59</sup> Adequate housing in adjacent townships can

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wealth Court primarily on the grounds that no building permits had been applied for to build and that in any event the relief requested would intrude into the legislative field and inject the court into political and non-justiciable controversy. 302 A.2d at 900, 904-05.

The second and more traditional exclusionary action involving the poor was *Raum v. Board of Supervisors*, 20 Pa. Commw. Ct. 426, 342 A.2d 450 (1975), in which certain low-income individuals in a township intervened in an action contesting the validity of an ordinance creating a unified development area on the grounds that it was exclusionary because of alleged failure to provide for low-income housing. The court ruled against the challenge because the proposed development had provided for houses for as little as \$18,000, no one had applied to build low-income housing in any event and for that matter the decline of low-income individuals in the township was attributable to market forces rather than zoning. *Id.* at 444, 342 A.2d at 459.

54. 476 Pa. 182, 382 A.2d 105 (1977).

55. *Id.* at 188, 382 A.2d at 108.

56. 164 N.J. Super. 563, 397 A.2d 384 (1978).

57. *See Rose, Three-and Five-Acre Zoning Upheld in New Jersey—Rural Town Exempt From Mt. Laurel Requirement*, 8 REAL EST. L.J. 57 (1979). Rose was a witness in the case, and judging from the results, a highly competent one.

58. *See, e.g., Glenview Dev. Co.*, 164 N.J. Super. at 563, 397 A.2d at 384; *Windmill Estates, Inc. v. Zoning Bd. of Adjustment*, 158 N.J. Super. 179, 385 A.2d 924 (App. Div. 1978).

59. A comparison of two townships both of which were found to be in the path of progress by the Pennsylvania courts is illustrative. In *Girsh*, Nether Providence Town-

form an acceptable defense in New Jersey,<sup>60</sup> and New York as well,<sup>61</sup> and high-rise apartment buildings may be excluded on the same grounds.<sup>62</sup> The former was not true at least until the 1978 amendments to the Pennsylvania Municipalities Planning Code authorizing municipalities to do joint planning.<sup>63</sup> The latter has never been true.

As noted, the approach to remedy has differed. In New Jersey there has been a strong proclivity for the courts to hold out for a general revision to correct zoning deficiencies on the comprehensive level without primary regard to site-specific relief. For instance, litigation started in 1970 in the New Jersey case, *Oakwood at Madison, Inc. v. Township of Madison*,<sup>64</sup> came before the state supreme court in 1977. The court finally granted site-specific relief to the corpora-

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ship, based on the 1960 census, was 12 miles from Philadelphia with approximately 2,802 persons per square mile. 437 Pa. at 238, 263 A.2d at 386. According to table 1 of the U.S. census of 1970, lying next to it on the way to Philadelphia was Marple Township with a population density of 2,401 persons per square mile. Buckingham Township, according to the U.S. census of 1970, had a population density of 156 persons per square mile, approximately 5.6% of the population density of Nether Providence Township at the time *Girsh* was decided. Between it and Philadelphia lay Wrightstown and Warwick townships with population densities of 223 and 193 per square mile respectively.

Buckingham Township had for some years had property zoned at a density of four units per acre, none of which had been developed at that density. The courts approved approximately 9,000 dwelling units in a township with a 1970 population of 5,150 individuals housed in 1,609 dwelling units according to the 1970 U.S. Census. This type of overkill makes it clear that the court's purpose was not, solely at least, to correct a deficiency. The author was involved in this litigation as counsel at the appellate level.

60. *Nigito v. Borough of Closter*, 142 N.J. Super. 1, 359 A.2d 521 (App. Div. 1976); *Berenson*, 38 N.Y.2d at 102, 341 N.E.2d at 236, 375 N.Y.S.2d at 672. It was stated in *Berenson*:

[In this regard we there noted that] [s]o long as the regional and local needs for such housing were supplied by either the local community or by other accessible areas in the community at large, it cannot be said, as a matter of law, that such an ordinance had no substantial relation to the public health, safety, morals or general welfare.

*Id.* at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 681-82.

61. *See, e.g.*, *Berenson*, 38 N.Y.2d at 102, 341 N.E.2d at 236, 378 N.Y.S.2d at 672.

62. *See, e.g.*, *Swiss Village Assoc. v. Municipal Council*, 162 N.J. Super. 138, 392 A.2d 596 (Ch. Div. 1978).

63. PA. STAT. ANN. tit. 53, § 11101 (Purdon 1972). Though the Article authorizes joint municipal Planning Commissions, joint zoning is not provided for and it is not clear what the effect would be if member municipalities chose to enact zoning pursuant to joint planning in such a way as to exclude the poor from certain of the planning townships. *Id.* § 11102. But, to paraphrase the principle rather than the literal language, the Pennsylvania court has indicated that regional planning would be desirable, it being clear that the region must zone for everything for all people. *National Land*, 419 Pa. at 511, 215 A.2d at 603.

64. 72 N.J. 481, 371 A.2d 1192 (1977).

tion that sought to build low-income housing.<sup>65</sup> By contrast, in Pennsylvania it was early adopted that as a matter of reward, the developer should be able to pursue his plans irrespective of the desirability of comprehensive planning in the township.<sup>66</sup> Until 1977, when *Surrick* was announced, the Pennsylvania courts had not formally adopted the amorphous fair-share concept that has caused the New Jersey judiciary so much difficulty.<sup>67</sup>

Most significantly, as noted,<sup>68</sup> Pennsylvania does not grant relief beyond site-specific performance. A township's zoning may remain exclusionary after a developer has won and built the housing proposed by him. The Pennsylvania courts have yet to force and supervise a general revision of a township ordinance. There is force only in the sense that the township's ordinance has been declared unconstitutional. Hoping to avoid further problems with developers, townships customarily revise their ordinances after they are attacked. Quite frequently they were in the process of revising when the curative challenges were filed because the challengers did not like the proposed changes.<sup>69</sup>

Though stating the traditional deference doctrine to the effect that legislation is to be considered presumptively constitutional, both New Jersey and Pennsylvania have in fact actually inverted the pre-

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65. *Id.* at 552-54, 371 A.2d at 1127-28.

66. *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 228, 328 A.2d 464, 468 (1974).

67. Justice Roberts in his concurring opinion in *Surrick*, 476 Pa. at 182, 382 A.2d at 105, strongly objected to the majority's explicit adoption of the fair-share concept from the New Jersey judiciary on the grounds that it had caused undue concern and trouble to the New Jersey courts, stating: "Our own case law has proved adequate to the task of preventing unconstitutional exclusionary zoning schemes without involving our judiciary in the endless complications engendered by *Mt. Laurel* in New Jersey. We would do well to continue to steer clear of 'fair-share'." *Id.* at 200-01, 382 A.2d at 115 (Roberts, J., concurring) (footnote omitted). He charged the majority with going "far beyond anything this Court had ever decided or suggested" in introducing "fair-share." *Id.* The majority disagreed, and the author believes rightly so, stating that the fair-share doctrine had always been part of the Pennsylvania approach. *Id.* at 191 n.8, 382 A.2d at 109 n.8. It has been part of the substantive analysis.

Inasmuch as Justice Roberts equated the detailed supervisory role of the New Jersey courts with the fair-share concept, and the majority did not appear to, the difference between the two is perhaps illusory. If, in adopting or reaffirming the fair-share principle in *Surrick* the Pennsylvania court intended to adopt responsibility for supervising revision of zoning ordinances in relation to regional interest, it has not become apparent there or in any other decision. The court's role still appears to be one of telling Pennsylvania municipalities to get out of shark infested waters.

68. *See, e.g.*, *National Land*, 419 Pa. at 504, 215 A.2d at 597.

69. *See, e.g.*, *In re F.P.A. Corp.*, 25 Pa. Commw. Ct. 221, 360 A.2d 851 (1976); *Buckingham Township v. Yaroschuk*, 4 Pa. D.& C.3d 790 (1977), *aff'd sub nom.*, *Buckingham Township v. Barness*, 33 Pa. Commw. Ct. 364, 382 A.2d 140 (1978), *cert. de.ied.*, 439 U.S. 1116 (1979).

sumption of constitutionality of legislative action.<sup>70</sup> Pennsylvania especially has abdicated any serious effort to exercise judicial restraint. In Pennsylvania something akin to the compelling state interest approach has been taken wherein the courts declare that once it has been established that there is in fact exclusionary zoning the burden devolves on the municipality to establish compelling reasons for it.<sup>71</sup> In general, Pennsylvania has taken an extremely limited view of the power of the local legislatures to create large lot zoning, even to the point of invalidating it as unreasonable where admittedly not exclusionary.<sup>72</sup>

The New York decisions tend to coincide with the New Jersey approach. Exclusionary zoning litigation is heavy and quite often successful only in New Jersey and Pennsylvania.

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70. One commentator has observed:

There is clearly a distinction to be drawn between the test suggested in *Livermore*, which merely calls for application of some statewide concept of public welfare in evaluating a zoning ordinance, and the Pennsylvania approach which, as a matter of constitutional law, defines the substantive conception of public welfare to be applied. While the *Livermore* reasoning was prompted by the inability of local city councils to balance the competing interests, the Pennsylvania court has indicated no basis—other than judicial fiat—for its decision that property owners cannot fend for themselves in the political arena. No strong argument supports the *National Land* proposition that a court may choose to give greater protection to the right of a property owner to develop his land than to the right of a locality to plan for orderly development within its boundaries.

Note, *supra* note 7, at 1163.

The author also suggested that the Pennsylvania approach was simply an exercise in the preferences of the Pennsylvania judiciary and concluded that the California courts had rejected such "antiquated notions." *Id.*

71. *Surrick v. Zoning Hearing Bd.*, 476 Pa. at 194-95, 382 A.2d at 111.

72. In a recent case, the Commonwealth Court of Pennsylvania held that though there was no exclusion in the township that ten acre zoning exceeded the police power. *Martin v. Township of Millcreek*, 50 Pa. Commw. Ct. 249, 413 A.2d 764 (1980). The court said that the zoning plan was not reasonable and was therefore arbitrary and capricious and would not, in any event, save farmland. *Id.* at 258, 413 A.2d at 768. The court came close to holding that there was a taking but perhaps it was only one relevant factor in relation to the reasonableness of the zoning.

Planner, consultant and primary architect of the Philadelphia Urban Renewal Renaissance, Edward Bacon, has suggested just the contrary; that 10 acre minimums would be highly desirable from the perspective of maintaining the quality of nature and open space:

Because so many people are seeking a place in the natural countryside around cities, land cannot be wasted. Land should be subdivided either in lots large enough to preserve the essential characteristics of nature (ten acres for example) or lots large enough to meet the immediate space needs a family. This, in turn, leads to an entire new zoning idea: specification of a maximum size of a residential lot in certain areas.

URBAN LAND, April 1, 1971, at 4, col. 2.

A more positive assessment of the spread of judicially mandated regional and nonexclusionary planning for housing needs was found by one commentator who stated without recitation of the states involved:

One finds that many state courts have adopted an assessment of regional housing needs as an intrinsic element in their review of zoning ordinances; a perusal of case law indicates that this has become an element in the court decisions of at least eight states, including five of the eight largest states in the United States, containing between them roughly one-third of the nation's population.<sup>73</sup>

It is believed that the court's assessment in the manifestly anti-exclusionary zoning decision of *Suffolk Housing Services v. Town of Brookhaven*<sup>74</sup> is somewhat more accurate in addressing the trend:

In this republic, invidious legal classifications ultimately yield, even at some pain to the established social order . . . but if past is prologue no prescience is necessary to forecast that the process of eliminating the invidiously exclusionary aspects of Euclidian zoning will be a protracted one. At the Federal level the 'intentional discrimination' standard enunciated by the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* . . . eliminates any pragmatic federal judicial remedy at this time and the few states to consider the exclusion issue have been slow to move.<sup>75</sup>

Litigation successes are, of course, reflected in the reporters. Actual construction successes are often another matter. For instance, after successful litigation in *Girsh*, not one of the 1,600 proposed units was built. And, after winning in *National Land* very little construction took place. But, there are building success stories for the developers. Some feeling for construction success and failure might be gained by a perusal of the response to a March 4, 1982 questionnaire by the author inquiring, among other things, as to the number of units actually built pursuant to curative challenges.<sup>76</sup>

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73. Mallach, *Exclusionary Zoning Litigation: Setting the Record Straight*, 9 REAL EST. L.J. 275, 289 (1981).

74. 91 Misc. 2d 80, 397 N.Y.S.2d 302 (Sup. Ct. 1977), *modified*, 63 A.D.2d 731, 405, N.Y.S.2d 302 (1978).

75. *Id.* at 84-85, 397 N.Y.S.2d at 307 (emphasis added).

76. Inquiry was made with respect to many significant decisions arising on the east coast, where the bulk of litigation has occurred. It is not suggested that the inquiry is statistically valid. The survey asked first the number of housing units that had been proposed and second, the number that had been actually completed as of the time of the

#### IV. REASONS FOR NOT FOLLOWING EXCLUSIONARY ZONING DECISIONS

Almost all of the reasons cited hereinafter as to why there has not been, or should not be, a greater judicial following of the exclusionary zoning decisions overlap and interrelate. The limited documentation is intended primarily to be representative of the type of data available rather than totally supportive in either quantity or quality to substantiate any thesis. Patently, a vast amount of research would need to be done in order to make the proper legislative determinations. Such research would encompass the fields of sociology, criminology, housing market analysis, planning, political science, all five, or more.

##### A. *What's Wrong With Exclusionary Zoning?*

Though it might be somewhat extreme to suggest that reasonable minds could not differ concerning exclusionary zoning, the problem, if there is one, has been overstated almost to the point of hysteria by a number of prominent writers. One author states:

Yet perhaps the most troubling aspect of *Belle Terre* is the Court's abdication of its constitutional responsibility. Again there is the suggestion that zoning is a purely legislative function, with no proper supervisory role for the federal courts. This is a most lamentable situation.

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In narrowing the issue to a specific project, the Court precluded even the most superficial attack on the loathesome [*sic*] effects of

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survey. Some additional information is reported, including data concerning lawsuits not inquired about. Copies of the responses have been furnished to the *Western New England Law Review*. The results were as follows: *In re Girsh*, 437 Pa. at 237, 263 A.2d at 395 (1700 proposed, 0 constructed); *Coslett v. Township of Marple*, 62 Del. 552 (1975) (104 proposed, 35 constructed with construction proceeding); *In re Concord Township*, 439 Pa. at 446, 268 A.2d at 765 (117 proposed, 110 constructed); *National Land*, 419 Pa. at 466, 268 A.2d at 765 (0 constructed, handful built under a negotiated two-acre standard); *Oakwood at Madison*, 72 N.J. at 481, 371 A.2d at 765 (1750 proposed, 0 constructed; construction anticipated—held up by subsequent litigation with respect to punitive water connection fees); *Warwick Land Development Corp. v. Board of Supervisors*, 31 Pa. Commw. Ct. 450, 376 A.2d 679 (1977) (176 proposed, 100 constructed, still under construction).

In response to an inquiry about *Mount Laurel*, counsel for the Township of Mount Laurel, John W. Tremble, Esq., replied as follows: "This was a hypothetical lawsuit. The P's [plaintiffs] never had a proposal for building housing. Their attorneys were only attempting to win an exclusionary zoning case—not find housing for low and moderate income people." Letter from John W. Tremble to Olan B. Lowrey, (March 4, 1982) (written on the standard inquiry form used in the survey).

exclusionary zoning.<sup>77</sup>

Another comments that "[T]he Court's willingness to evaluate land use policies under the due process clause seems restricted to actual fits of municipal madness; mean and self-serving acts of exclusion are apparently to be received as jeweled exercises of the police power."<sup>78</sup> Yet another warns that:

Justifications based upon the preservation of the community character, fiscal integrity, or other purely provincial concerns, however, cannot be given much weight when their effect will be to limit the potential choice of living conditions for millions of people.

. . . .

If the people in this country are to be afforded the widest possible choice in regard to where they may live, most or all of the recommended actions must be implemented. To minimize the ever increasing housing and employment opportunity crisis facing millions of people in this country these actions must be implemented in the immediate future. Failure to undertake the recommended actions cannot help but exacerbate a problem that is already at a crisis level. The consequences of such a failure cannot help but be dire. To permit some philosophical view of federalism to produce such dire consequences is madness.<sup>79</sup>

It may well be that the issue of exclusionary zoning is more moral than either legal or practical, that the vast literature relating to it is concerned with people's concept of right and wrong more than the significance of any established and traditional law involved in the various jurisdictions that have acted in relation to it. It has been expressed well:

Finally, a major underlying proposition in support of the fight against exclusionary zoning, has been that *to the degree that suburban growth takes place, and will continue to do so, people of all races and incomes should share in that growth*. The essence of the proposition is choice. People who want to live in the cities should be able to continue to do so, but no one should be compelled to live in the cities (or anywhere) by virtue of their economic level or

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77. Lamb & Lustig, *The Burger Court, Exclusionary Zoning, and the Activist-Restraint Debate*, 40 U. PITT. L. REV. 169, 196, 215 (1978-79).

78. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1421 (1978).

79. McDougal, *Contemporary Authoritative Conceptions of Federalism and Exclusionary Land Use Planning: A Critique*, 21 B.C.L. REV. 301, 308, 344 (1979-80).



condition.<sup>80</sup>

Indeed, very little attention has been given to the actual need for housing in certain localities, the desire for such housing, the need to live there or the capacity to pay for it. The courts generally have not directed themselves to the question of whether or not anyone is actually being precluded by zoning from moving into a general region as opposed to being precluded from moving into a specific governmental area. In an article strongly supporting judicial activism in exclusionary zoning decisions, the planner Alan Mallach candidly stated:

No serious critic of the practices of exclusionary suburbs has ever seriously argued that all suburbs exclude all but the wealthy; although many indeed do, one finds suburban communities in many metropolitan areas in which housing is available for middle-income families. In the New York SMSA, for example, the Town of Brookhaven in Suffolk County saw, during the 1970s, the construction of some 30,000 houses, largely selling for prices between \$35,000 and \$45,000, many affordable by families earning roughly the median income in the region. Similar communities are found in many parts of the country. Other suburban communities, where new construction may be either expensive or limited in number, still offer existing houses at prices affordable by middle-income families; in the Philadelphia SMSA, for example, there are a handful of communities of clearly suburban character in which the median resale price of single-family houses was under \$40,000 in 1979.<sup>81</sup>

Even without definitive statistics to illuminate the situation it is abundantly clear that there are not a sufficient number of wealthy individuals to take up all the land surrounding metropolitan areas no matter what zoning standard is used. Natural market forces alone will ensure that where there is a dollar to purchase there will be a place to spend it outside the city for housing or any other product.

What is not certain is that any person can buy a home in any municipality that he chooses because the municipality may be too expensive. It may be too expensive because it was pioneered with large lot zoning or by affluent people that have established an ambiance that has engendered a high market price or because of an especially desirable location. This is where the true crux of the conflict

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80. Mallach, *supra* note 58, at 282 (emphasis in original).

81. *Id.* at 280-81 (citations omitted).

between the judicial housing activist and others appears to be: the concept that every township must have its poor town or be a microcosm of American society in general. One of the most effective delineations of the issue was made by Justice Schreiber of the New Jersey Supreme Court in his dissent in *Oakwood*:

There is broad language in *Mt. Laurel* to the effect that a "developing" municipality must provide by its land use regulations the reasonable opportunity for an appropriate variety and choice of housing for *all* categories of people who may desire to live within its boundaries. . . . I do not accept that generalization. The general welfare calls for adequate housing of all types, but not necessarily within any particular municipality. . . . Environmental, ecological, geological, geographical, demographic, regional or other factors may justify exclusion of certain types of housing, be it two-acre or multifamily.<sup>82</sup>

There have always been sectors, sometimes relatively large ones, where not everyone could afford to live and therefore could not live. What is so pernicious about such a sector where it happens to coincide with the municipal boundaries of a governmental entity? Is the moral outrage primarily focused on the fact that local governmental action has contributed to the inability of some people to afford to live in some areas? If so, the anger would appear to be misdirected. There is every probability that what has been characterized as impermissible exclusionary zoning actually gives rise to greater diversity and therefore greater general pleasure in society. The principle has been well-expressed by Robert C. Ellickson:

One can find much to admire in the *Mount Laurel* decision. The court properly perceived that state judiciaries must play a role in curbing local parochialism and had the wisdom to rest its decision on the right document—the state constitution. But it clearly bungled the remedy. A suburb should not be prohibited from imposing elite standards for housing construction if it is willing to compensate those injured by the standards. There is little to recommend policies designed to ensure that each neighborhood has a mixture of all housing types (and hence all income groups). The famous Tiebout Hypothesis suggests that differentiation among suburbs enhances consumer satisfaction by making available a wider variety of packages of public goods. The *Mount Laurel* decision needlessly reduces the richness of residential choices avail-

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82. 72 N.J. at 622, 371 A.2d at 1263 (Schreiber, J., dissenting).

able to New Jersey households.<sup>83</sup>

Have we reached the point where we insist that "birds of a feather not flock together" at least exclusively in a given municipality? If so, are we overlooking the fact that even if every municipality plans for a poor section there would still not be social integration? What merit is there in any event to attempted mandated social and economic integration? Whatever merit there may be has been emphatically rejected by the American public, who almost uniformly buy into the most exclusive community they can afford.

Townhouses and apartments will not, by exclusionary zoning decisions at least, be interspersed among the homes of the affluent in any event. Is that degree of forced social integration next on the agenda of the activist? It has very nearly been suggested by Anthony Downes in his book, *Opening Up The Suburbs*.<sup>84</sup> He first urges that low income housing be placed everywhere so that the American public will not flee where it has been placed because there is no place to flee.<sup>85</sup> He then suggests as a further possible remedy: "In all cases, *some residential mixing of deprived households with non-deprived households, with the latter exerting a dominant influence, is necessary to achieve a significant upgrading of the former.*"<sup>86</sup>

#### B. *Zoning as a Democratic Process*

Zoning for exclusive sectors simply aids the process of voting for preferences with dollars. It is fundamentally nothing more than an exercise in democracy so that the greatest majority can achieve the greatest happiness. Zoning is a democratic process that has permitted what people want so long as it bears some substantial relationship to health, safety or general welfare. As stated by Justice Douglas in *Village of Belle Terre v. Boraas*:<sup>87</sup> "The police power is not confined to elimination of filth, stench, and unhealthy places."<sup>88</sup> For instance, a height limitation of thirty feet on one side of the street and 100 feet on the other is nothing more than a legitimate exercise in preference.

If a certain area is desirable because of the character of the classes that live there will it not become less desirable to the extent

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83. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 506 (1977).

84. A. DOWNS, *OPENING UP THE SUBURBS* (1973).

85. *Id.* at 141.

86. *Id.* at 31.

87. 416 U.S. 1, 9 (1974).

88. *Id.* at 3-4.

that classes with differing perspectives are introduced? And, if it is a matter of open space, won't that quality be severely diminished by the very act of erecting the higher density housing essential to the poor? Is the open space to be that adjacent to where the lower income housing is erected? If so, the owners of that open space will have been crowded because their new neighbors have intensified the use of the land that formerly was a visual and auditory amenity. Explicitly, imagine several four-acre plots of ground. Each neighbor enjoys the space of every other neighbor. Place multiunit housing on one and you diminish the quality of life for all. If this is to be avoided by placing all multiunit housing next to other multiunit housing then the poor have moved from a crowded city to a crowded suburb.

Or, do we put the poor where no one lives so that they are surrounded by forest or farmland, both obviously lacking in transport, jobs and social services for the poor? Perhaps we should put no one anywhere.

C. *Economic Factors, Not Exclusionary Zoning, Exclude Poor From Suburbs*

There is a common perception that exclusionary zoning excludes the poor from the suburbs.<sup>89</sup> This is not true. Cost of housing in the suburbs, along with other factors, excludes the poor. If zoning were rescinded or if every acre in the suburbs surrounding each major American city were zoned for unlimited multiunit housing, the poor could not afford to buy the housing constructed and there is nothing to indicate that any more housing would be built. Housing is built only for a market and that means purchasers with resources to buy.

In *Mount Laurel* it was recognized that the poor could not afford to purchase housing erected for them, that it would have to be built by a public sector or private charity.<sup>90</sup> In the Pennsylvania de-

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89. McDougal, *supra* note 79, at 305.

90. Specifically, the court in *Mount Laurel* said:

The record is replete with uncontradicted evidence that, factually, low and moderate income housing cannot be built without some form of contribution, concession or incentive by some level of government. Such, under various state and federal methods, may take the form of public construction or some sort of governmental assistance or encouragement to private building. Multi-family rental units, at a high density, or, at most, low-cost single-family units on very small lots, are economically necessary and in turn require appropriate local land use regulations.

67 N.J. at 170 n.8, 336 A.2d at 722 n.8.

cision of *Raum v. Board of Supervisors*,<sup>91</sup> the court concluded that the inability of the poor to live in the suburbs was a result of market function and not discrimination.<sup>92</sup> Even some writers are beginning to recognize the fact of market exclusion as opposed to zoning exclusion. Frederick M. Wirt observed that "metropolitan color sorting rests partly upon economic grounds; higher property values confronting a black group characteristically possessing more limited resources than whites, would serve to keep the former out of suburbia even if whites were free of all racial prejudice."<sup>93</sup> The effect of uniformly zoning for those of lesser income without massive governmental or private funding of low-income housing construction would be the destruction of some homogeneity in some few municipalities only, as well as, perhaps, some intensification of social problems.

It probably would not even seriously affect the white flight phe-

91. 20 Pa. Commw. Ct. 426, 342 A.2d 450 (1975).

92. The *Raum* court recognized that market conditions, not zoning, excluded the poor:

The crux of Main Line's challenge is that the Township's zoning is exclusionary in that it fails to provide for its "fair share" of housing opportunities for low and moderate income persons. . . . Assuming that we hold the Township's zoning to be exclusionary, Main Line argues that the "fair share" concept be implemented by requiring Fox to affirmatively allocate and develop a portion of Chesterbrook as low and moderate income housing units, or that the Township be ordered to plan and zone for such housing.

We do not decide the question of the appropriate remedy here, however, as we cannot agree that the Township is exclusionary when considered in light of the rezoning achieved. . . . At best, the record establishes that over the past decade the percentage of low income (and minority) residents of the Township has declined, while the development proceeding in the Township has been in the nature of single-family dwellings and apartments affordable by persons of above average income. The evidence, however, does not establish that this direction in suburban growth is attributable to the zoning of the Township. Rather, it would appear to be attributable to the high cost of land and accessory services common to municipalities within access of the Philadelphia metropolitan area. This basic fact of life does not render the zoning of the Township exclusionary. . . . Given the high density, multiple-family uses permitted under Ordinance No. 267, which at the time the Chesterbrook development was approved provided for housing units for as low as \$18,000.00, we can only conclude that Main Line has failed to sustain its burden of proving the Township's zoning to be exclusionary.

*Id.* at 443-45, 342 A.2d at 458-59 (citation omitted).

This is believed to be the closest decision in Pennsylvania to holding that the poor as such have rights under exclusionary zoning doctrine. But, the issue was not squarely met.

93. Wirt, *Financial and Desegregation Reform in Suburbia*, in 7 *THE URBANIZATION OF THE SUBURBS* (L. Masotti and J. Hadden eds. 1973).

nomenon because there is now no shortage of housing in the suburbs for those who can afford to pay.

If the focus were on those of some steady but limited income beyond that of the poor it is possible, even probable, that mobile homes would find their way into municipalities where they have not heretofore been welcome. But, there is no reason to believe that the total number of mobile or other homes available to those with limited income would increase beyond the personal capacity to buy those homes. There is no reason to believe that market price would be significantly affected by rezoning of some or all municipalities.

No one would be naive enough to assume that new housing of whatever kind will be built for the American poor by the private sector. And, the statistics make it clear that such building will not be done by the public sector either at least until such time as the concept of quality for government-sponsored housing is changed drastically. As pointed out in the 1971 presidential address to the American public on the state of housing, at a time when some 40% of American citizens were qualified for government-sponsored housing, the cost would be astronomical if all eligible families were subsidized and there would be a substantial social inequity if the Federal government enabled some people to occupy better housing than many of those who worked to pay the taxes to enable the construction of that housing.<sup>94</sup>

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94. In the Third Annual Report on National Housing Goals, the President of the United States stated in part:

A second major policy issue posed by the current array of Federal housing programs is the problem of equity. As Federal subsidies are applied to plug the gap between housing costs and a family's ability to pay, the number of American Families who are receiving large Federal subsidy payments to assist them in buying or renting a place to live is increasing rapidly. By the end of fiscal year 1972, 2 million or more families probably will be receiving housing subsidy under one or another of the many Federal programs. The amount of such subsidies range as high as \$2,400 per family per year.

Quite obviously, these subsidy programs present the Federal Government with serious problems of social equity. In spite of rapidly increasing production, the families receiving subsidies are among the fortunate few compared to the universe of families who are potentially eligible. Under present law, as many as 25 million American households—40 percent of the total population—are eligible for the major subsidy programs. If all eligible families were subsidized the cost would be astronomical. Yet unless major changes are made, as these programs continue to gain production momentum, it will be difficult to continue favoring a select few in the population while the rest of the Nation is left to seek decent housing completely on its own. Since it is doubtful that the public, and hence the Congress, will be prepared (p. 24) to accept the staggering budgetary cost of a more global coverage toward which present housing subsidy

In 1981 in his first major address to an industry group, Secretary of the United States Department of Housing and Urban Development, Samuel R. Pierce, Jr., stated that the new construction program was grossly expensive, that the subsidized housing debt in 1980 was 220 billion dollars, that "regardless of what we do it would be over a quarter of a trillion dollars by the end of 1982, that it had not been effective in meeting the needs of housing the poor and it was, therefore, to be scaled back."<sup>95</sup>

An additional problem is that transportation in the suburbs is relegated almost exclusively to the private automobile or the public taxi. Both are beyond the economic resources of the poor. In the cities, the poor have long clustered in corridors along public transport routes. With two cars being the norm in suburban America it is not realistic to assume that the poor, even if transplanted, would have adequate mobility.

Even assuming the desirability of artificially encouraging the poor to move to the suburbs zoning is not an effective tool to achieve it. For those who may envision local governments building or subsidizing low-cost housing there can only be disappointment. Justice Mountain of the Supreme Court of New Jersey dissenting in *Oakwood* stated it well:

In *Mt. Laurel* we said, "Courts do not build housing nor do municipalities". . . . Today the majority repeats, "Municipalities do not themselves have the duty to build or subsidize housing". . . . This I take to be settled doctrine, which should not, I submit, be altered in any way except by legislation. This comment is provoked by the plethora of suggestions that have arisen on all sides demanding various kinds of immediate and far-reaching af-

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programs may be forced to head, the time to make needed changes is rapidly approaching.

Two additional elements in the present housing subsidy programs intensify the social equity dilemma of too many applicants for a limited amount of funds. One is the emphasis placed on linking the Federal subsidy almost exclusively to newly constructed housing units. This emphasis arises out of the desire to use Federal subsidies to provide as much stimulus as possible to housing production. But the result is that eligible families in many communities are moving into brand new homes on which they make relatively modest payments while other families in similar—or maybe even slightly better—basic economic circumstances are left struggling to meet their monthly payments in older homes purchased without subsidy.

*Message from the President of the United States Transmitting The Third Annual Report on National Housing Goals*, Pursuant to the Provisions of Section 1603 of the Housing & Urban Development Act of 1968, U.S. Government Printing Office, 1971.

95. Lawyers Title News, Jan.-Feb. 1982, at 17, col. 3.

firmative action—kinds of action that if undertaken would require the exercise of some unspecified municipal power, but certainly not the zoning power.<sup>96</sup>

D. *Is There Employment for the Poor in the Suburbs?*

Though writers and courts have decried the inability of the unemployed poor to live in the suburbs supposedly convenient to available employment,<sup>97</sup> seemingly no study has been done to establish that they do generally have the skills level or the discipline essential to the prospective employment.

At this time the substantial number of skilled individuals unemployed would indicate that a move to the suburbs of the unskilled poor is simply a shift of the problem of unemployment from one location to another. Strongly supportive of this probability is the position taken by the National Federation of Independent Businesses. This group, one that might logically be expected to give substantial support to the Reagan administration's enterprise zone concept for the inner city, has opposed it for highly cogent reasons:

In a recent policy statement, the federation said taxes were among the least important problems cited by small businesses that attempt to establish themselves in blighted areas. Far more important concerns, it said, are crime, costs of insurance and energy, high interest rates and the *inability to hire qualified employees*.<sup>98</sup>

The very existence of government-sponsored low income housing, as opposed to housing built on the open market, detracts from the availability of jobs because it tends to drive business as well as people from the environs.<sup>99</sup> The industry that many would like to

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96. 72 N.J. at 630, 371 A.2d at 1267.

97. *In re Girsh*, 437 Pa. at 244, 263 A.2d at 398 (citing N.Y. Times, June 29, 1969, at 39 (city ed.)).

98. Philadelphia Inquirer, Jan. 27, 1982, at 13, col. 1 (emphasis added).

99. The following assessment of this situation was made by the City of Philadelphia:

According to the 1980 Census, Philadelphia had a total of 684,298 residential units which provided housing for its 1,688,000 people. 61% of these units were owner occupied; 39% were occupied by renters. Since World War II a combination of factors have produced a trend of housing abandonment and decreased housing availability for low and moderate income persons: suburbanization, loss of employment, increases of housing costs, vandalism, inavailability of financing in some areas, and over accessibility of financing in others. In 1980 the City Department of Licenses and Inspections located 22,071 vacant structures in the city. These structures were usually severely dilapidated, open to the elements or boarded up. Most of the vacants were either rental structures or



pursue with low income housing has in many instances already left the city in part at least because of the social problems associated with some of the occupants of that housing. Even a cursory visual examination of major low income housing sites in the American city will show that all too often such industry or business as was there before the advent of the housing has moved either to the suburbs or to a safer location someplace else in the city.

If low-income individuals had the skills and job discipline to offer to industry, the incentive for it to remain in the city would be greatly enhanced. Further, if they did have the skills and discipline to make them desirable employees in the suburbs the tremendous number of such unemployed individuals ready and willing to work would have created something akin to the economic miracle of Hong Kong in the inner city. The problem would not be to move low-income housing to the suburbs in order to achieve jobs for the unemployed poor. It would be to make proper adjustment for the vast industrial and business enterprises flowing into the inner-city to take advantage of the labor market.

These considerations obviously have very little relevance to exclusionary zoning decisions forcing multiple unit housing on the private market. It is safe to assume that those to purchase such housing generally have marketable skills and/or education.

#### E. *Expensive to Society to Move Poor to Suburbs*

To the extent that exclusionary zoning decisions result in new construction in the suburbs to encourage citizens to leave those cities or towns where a housing surplus exists, as it does throughout most of the nation,<sup>100</sup> an unwarranted expense is being placed on the public. This is because new construction is expensive and the new hous-

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larger single family residences. Overwhelmingly, they were concentrated in the areas north of Center City and in low and moderate income areas in general. The number of long-term vacant structures constitute approximately 4.4% of the total number of residential structures in the city which exceed 500,000. Of the vacant structures approximately 25-30% are 2 story, 2-4 bedroom, properties which are structurally intact and suitable for acquisition and rehabilitation activities.

CITY OF PHILADELPHIA, COMMUNITY DEVELOPMENT BLOCK GRANT APPLICATION (June 1982).

100. The Secretary of the Department of Housing and Urban Development noted recently that "there is no nationwide shortage in the rental housing market. Note that I said nationwide; the study found clear evidence of market shortages in some areas, offset by actual surpluses of rental units in others." *Lawyers Title News*, Jan.-Feb. 1982, at 17.

The question still remains whether it is desirable to encourage the unemployed and unemployable to utilize surplus housing and as to why the housing has become surplus.

ing makes that abandoned in the city surplus. As of April, 1982, the national weighted average for new homes was 95,700 dollars as opposed to 69,100 dollars for existing homes.<sup>101</sup> New construction carried out under federal sponsorship is no less expensive and all factors considered is probably substantially more costly than private sector housing.<sup>102</sup> Perhaps somewhat representative of the cost of government sponsored housing is the report of the Office of Housing and Community Development in the city of Philadelphia; it has been spending an average of 60,000 to 90,000 dollars to rehabilitate a single home.<sup>103</sup>

In addition, existing private sector housing in the American city tends to be substantially less expensive than that available in the suburbs. For instance, in the city of Reading, Pennsylvania the average sale price for inner-city homes in 1982 has thus far been 24,335 dollars as opposed to 55,613 dollars in the county surrounding the

101. Telephone interview with Lawrence David, Economics Analyst, Federal Home Loan Bank of Pittsburgh (June 1982).

102. One report stated:

By any measure, HUD's figures on the multi-family effort are staggering. In the last eleven years loans to the government exceeded \$1 billion—the agency's books are too jumbled to get a precise figure. Failures equaled about 10 percent of the projects insured, a default rate that might have driven private lenders to bankruptcy.

Reading Eagle, May 2, 1982, at 19, col. 5.

Secretary Pierce of the Department of Housing and Urban Development stated:

One of the central conclusions I have come to in my own thinking is that the § 8 new construction program simply is not appropriate to our present resources and needs. Over the years, the cost of such housing assistance has become absolutely prohibitive. Taken together with other outlays, § 8 pushed our outstanding subsidized housing debt to 220 billion by the end of 1980.

By the end of 1982, regardless of what we do, that debt will climb to over a quarter of a trillion dollars. Not only has § 8 been expensive, it has not been effective in meeting the needs of housing the poor. It is our intention, accordingly, to scale back § 8 severely. . . . *I fully expect that HUD will be supporting far, far less building than it has in the past.*

Lawyers Title News, Jan.-Feb. 1982, at 17, col. 3 (emphasis added).

Housing being constructed under court order can be astonishingly expensive. In Philadelphia, the Bulletin reported the following cost of the court-mandated Whitman Project at a point in time when the cost escalation was far from complete:

The bottom line is in keeping with the season. Red as holly berries. The per unit cost of the project's 120 townhouses—now get this—is going from \$87,672.79 to \$119,583.33. An increase of \$31,910.46 since the no-bid contract was negotiated last December 21. Inflation? That had already been figured in. Gold plating? Marble bathrooms, parquet floors? Not a bit of it. Still the same brick-and-clapboard, three-room houses.

The Bulletin, Dec. 16, 1980, at B 7 (quoting Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3rd Cir. 1977)).

103. The Temple News, (Philadelphia) Apr. 14, 1982, at 2, col. 3.

city of Reading.<sup>104</sup> Or, compare 18,200 dollars as the median price of homes sold in the city of Philadelphia in 1981 to 95,700 dollars for a newly constructed home in the same city.<sup>105</sup>

Construction costs alone do not reflect the total cost of building new housing. The total utility infrastructure must be factored in. The major cities that are currently losing population already have a utility infrastructure that is extremely expensive to duplicate in the suburbs. The citizens already living in a municipality subject to court mandated housing must bear a substantial portion of the costs of sewers, roads, schools and other service facilities to support new construction.

The government programs essential to move the poor to the suburbs are so expensive they will not be adequately funded to accomplish the intended end. Whether it is done in the public or private sector, only the most compelling reasons would justify the building of new housing in order to abandon the old.

#### F. *Exclusionary Zoning Decisions Are Unpopular*

Another major reason for judicial reluctance to assume zoning responsibilities is because the decisions are both unpopular and contravene sound zoning principles which, because of their inherent value, are held dear by the American public. That public, of course, includes the judiciary. Maintenance of property values is often trampled by exclusionary zoning decisions. *Berman v. Parker*<sup>106</sup> and *Belle Terre*,<sup>107</sup> recognized the extreme breadth of action permissible under the police power to protect those values. In *Belle Terre*, Justice Douglas speaking for the majority stated:

A quiet place where yards are wide, people few, and motor vehicles are restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>108</sup>

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104. The Reading Eagle, Apr. 18, 1982, at 1, col. 3.

105. Telephone interview with Philadelphia Planning Commission based on tapes of 1980 Census.

106. 348 U.S. 26 (1954).

107. 416 U.S. at 1.

108. *Id.* at 9.

Because exclusionary zoning decisions virtually always infringe on these values to some degree, there is no place where such decisions are welcomed by those who live in the area to be affected.<sup>109</sup> If the decision relates to government-sponsored housing as opposed simply to a prohibition of large lot zoning or an insistence that townhouses be permitted along with other multiunit housing, the resistance is even more vigorous and sustained. For instance, in *Joseph Skilken & Co. v. City of Toledo*<sup>110</sup> a proposal to permit greater housing density met serious opposition only at such time as it was discovered that the change in zoning was to accommodate government sponsored housing.

The courts have not been oblivious to the injury resulting from placing low-income housing in neighborhoods. In *Skilken* the proposed change from 20,000 square feet per lot to 6,000 square feet for the purpose of erecting single-family detached dwellings under government sponsorship was thoroughly denounced by the Sixth Circuit:

Under this broad order all zoning laws in conflict therewith would be invalidated. Low cost public housing could move into the most exclusive neighborhoods in the metropolitan area and property values would be slaughtered. Innocent people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods, and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed. All of

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109. The loss of an election in New Jersey, where the primary thrust has been to secure housing for those of low and moderate income, illustrates the public attitude. Morris County, New Jersey was the site in 1982 of housing litigation supported by the then incumbent Democratic administration as well as by gubernatorial candidate James J. Florio. The housing was opposed by the ultimately successful Republican candidate Thomas H. Kean who carried the county by 45,455 votes. This was by far his largest margin in any of the 21 counties that he carried. As stated by the Philadelphia Inquirer, "[w]hen Florio lost the contest by fewer than 2,000 votes statewide, he said that one of the major reasons his plan had been thrown off had been Kean's overwhelming victory in Morris County." Philadelphia Inquirer, Jan. 31, 1982, at B1, col. 6.

In the early 1970's the Department of Housing and Urban Development recognized the impossibility of controlling crime in the now infamous Pruitt-Igoe high-rise project in St. Louis and dynamited a large portion of the structures. N.Y. Times, Oct. 26, 1972, at 45, col. 8.

In a recent study done by the Committee of 70, a political watchdog group in Philadelphia, Pennsylvania, a 76 page "Housing Governance Study" was conducted wherein the group concluded that public housing projects "are so studiously avoided, it is as if they were surrounded by moats with alligators in them." Philadelphia Daily News, Apr. 13, 1982, at 5, col. 5.

110. 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068 (1977).

this would be accomplished simply by an order of a Federal Judge, and at the expense of the taxpayers.<sup>111</sup>

Though the strength of this rhetoric has not been noted elsewhere and undoubtedly the government sponsorship was a significant factor in its intensity, it is fundamental that rezoning to permit greater density diminishes the value of those properties in the area restricted to the older zoning standard.

In *Karlan v. Harris*,<sup>112</sup> the Second Circuit in partial response to the following admission by HUD held in an action under the National Environmental Policy Act, that HUD had failed to comply with the National Environmental Policy Act of 1969 (NEPA)<sup>113</sup> approving a seventeen-story building exclusively for those of low-income:

For example, attitudes of low-income and minority persons toward street life are frequently conditioned by the economic limitations on their mobility and by their cultural heritage. Their use of public space is often in conflict with the values of middle and upper-class people, mobile and able to spend leisure time away from home. Differing social and cultural attitudes about territoriality and privacy, accoustical as well as spatial, could fuel the tension which excessively close physical relationships between 'vest pocket' projects and high-cost housing might generate.<sup>114</sup>

For those who choose not to read footnotes, it is noted that the court was reversed for its concern because HUD had already addressed that concern, all that is necessary under NEPA.

#### G. *Exclusionary Zoning Decisions Contravene Legitimate Zoning Principles*

Site-specific relief frustrates comprehensive planning. To the extent that a constitutional challenge results in a mandate that the governmental body alter its zoning structure so as to comport with judicial views, as often done in New Jersey, the conflict with sound planning is relatively limited. Though the government may be forced to provide for uses that are not preferred it can within some reason determine the extent, scope, and location of those uses and can thereby relate the changes intelligently to the comprehensive

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111. *Id.* at 880-81.

112. 590 F.2d 39 (2d Cir. 1978), *rev'd*, 444 U.S. 223 (1978) (quoting HUD, DISPER-SAL OF LOW INCOME UNITS ON MORE SITES A-71 (1977)).

113. 42 U.S.C. §§ 4321-4347 (1976 & Supp. IV 1980).

114. 590 F.2d at 43.

plan and existing zoning ordinance. Where, however, as is customary in the Commonwealth of Pennsylvania,<sup>115</sup> site specific relief is consistently granted as a matter of reward to the developer, the conflict with sound planning is more often than not direct and extremely disruptive. The mold is less clear in New York because of the limited amount of litigation but both general rezoning under court supervision and site specific relief have been granted there.<sup>116</sup>

In New Jersey, the initial tendency of the judiciary was to permit the municipality to revise its zoning ordinance to comport with the desires of the court, but the reluctance of those governing bodies to read the court's directives in a fashion consonant with their own preferences has resulted in site specific relief there as well as in Pennsylvania. A prime example is *Oakwood*<sup>117</sup> where, as noted, after some six years of litigation the state supreme court ultimately granted site specific relief to the developer, while at the same time maintaining a continuing supervision over rezoning the township.

A developer wants to maximize profits. His choice of a place to build is based primarily on that single consideration rather than public interest as reflected by the comprehensive plan or zoning ordinance. To the best of his ability he will choose that land where the greatest profit can be made from rezoning it to permit greater density of development. If there is high density zoning, say four-acre, then it is clearly to the developer's advantage to challenge in that sector in order to take advantage of the gain derived from converting land valued for one unit per four acres to one unit per acre.

One example is the landmark decision in *National Land*.<sup>118</sup> As discussed, the developer sought to rezone land providing for one unit per four acres to one unit per acre. The developer was successful even though some thirty-five percent of the township was already zoned for one house to the acre and largely undeveloped. The developer could have purchased land and developed in the thirty-five percent of the township where the zoning density desired by him was available pursuant to the terms of the ordinance. The per acre cost of that land zoned for one house per acre would, of course, have been significantly higher than that in the four-acre sector.

It is indefensible to permit the developer to pursue this course to the detriment of comprehensive planning. What the developer does

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115. See, e.g., *Casey v. Zoning Hearing Bd.*, 415 Pa. 219, 328 A.2d 464 (1974).

116. *Berenson*, 38 N.Y.2d at 102, 341 N.E.2d at 236, 378 N.Y.S.2d at 672.

117. 72 N.J. at 481, 371 A.2d at 1192.

118. 419 Pa. at 504, 215 A.2d at 597.

is tantamount to spot-zoning and is anathema to the entire concept of legitimate comprehensive zoning. In fact, more often than not, because of the economic incentive, such a course of action is going to be diametrically opposed to comprehensive planning. Low density zoning ordinarily bears a rational relationship to availability of schools, sewers, road networks and public need.

Because zoning continues to restrain adjacent property owners, the developer gains a windfall in terms of the neighbors' open space while additional stress is placed on public facilities that were not planned for high density development. If the new development is too large for the existing service infrastructure, then the municipality must furnish adequate sewerage, roads or other public services needed for the random development. This would appear to be true even though such infrastructure has already been developed in another portion of the township planned for higher density development.

#### H. *Deference to Legislative Judgment*

As observed in the California decision of *Associated Homebuilders v. Livermore*,<sup>119</sup> New Jersey and Pennsylvania have refused to show traditional deference to legislative judgment in such decisions as *Mount Laurel* and *In re Girsh*:

We conclude from these Federal decisions that when an exclusionary ordinance is challenged under the [F]ederal due process clause, the standard of constitutional adjudication remains that set forth in *Euclid v. Ambler Co.*, . . . . [I]f it is fairly debatable that the ordinance is reasonably related to the public welfare, the ordinance is constitutional. A number of recent decisions from courts of other states, however, have declined to accord the traditional deference to legislative judgment in the review of exclusionary ordinances, and ruled that communities lacked authority to adopt such ordinances. Plaintiff urges that we apply the standards of review employed in those decisions in passing upon the instant ordinance.<sup>120</sup>

The court accurately concluded:

Most zoning and land use ordinances affect population

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119. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

120. *Id.* at 606, 557 P.2d at 486-87, 135 Cal. Rptr. at 54-55 (citations omitted). For an excellent analysis of judicial restraint, see Kolis, *Citadel of Privilege: Exclusionary Land Use Regulations and the Presumption of Conditional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981).

growth and density. . . . As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning. . . . "Were a court to . . . hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning would be literally turned upside down; presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed."<sup>121</sup>

The law is, of course, what the courts ultimately say it is. They are as a practical matter, unlike the legislature, the ultimate arbiter. For this reason, if for no other, the scope of their responsibilities might be likened to those of a fiduciary. It is fundamental that a fiduciary must act solely and exclusively in the interest of the beneficiary and is held to the very highest degree of restraint in discharging that responsibility. Because there is nobody to second guess the judiciary and because it is not readily responsive to the political system in order that the disaffected may make their convictions known, the judiciary should act only when there is a matter of law to be determined and not where there is a sociological preference to be expressed.

Judge Arlin M. Adams of the Third Circuit has probably addressed the broad issue of judicial restraint as well as may be done: "Democracy—and the judicial system in our democracy—will not, in my view, succumb to assassination. But it may succumb to an erosion of confidence from the disruptive and unwise arrogation of legislative power by institutions not suited to its exercise."<sup>122</sup> With respect to exclusionary zoning the principle has been exceedingly well-expressed in *Confederacion de la Raza Unida*<sup>123</sup> where the court responded to an attempt to invalidate local zoning on the grounds of the supremacy of the Federal Housing Act Law and the fourteenth amendment by stating:

We thus reach the merits of plaintiffs' claims as set forth in the first amended complaint. We must do so with full recognition that the courts have traditionally recognized that zoning matters

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121. *Associated Homebuilders*, 18 Cal. 3d at 603, 557 P.2d at 485, 135 Cal. Rptr. at 53 (citations omitted).

122. 72 N.J. at 636, 371 A.2d at 1270 (Clifford, J., concurring, quoting Adams, *Judicial Restraint, The Best Medicine*, 60 JUDICATURE 179, 182 (1976)).

123. 324 F. Supp. at 895.



are of particular concern to, and the province of, the local communities involved and that the courts should interfere with the judgment of the local authorities only in the most extreme cases, and under the most extreme circumstances. This attitude goes back at least as far as *Village of Euclid v. Ambler Realty Co.*, . . . which plaintiffs rightly describe as the "landmark case" in the whole field.<sup>124</sup>

In New Jersey there is apparently an increasing awareness on the part of the supreme court of that state that they may have grabbed a cat-by-the-tail without fully understanding its dimensions and proclivities. In the 1977 *Oakwood* decision, the majority stated:

We take this occasion to make explicit what we adumbrated in *Mount Laurel* and intimated above—that the governmental sociological—economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administrative function rather than a judicial function to be exercised in the disposition of isolated cases.<sup>125</sup>

However, in spite of this recognition, not truly convincingly expressed by the majority theretofore, a divided court determined that *Oakwood* had not come up with a plan to meet its fair-share. One concurring opinion called for more stringent action; two concurring and dissenting opinions and a one-third concurring opinion suggested that the matter might more appropriately be left to the legislature.

Justices Schreiber and Mountain, concurring and dissenting, and Justice Clifford, concurring: All called for a searching analysis of the separation of powers doctrine in relation to New Jersey's exclusionary zoning decisions. In his concurring and dissenting opinion, Justice Mountain raised a significant consideration by quoting from a recent law review article:

The desirability of a judicial remedy cannot be assessed without considering, for example, the potential for undesirable permanent alteration of the municipality that is inherent in any decision to rezone. A court that concludes it has unwisely ordered busing to desegregate a school system can easily correct its error by withdrawing or altering its order.

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124. *Id.* at 897 (citations omitted).

125. 72 N.J. at 534, 371 A.2d at 1218.

When a court rezones, however, buildings may be erected and development plans previously under consideration may be abandoned. Thus, unlike courts that reapportion to secure an effective political process or employ busing as a temporary measure to desegregate schools until society develops integrated and equal school facilities, the court that rezones makes a decision for the community that may not be subject to effective revision.<sup>126</sup>

In Pennsylvania, the other state suffering a multitude of exclusionary zoning litigation, no comparable division and concern has been expressed in recent years. The Pennsylvania courts appear to be relatively comfortable with their prodeveloper decisions and, as noted, the majority even went so far in 1977 as to reaffirm the undefined Pennsylvania view at least as to the troublesome fair-share concept.

Legislative deference should relate to both the substantive and remedial law of exclusionary zoning. Just as no decision has been found wherein the courts have declined subject matter jurisdiction over charges of exclusionary zoning, none have been found to hold that remedy is an exclusive judicial province. To the contrary, often, as in *Oakwood*, it has been appropriately treated as primarily a legislative responsibility.<sup>127</sup> The court ultimately granted site-specific relief but even then otherwise continued to treat the remedy as a legislative matter subject to review. Though the plaintiff was in effect granted rezoning and a building permit by the court, revision of the township zoning ordinance as further needed to meet the judicial desire was left with the township subject to further court review.<sup>128</sup>

In those jurisdictions that have already concluded on constitutional grounds that certain fact patterns are impermissibly exclusive on the basis of their constitution or because beyond the scope of the police power, the legislature probably does not retain the option to preempt substantive judicial decisions. But it is not clear that the legislatures may not preempt or significantly control the remedy once a judicial determination of exclusionary zoning has been made.

In Pennsylvania a legislative effort to control the scope of substantive review has been largely unsuccessful. In October of 1978, the legislature passed a bill providing that even though the courts had made a determination that zoning was in fact exclusionary they

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126. *Id.* at 627, 371 A.2d at 1265 (quoting Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 774-77 (1976)).

127. *Oakwood*, 72 N.J. at 534, 371 A.2d at 1218.

128. *Id.* at 553-54, 371 A.2d at 1228.

should have the power to invalidate the exclusionary ordinance only if

the municipality ha[d] not acted in good faith or made a *bona fide* attempt in the adoption of its ordinances or maps, or any amendments thereto, to meet the statutory and constitutional requirements for nonexclusionary zoning; or the ordinance imposes limitations that are not reasonably related to the municipality's authority to determine its physical growth pattern, protect the Commonwealth's public natural resources, coordinate development with the provision of public services, or protect the character of the community.<sup>129</sup>

In the decision of *Hopewell Township Board of Supervisors v. Golla*,<sup>130</sup> the court held that the first phrase proclaiming innocent exclusionary zoning to be constitutional and the second phrase purporting to restrict those considerations available to the court in making a constitutional determination was "an unconstitutional transgression of the separation of powers."<sup>131</sup> Out of the nine member court, two of the judges dissented on the ground that the commonwealth court should not have addressed the merits of the separation of powers issue until such time as the lower court had complied with the legislative directive to make findings.<sup>132</sup> Two of the dissenting opinions argued that deference should be given to the legislative enactment at the local level and that the presumption of its constitutionality as nonexclusionary should have been sustained.<sup>133</sup> But none actually argued that the act of the state legislature could in fact control the scope of judicial review in relation to a finding of exclusionary zoning. The court left no doubt as to who has the last word. It is suspected that to the extent, if any, that other jurisdictions become involved the answer to attempted legislative curtailment of substantive determinations will be the same.

What the legislature should have done to support comprehensive planning was to enact a remedial provision giving the township the right to restructure an ordinance found to be exclusionary in a manner that would not accord the special privilege of site-specific relief. Such relief would appear to be no more than a judicially created privilege not based on constitutional considerations. Because the Pennsylvania courts see the need for reward, a provision for at-

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129. PA. STAT. ANN. tit. 53, § 11011(1)(a)-(b) (Purdon 1972) (emphasis added).

130. 58 Pa. Commw. Ct. 572, 428 A.2d 701 (1981).

131. *Id.* at 585, 428 A.2d at 706.

132. *Id.* at 594-95, 428 A.2d at 710-11.

133. *Id.* at 587, 591, 595, 428 A.2d at 707, 709, 711.

torney's fees for the successful plaintiff might gain a margin of judicial respect for a legislative effort to control the remedial process by legislatively eliminating site-specific relief.

Thus far in the American political system the populace has not been conditioned to respond to unpopular activist judicial decisions by, even where the opportunity presents itself, voting against an incumbent judge. This is not true with respect to someone whom they traditionally think of as being within the political spectrum. There, in the various legislative bodies, the incumbent must stand responsible to the public for his or her actions. If the courts continue to interject themselves into what is clearly the legislative arena then there will be mounting pressure to devise some system to permit the electorate a more efficacious means of removing those judges who indulge in unpopular judicial legislation.

This is not to suggest that judges should be subject to removal for unpopular judicial decisions. That would be in direct and dire conflict with the fundamental principle that judges often have an obligation to make unpopular decisions in order to sustain the rights of the minority against infringement by the majority. But, it is to suggest that to the extent that the judiciary seeks to substitute itself for the legislative body, it should be equally accountable to the body politic in what would prove to be a lamentable politicalization of the judgmental process.

Perhaps it comes down to what was recognized by the First Circuit in *Steel Hill Development*,<sup>134</sup> where six-acre zoning was sustained. The court invoked NEPA and called for the health and welfare of man<sup>135</sup> by observing that "if the federal government itself has thought these concerns to be within the general welfare . . . we cannot say that Sanbornton cannot similarly consider such values and reflect them in its zoning ordinance."<sup>136</sup> The court then observed "that it could not find the six-acre requirement reasonable if only health and safety were considered, but that such requirement was reasonably related to the promotion of the general welfare of the community."<sup>137</sup> It would seem that many of our courts have lost sight of the distinction.

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134. 469 F.2d at 956.

135. 42 U.S.C. § 4321 (1976 & Supp. IV 1980).

136. 469 F.2d at 961.

137. *Id.* at 960.

### I. *Neither Municipalities Nor Courts Are Qualified To Engage In Regional Planning*

The courts that are seeking to force regional planning though the legislatures have long granted the power to local government units that are not qualified to do regional planning. In *Berenson*, the New York Court of Appeals was open in its demand:

Zoning, as we have previously noted, is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning. While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. Whether New Castle should be permitted to exclude high density residential development depends on the facts and circumstances present in the town and the community at large. Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done. That is what remains to be considered upon the trial in this case.<sup>138</sup>

The state legislature in New York apparently does not favor regional planning. After some experimentation,<sup>139</sup> with overriding local zoning law through a state agency called the Urban Development Corporation (UDC), the legislature has chosen to leave the power of zoning with local municipalities.

In Pennsylvania the directive of the supreme court to the legislature was only slightly less specific. After having just legislated the right to planned unit development as a new and existing planning technique, contrary to well-established law, in *Eheney v. Village 2 at New Hope, Inc.*,<sup>140</sup> the Pennsylvania Supreme Court in *In re Con-*

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138. 38 N.Y.2d at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682.

139. In 1968, the New York State Urban Development Corporation (UDC) was created to promote the policies of the New York State Urban Development Act. N.Y. UNCONSOL. LAWS §§ 6265 to 6285 (1973). Included in its grant of powers to effect these policies was the power of the corporation to overrule local zoning ordinances. As a result of widespread opposition to this authority to overrule local zoning ordinances, the legislature in 1973 curtailed the power of the UDC. *Id.* § 6265(5). The Corporation's zoning overrule authority as it affected residential projects in towns and incorporated villages was limited. The amendment provides that unless and until objections made by governing bodies of towns and villages have been withdrawn the proposed project may not go forward. Seemingly, objections might never be withdrawn.

140. 429 Pa. 626, 241 A.2d 81 (1968).

*cord Township*<sup>141</sup> stated:

New and exciting techniques are available to the local governing bodies of this Commonwealth for dealing with the problems of population growth. Neither Concord Township nor Easttown Township nor any other local governing unit may retreat behind a cover of exclusive zoning. We fully realize that the overall solution to these problems lies with greater regional planning; but until the time comes that we have such a system we must confront the situation as it is. The power currently resides in the hands of each local governing unit, and we will not tolerate their abusing that power in attempting to zone out growth at the expense of neighboring communities.<sup>142</sup>

In New Jersey, the courts are telling townships as to the type of region that they must plan for.<sup>143</sup>

Neither New York nor Pennsylvania courts have indicated clearly whether the change should involve a legislative mandate that local bodies do regional planning, or that the power to plan be placed in legislatively created regional rather than local bodies. The latter would seemingly involve a complete restructuring of local government honored by some two hundred years of continuity. The legislatures have over a long period of years declined to do either. They clearly favor local as opposed to regional control and appear to have little interest in forcing impractical regional planning on local bodies with local interests and limited resources. And, of course, absent an unidentified constitutional infirmity, the power to make that determination lies with the legislature and not the courts. Seemingly, the courts recognize that fact. The result is that with the legislature saying one thing, the courts saying another, and the local bodies not capable and generally not inclined in any event to do regional planning, the burden is devolving on the courts.

In addition, the courts are less prepared to carry out regional zoning than are the multitudinous local bodies. Pennsylvania will be used to illustrate. There are 2,571 municipal government units with the power to zone. Of those only some 1,334 have planning commissions and that, of course, is ordinarily an unpaid civic function. Though there are some professionals on the larger municipal staffs no significant portion of the 2,571 units have professionals on their

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141. 439 Pa. 466, 268 A.2d 765 (1970).

142. *Id.* at 470, 268 A.2d at 769. It is interesting that the court predicated its decision on what the court could or would not "tolerate" rather than on any existing principle of law.

143. Mount Laurel, 67 N.J. at 151, 336 A.2d at 713.

staff. Only about one-half of third class cities, fifty-one to be exact, have professional staff. Though all counties have planning commissions not all have professional staff.<sup>144</sup> Of course, the Pennsylvania Legislature has not empowered counties to carry out zoning functions except in the absence of local planning by municipalities.<sup>145</sup>

The question has to be asked as to which of the 2,570 other municipalities in the Commonwealth of Pennsylvania each municipality must plan for? Does the planning take place with those to the north, south, east or west, or in all directions, and if so, how far in any or all directions? Must the planning include factors generated or emanating from territory across state borders? If we assume that any ten municipalities are to be planned for in relation to the regional responsibility of any one, then is it accurate to suggest that we might have as many as ten or twenty other municipalities each planning in relation to the ten? Does a municipality on the border of one region plan in relation to municipalities in other regions? In other words, where are the regions, where does a local government draw the lines and at what cost does it assume such repetitive, broad, and far-reaching responsibilities often inherently inconsistent with its own interests?

Even if regional planning were to become a reality based on municipalities joining together,<sup>146</sup> there would still remain the problem of delineating the regions that they must plan for. Interestingly, it might be possible for them to do legally what cannot be done legally now, at least in Pennsylvania. For instance, if eight townships planned together, they might permit townhouses, commonly occupied by the poor, in only one, two, or three of those townships. The courts would then be forced to face a rejection of the regional planning concept or accept economic stratification. If they rejected the right of a region to so plan, then it would be clear that their commitment is to economic or social integration rather than to the right of those of lesser income to live in the suburbs. It would also be clear that the courts are not serious about independent regional planning. If there are legal reasons, or even sufficiently compelling public policy considerations, for the courts to mandate that every municipality

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144. Telephone interview with Dan Herbster, Chief of Municipal Statistics and Records Division of the Dept. of Community Affairs of the Commonwealth of Pennsylvania.

145. PA. STAT. ANN. tit. 53, § 10602 (Purdon 1972).

146. It was not until 1978 that the Pennsylvania legislature acted to explicitly permit multiple municipalities to plan together. PA. STAT. ANN. tit. 53, § 11101 A (Purdon 1972).

have its fair-share, why should it be presumptively possible that regional planning defeat exactly that concept?

If it is a prickly question as to the scope of regional planning responsibilities for municipalities, then it is a doubly prickly question for the courts. The local municipality at least has been delegated the responsibility by the legislature, has the advantage of familiarity with its territory, people, and politics, and is in a position to make the discretionary concessions and decisions called for by the legislative process. Until such time as the courts decided that the local citizens had an obligation to plan on a regional basis, the resources and interest adequate to some reasonable planning level was present in the local municipality. Technical expertise was usually available from the county planning commission.

The courts are generally bereft of local knowledge, especially in the case of 2,571 jurisdictions, and have no responsibility or practical capacity to take into consideration discretionary political factors. In the last analysis, a court must make the determination as to whether court mandated regional responsibilities have been met. At best, the court's capacity to do that is limited; as aptly set forth by Justice Mountain in his dissenting opinion in *Oakwood*:

Quite apart from the uncertain efficacy of this newly formulated rule, there are a number of reasons why courts should abstain from seeking ultimate solutions to this area, but should rather urge a legislative, or a legislative-administrative approach. In the first place courts are not equipped for the task. If a court goes beyond a declaration of validity or invalidity with respect to the land use legislation of a particular municipal body, it invites the fairly certain prospect of being required itself to undertake the tasks of rezoning. Of course it has neither the time, the competence nor the resources to enter upon such an undertaking. It must therefore appoint planning experts to do the work for it. . . . A principal weakness inherent in this approach is that no authoritative guidelines exist at the present to aid the trial judge and the planning experts he has appointed, and to which the law would require that they adhere. Therefore a land use plan so devised will reflect rather the informed judgment of the chosen expert than a judicial application of settled principle to particular facts. Full realization of this is likely further to diminish the probability of community acceptance.<sup>147</sup>

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147. *Oakwood*, 72 N.J. at 625-26, 371 A.2d at 1264-65. (Mountain, J., concurring & dissenting). Court appointed experts were not entrusted by the legislature any more than was the judiciary to carry out the zoning function, nor were they elected by the local



Most trial judges have no more than one or two briefing clerks trained in the law. Few judges or briefing clerks are trained as planners. It can be assumed that none of those responsible for judicial decisions or research in relation to those decisions are going to have any substantial personal knowledge of the complex consideration that should go into what admittedly constitutes legislative comprehensive planning. This is especially true when there is the possibility that any one of a thousand municipalities might be the defendant. Moving to the appellate courts in Pennsylvania as an example, they are faced with the possibility of making a decision with respect to any one of better than 2,500 units. We cannot expect efficient, effective, sagacious or acceptable planning at any judicial level.

The expense of planning for a relatively small township, known to the planners, even though they are probably laymen is one thing. The expense of engaging in the type of comprehensive planning that needs to be done for a regional area, taking into consideration a non-defined geographical sector of vast proportions and multiple governmental units subject to second-guessing by the courts in what has developed as a concomitant to the planning process, is another.

In determining the type of resources that would be necessary to effective regional planning by either court or municipality, it might be instructive to look at the size and cost of operation of one planning commission in the State of Pennsylvania. The Bucks County Planning Commission, with a budget of 1,064,943 dollars in 1982 has 40 employees. Twenty-four of these employees have degrees in either planning or architecture.<sup>148</sup> Forgetting for the moment that zoning is as much an exercise in democracy as in expertise, these figures indicate the quantity and quality of resources essential to regional planning in terms of expertise. Recognition by the courts of the political nature of zoning, and that neither the courts nor local

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citizens wherein the legislature did choose to make the ultimate repository of power as recognized in *City of Eastlake v. First City Enterprises*, 426 U.S. 668 (1976).

The theme is not new. In *Garrett v. City of Hamtramck*, 503 F.2d 1236 (6th Cir. 1974), the court stated that the affirmative provisions in a decree "should be no greater than required because courts are ill-equipped to administrate the details of a municipality's affairs." *Id.* at 1249. The same court reiterated that philosophy a year later in *Joseph Skilken & Co.* Chief Judge Phillips indicated that the requirement that Toledo develop a sweeping plan of affirmative action is unnecessary in this case. More important, it would deeply involve the District Court in complex and delicate problems of city planning that are best left to the municipal government and to the various administrative agencies.

528 F.2d at 882.

148. Telephone interview with Robert Moore, Executive Director, Bucks County Planning Commission, April 13, 1980.

governing bodies have the needed resources, could well account for the limited spread of the exclusionary zoning doctrine.

One other important factor that should be looked to before the courts assume zoning responsibility is the capacity of the courts to translate their policy into reality. Handing down planning decisions that have no appreciable effect is no planning at all. In New Jersey, for example, the courts have been singularly unsuccessful in doing anything about providing low-income housing through random invalidation of the local legislative process, based on where lawsuits happen to be brought.

Not only did it take seven years for the developer to get definitive relief in *Oakwood*<sup>149</sup> but no housing has ever been built since *Mount Laurel*,<sup>150</sup> and the matter along with five other consolidated decisions is once again pending before the Supreme Court of New Jersey.<sup>151</sup>

Alan Mallach, planning expert, commentator,<sup>152</sup> and an ardent advocate of judicial intervention, has acknowledged that exclusionary zoning litigation has had only modest measurable impact to date.

This statement is not easy either to document or controvert. It is, nonetheless, the consensus of those engaged in such litigation, at least in New Jersey (which has had, most probably, more such litigation than any other state) that any change in the character of suburban development resulting from *Mt. Laurel* and its successors is modest in the extreme. Indeed, one interesting observation is that the percentage of new suburban development that is in multifamily units, which one might assume would increase as a result of *Mt. Laurel*, has actually declined, from 50 percent of all units from 1972-1974 to only 32 percent of all units from 1976-1978. This is, of course, a function of a variety of economic factors unrelated to zoning per se . . . .<sup>153</sup>

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149. 72 N.J. at 481, 371 A.2d at 1192.

150. 67 N.J. at 151, 336 A.2d at 713 (1975).

151. Implementing *Mount Laurel* appears to involve insurmountable problems. The Supreme Court of New Jersey agreed in the Fall of 1980 to hear a consolidated appeal of six lower court exclusionary zoning decisions, possibly to re-evaluate some principles of *Mount Laurel*. The court posed a number of questions toward which oral argument was to be addressed.

The original *Mount Laurel* decision is not technically involved. The case arising out of the original *Mount Laurel* decision is commonly called *Mount Laurel II*. Though the case was argued in November of 1980, and additional argument was held in December of 1980 the decision has not come down as of the submission of this manuscript. Telephone interview with spokesman for the Supreme Court of New Jersey, June 16, 1982.

152. Mallach, *supra* note 58.

153. *Id.* at 277 n.4.

It has always been a limitation on the police power that the means adopted by the legislature must be reasonably calculated to achieve the ends sought. As recognized by the United States Supreme Court in *Nebbia v. New York*:<sup>154</sup>

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.<sup>155</sup>

If the courts are going to invade the legislative realm is it asking too much that they be held to the same standard as the legislature?

#### J. *Federal Decisions Do Not Support Exclusionary Zoning Doctrine*

If, as determined in *Lindsey v. Normet*,<sup>156</sup> there is no constitutional right to housing<sup>157</sup> it is doubly difficult to envision either a constitutional right to live in a given municipality, obviously in housing, irrespective of whether the claimant has ever lived or worked there, or given the latter, the right to have better housing in the same municipality.

In an area dependent in significant part on the assertion of constitutional principles to invalidate otherwise valid legislative enactments, the insistence of the federal judiciary, especially the United States Supreme Court, on recognizing the validity of local legislative action has severely retarded the spread of exclusionary zoning decisions. The federal courts, by and large, have not been willing to embrace exclusionary zoning as an integral part of the civil rights movement.

In 1970 in *Southern Alameda Spanish Speaking Organization v. City of Union City*,<sup>158</sup> a citizen initiated referendum overturning approval of a zoning change made to permit low-income housing was sustained. In 1971, *James v. Valtierra*,<sup>159</sup> once again sustained the

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154. 291 U.S. 502 (1934).

155. *Id.* at 525 (citations omitted).

156. 405 U.S. 56 (1972).

157. *Id.* at 74.

158. 424 F.2d 291 (9th Cir. 1970).

159. 402 U.S. 137 (1971).

use of the citizen referendum to reject low-income housing. *Golden v. Planning Board*<sup>160</sup> in 1972 upheld the right of a municipality to exclude to some indeterminate extent by staging its growth.

These decisions were reinforced by the United States Supreme Court in *City of Eastlake v. Forest City Enterprises*<sup>161</sup> in 1976, wherein the Court sustained the right of a city to submit proposed zoning changes to a public referendum. In 1974 in *Belle Terre*<sup>162</sup> the Supreme Court gave almost carte blanche under the police power and sustained the right to exclude nonrelated members of a family from housing in order to protect family values, which includes the enjoyment of open space. The Court stressed "that exercise of discretion . . . is a legislative, not a judicial, function."<sup>163</sup>

In 1975, the Court in *Warth v. Seldin*,<sup>164</sup> held that without a substantial nexus, such as employment or residence, citizens lacked standing to litigate the question of exclusionary zoning. Perhaps the most significant portion of the *Warth* decision was the Supreme Court's expression of its concept of federalism when it stated:

We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process.<sup>165</sup>

By 1977 in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>166</sup> the Supreme Court was willing to hold that disparate impact on minorities did not give a right to change the zoning of the city, absent an intent to discriminate.<sup>167</sup>

From the perspective of judicial activists there may be hope from the Third and Seventh Circuits. *Resident Advisory Board v. Rizzo*<sup>168</sup> held that under title 8 of the Civil Rights Act of 1968 disparate impact alone, irrespective of constitutional violation, was sufficient grounds to grant relief.<sup>169</sup> In the *Metropolitan Housing*

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160. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1971), *appeal dismissed*, 409 U.S. 1003 (1972).

161. 426 U.S. 668 (1976).

162. 416 U.S. at 8.

163. *Id.*

164. 422 U.S. 490 (1975).

165. *Id.* at 508 n.18.

166. 429 U.S. 252 (1977).

167. *Id.* at 265.

168. 564 F.2d 126 (3rd Cir. 1977).

169. *Id.* at 148.

*Development Corp. v. Village of Arlington Heights*<sup>170</sup> decision on remand, the Seventh Circuit was more conservative but nevertheless followed the same line suggesting that disparate impact as one factor combined with other considerations such as some evidence of intent could constitute a basis for relief.<sup>171</sup>

But, no matter how postured, distinguished or minimized, the high court decisions establish a reasonable expectancy that not one state decision invalidating zoning as exclusionary would have survived scrutiny under federal constitutional principles. It is rumored that it has gotten so bad that one has to turn to the state courts to get one's constitutional rights.

Indeed, both New Jersey and Pennsylvania courts have made it clear that they rely on state grounds. In Pennsylvania, the Federal Constitution has been cited but in *Surrick* it was stressed that those grounds do not include the equal protection clause of the fourteenth amendment.<sup>172</sup>

#### K. *Exclusionary Zoning Decisions Do Not Effect Racial Integration*

Undoubtedly one of the generally unspoken reasons behind the exclusionary zoning decisions, especially in New Jersey, has been a desire to further integration in a society that is still largely divided along what would appear to be primarily economic lines but that nevertheless coincide with race. Perhaps one influence dampening adoption of the doctrine of exclusionary zoning is a growing conviction that there is very little that either government or organized groups can do to further integration, that where it happens successfully it is based on personal decisions, capacities and interrelationships.

It is one thing for an economically successful minority family, probably with an educational level equivalent to their achievement in some rough proportion, to decide to buy into a neighborhood convenient for employment and congenial to their personal taste under circumstances where everything indicates they would like and are prepared to become part of the community. It is totally another thing for the courts to decree contrary to local law that housing projects are to be built with public funds to be occupied primarily by people of significantly lower economic and educational levels. The

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170. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

171. *Id.* at 1290-94.

172. 476 Pa. at 193 n.10, 382 A.2d at 110 n.10.

individuals who occupy such housing probably did not choose the community because they wanted to live there but because of cheap housing. In the ordinary course of events they would never have purchased homes and chosen to raise their families there or chosen to work there or to become part of the social fabric. The inducement of people to live there, usually in great density because the site looks to government officials to be a place desirable for or vulnerable to government-sponsored housing, is not necessarily calculated to achieve positive interpersonal relationships. If the community to be occupied was theretofore composed of single-family detached dwellings, multiunit housing furnished by the government or otherwise is not going to further integration.

There are, of course, those who have become pessimistic, unduly in the author's opinion, about our capacity to effect or even achieve integration. One example of a discouraging effort is the Concord Park development started just north of the city of Philadelphia some twenty-eight years ago and designed by the developer to be an ideal integrated community. *Today, The Philadelphia Inquirer Magazine*<sup>173</sup> reported that the development was "envisioned by a civil rights activist, backed by a Quaker builder and bolstered by hard-squeezed funds from Philadelphia's Black churches [and that] the development was hailed internationally as the first community designed for integration."<sup>174</sup> But, the natural equilibrium was upset from the very beginning because the developer secretly offered whites special incentives to move into his dream development. *Today* further reports:

Today, 28 years later, only five white families remain in the neighborhood that was supposed to be colorblind, the neighborhood that testifies to the hidden force that seems to drive people to live with members of their own race. And the 'perfect' society? The case of Concord Park suggests, as do other short-lived examples of racially balanced communities, that blacks and whites will seldom live together if given the choice.<sup>175</sup>

The article quotes Peter Muller, an urban geographer at the University of Miami who had previously studied Philadelphia's housing market for some ten years as an associate professor at Temple University, as stating that the phenomena was "a universal thing

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173. Diamond, *Remnants of a Dream*, *Today, The Philadelphia Inquirer Magazine*, Mar. 21, 1982, at 12.

174. *Id.* at 10.

175. *Id.* at 14.

[that] [p]eople tend to form clusters of like-minded people."<sup>176</sup> Like-minded yes, but like-skinned? Saul Alinsky was quoted as saying: "Integration is simply the time between the arrival of the first blacks and the departure of the last whites."<sup>177</sup>

Of course, a similar side of the coin is, as recognized in the *Glenview Development Co. v. Planning Board*<sup>178</sup> case in New Jersey, that if invalidating the so-called restrictive zoning laws in Franklin Township did result in more moves into the township then it would be upper income whites leaving the city:

In short, the lowering of barriers to high-density development in the rural and semi-rural areas of the State would probably promote and encourage movement of the white middle class from the traditional urban centers and their surrounding suburbs. A continuation and aggravation of that movement would tend to exacerbate currently existing social and economic divisions and would probably severely hamper an urban renaissance.<sup>179</sup>

Since the vast majority of exclusionary zoning cases have involved middle or upper income housing it is probable that to the extent there has been any impact on integration, it has been negative. The racial imbalance in the cities has been, if anything, intensified.

## V. CONCLUSION

In spite of the extensive coverage by the media and academics, it is clear that after seven years *Mount Laurel* has had very limited impact on the decisional process across the nation. A determination as to its impact on legislative enactments, necessarily involving an in-depth study of legislative history, may prove to be more positive. Only three states, Pennsylvania, New Jersey, and New York have had any significant number of exclusionary zoning decisions. Of those, both New York and Pennsylvania had well-established doctrines prior to the time that *Mount Laurel* was decided in New Jersey in 1975.

Furthermore, Pennsylvania has held to its basic prodeveloper theory that people have almost an unfettered right to do as they please with their property. New Jersey's preoccupation with the poor and other egalitarian concepts has been specifically rejected in Pennsylvania by the *Surrick* decision.

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176. *Id.* at 16.

177. *Id.* at 14.

178. 164 N.J. Super. 563, 397 A.2d 384 (Law Div. 1978).

179. *Id.* at 575-76, 397 A.2d at 390-91.

Though the New York decisions share greater brotherhood with those of New Jersey than Pennsylvania, the New York approach preceded, rather than followed *Mount Laurel*.

Perhaps equally significant is the fact that in New Jersey itself there has been a substantial diminution of fervor, if not a downright retreat, with respect to exclusionary zoning decisions. The New Jersey courts have found that they are ill-equipped both in terms of training, education, and staff resources, as well as hobbled by the inherent limitations of the ad hoc decision process, to effectively assist replanning the state in the mold that the judiciary would like to achieve.

If intervention into the local planning process is to prove effective, it is believed clear that in New Jersey, and those states pursuing the egalitarian concept, the answer should lie with the legislature and not the judiciary.

An interesting story about the Pennsylvania version of the doctrine has been told but not documented by a prominent law professor active in the land use field. As the story goes, in a conversation at a convention with one of the Justices of the Pennsylvania Supreme Court, exclusionary litigation was reviewed in relation to existing principles and doctrines. Subsequent to that general interchange of views, including questions and analysis, the academic stated quite candidly to the Justice: "Judge, you folks don't know what you're doing." With becoming candor the Justice replied, "You're right but we're going to force somebody to come up with a proper answer as to what should be done."