

ZONING MODELS AND FAIR SHARE HOUSING: THE CONFLICT  
BETWEEN LOCAL RESPONSIBILITY AND REGIONAL NEEDS

by

THOMAS W. MCNISH

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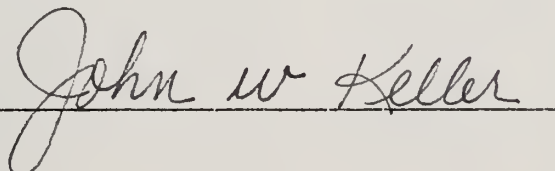
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## PREFACE

Zoning law undoubtedly has entered into a period of transition. Although a municipality's zoning power was once thought to be an entirely local matter, it is now considered to have regional implications. Suburban land-use practices are currently under attack by courts following a regional perspective of zoning. In examining suburban zoning practices, some state courts have rejected traditional legal approaches to zoning and instead have adopted an approach based upon a fair share allocation of regional housing needs. This regional approach raises issues other than those normally associated with zoning-- matters beyond the typical concern with the protection of private property rights.

Since housing location in a metropolitan area influences to a large degree the "quality of life" as well as the degree of inequality, whether among individuals or municipalities, the role of local land-use controls must be examined. The fair share housing approach has offered guiding principles in how local zoning ordinances should operate in providing areas for housing all income groups. Traditionally zoning approaches have rejected the fair share approach to housing usually on the basis of a "protection of property rights" rationale. It is intended that this thesis will show a relationship between the fair share housing approach and planning principles.

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## Chapter 1

### INTRODUCTION

Metropolitan development in the United States has been a dynamic but uneven process that has created as many problems as it has solved. The typical response to urban problems has often lacked a perception of the interrelation of the various communities within a metropolitan area. As a result, the problems of inner-city decay and suburban development have generally been treated as if they were two separate entities. The metropolitan area as a whole has emerged as the unit of analysis for many urban problems. The notion that certain problems pertain exclusively to the central cities and other problems pertain to suburbs is being challenged by planners and social scientists.<sup>1</sup> There is growing awareness that issues of inequality in the United States must be examined within a metropolitan context.<sup>2</sup>

As metropolitan political fragmentation has increased on the suburban periphery, the tendency toward spatial differentiation by socio-economic groups has also become greater.<sup>3</sup> Metropolitan spatial differentiation and political fragmentation can be viewed as interrelated issues having regional implications in their effect upon urban stratification and inequality. In a study by Richard C. Hill, governmental inequality defined in terms of municipal fiscal resources within a metropolitan area was found to be related positively to the size of the nonwhite population, the degree of income inequality,

the income distribution, and the number of municipalities per capita. The question of housing location within a metropolitan area therefore becomes a principal factor in the allocation of public goods and services. As Michael Danielson wrote:

The proliferation of suburban jurisdictions, each with independent control over access to residential, educational, and recreational opportunities within its borders, greatly reinforced the social, economic, ethnic, and racial differences among urban neighborhoods.<sup>5</sup>

### Suburban Exclusion

The power of developing, suburban municipalities to control the type of new housing construction primarily through local zoning laws, in essence, determines who will occupy that housing. Since income is a dominant factor in housing selection, local zoning laws enable a municipality to exclude low and moderate-income groups by prohibiting the type of housing within their economic means. Spatial differentiation by income becomes incorporated within the fragmented metropolitan political structure which maintain an unequal distribution of public goods and services. Michael Burns wrote:

When the poor are excluded from certain areas, or confined in others, a "separate-but-equal" situation arises. As we have learned from the civil rights movement, separate never meant equal, at least at this point in our history. As long as the poor, less influential members of our society remain confined in enclaves, city and county services available in those areas will remain inferior to the services provided in areas where the citizenry is more politically effective.<sup>6</sup>

Housing has remained a strictly local concern in the politically autonomous suburbs. The local land-use policies



of the developing suburbs, which have largely excluded low and moderate-income groups, have been able to thwart any movement to recognize housing as a regional commodity. Rarely have suburbs felt any responsibility for metropolitan problems which have tended to concentrate in the central cities. Only the problems of the suburban municipality are considered, although the local decision-making of the suburbs may have considerable impact on non-residents.

Residential location within a politically-fragmented metropolitan area produces great differences in the level of local services, local tax resources available to finance public services, the need for services, and the local tax rate.<sup>7</sup> The disparity in the fiscal resources of the central cities compared to those of the politically-independent suburbs may be attributed in part to suburban zoning laws that have promoted the single-family residence to the exclusion of other types of housing and also industrial and commercial development to bolster the local tax base. As a consequence, the cost of providing for the concentration of urban poor is placed on the central cities which have experienced a declining tax base due to decentralization of commerce and industry and the flight of the affluent to the suburbs. The suburbs tend to seek only relatively high-income residences, which generally produce a lower demand for services, and also high tax-yielding, non-residential property.

Central-city residents usually pay proportionately higher taxes for the equivalent levels of services in the suburbs, despite the likelihood that the need for such services may be

much greater in the central cities.<sup>8</sup> On the other hand, suburbanites can have, proportionate to income, either the luxury of a higher level of services at a low tax cost or a very small tax cost for an only average level of services.<sup>9</sup> Central cities also have more competing services to provide for unlike the suburbs that can either avoid many services through exclusionary zoning or utilize services already provided in the central cities.

Decentralizing businesses are even able to shop around for the best tax rate among the suburbs competing for non-residential property to augment their tax base. Extreme cases of economic segregation arise from such suburban development. For example, the zoning ordinances of 20 central New Jersey suburbs provided for the housing of 144,000 families yet included enough land for industry and research to create approximately 1.2 million jobs.<sup>10</sup> This common suburban practice of isolating the residence of the worker from the place of employment typifies the metropolitan inequality perpetuated in part by local zoning laws.

### The Regional Housing Approach

The concept of the fair-share housing allocation plan constitutes a means of meeting housing needs on a regional basis. Such a plan mandates that each suburban municipality within a metropolitan area must provide its regional fair share of low and moderate-income housing. The spatial distribution of economic groups becomes a salient factor in the regional housing allocation plan, an approach developed largely by a few state courts. These few state courts have invalidated local

zoning ordinances on the ground that municipalities were failing to meet their regional, fair share of low and moderate-income housing. The New Jersey courts have gone a step further by granting affirmative relief, i.e. actually requiring developing municipalities to provide for regional housing needs on the basis of a regional housing plan. The state courts, most notably in Pennsylvania and New Jersey, have developed a metropolitan approach to housing needs in response to the suburban municipalities, which have conducted zoning as a strictly local concern and often neglected regional considerations.

Regional housing plans, mandated by the state courts, may be the only realistic way to ensure that municipalities at least provide land zoned for low and moderate-income housing. This judicial remedy has been severely criticized as an usurpation of the legislative function of zoning and a violation of the separation of powers doctrine.<sup>11</sup> Attempts at metropolitan housing programs by both the legislative and executive branches of the federal government have generated intense political furor and consequently have been discontinued.

The Secretary of HUD, George Romney, experienced the quintessence of suburban politics in 1969 when he tried unsuccessfully to force Warren, Michigan to accept subsidized, low-income housing. The increasing number of suburban congressmen have been able to prevent any legislation requiring a metropolitan housing approach, as a bill in 1972 did,<sup>12</sup> or a "forced integration" approach which would have drastically limited local autonomy in zoning. Instead, Congress has been differential

to local control of zoning and even strengthened local autonomy in 1972 by granting communities the power to approve Section 235 and 236 subsidized housing.<sup>13</sup> The Housing and Community Development Act of 1974, despite one of its lofty goals of "spatial deconcentration of housing opportunities for persons of lower income,"<sup>14</sup> also rejected a metropolitan approach to housing.<sup>15</sup> Because of the extreme hostility towards metropolitan housing approaches, the judiciary (most likely the state courts) has been forced to address this problem of exclusion due to the failure of the other branches of government and may offer the only possible resolution of this issue. Norman Williams noted:

...it has been recognized that it is an essential part of the judicial function to watch over the parochial and exclusionist attitudes and policies of local governments, and to see to it that these do not run counter to national policy or the general welfare.<sup>16</sup>

#### THE SUBURBAN SOCIETY

The United States can no longer be viewed as an urban nation but rather as a suburban nation. The suburb typically exists as an independent political unit, jurisdictionally separate from the central-city government, but yet a part of the larger metropolitan area. The predominant form of metropolitan growth has clearly been the suburb--a trend that is expected to continue given the shortage and the high cost of available land in the central city. More people now reside in the suburbs than in the central cities and nonmetropolitan areas. Suburbanization certainly is not a recent phenomena, although the pace has accelerated subsequent to WWII and the concomitant effects have

become more pronounced in relationship to the core cities.

The suburbs have been the most dynamic area in the nation from a standpoint of economic and population growth. Not only have the central cities yielded their former population dominance of the metropolitan areas to the suburbs, but they have also experienced massive declines in industrial and commercial employment, which also were suburbanized.

In 1977 the suburbs accounted for 57.9% of the metropolitan population, whereas the central cities were 42.1%.<sup>17</sup> From 1970 to 1977, the population of the central cities declined by 4.0%, and the suburban population increased by 11.7%.<sup>18</sup> Over a period of the twenty years, the central cities changed from 56.8% of the metropolitan population in 1950 to 50.1% in 1960 to 46.1% in 1970.<sup>19</sup> This marked decline would have been even more striking if not for the suburban annexation by many of the core cities. On the other hand, the suburbs steadily grew from 43.2% of the metropolitan population in 1950 to 49.9% in 1960 to 53.9% in 1970.<sup>20</sup> This suburban population growth has been projected to be 65 to 70% of the metropolitan population and 44 to 46.5% of the total U.S. population by 2000.<sup>21</sup>

Suburban employment has also accounted for the largest portion of metropolitan employment growth. An estimated 80% of all new jobs are being created in the suburbs.<sup>22</sup> From 1960 to 1970, commercial and industrial decentralization resulted in an employment decline of 6.9% in the central cities of the 15 largest metropolitan areas compared to a 43.6% employment increase in the suburbs of these metropolitan areas.<sup>23</sup> Although

employment in the central cities has increased in government, service, or administrative functions, the suburban economic growth is indicative of the demise of the commercial and industrial functions of the core cities.

A Summary Discussion of the Socio-economic Characteristics of City and Suburb

The image of suburbia as an affluent, socially and racially homogenous development is an unfounded stereotype. There are black suburbs, ethnic suburbs, working-class suburbs, and even suburbs with significant amounts of poverty. Nevertheless, the trend is definitely toward a relatively affluent, white population in the developing suburbs. Aggregate census data tend to understate the degree of suburban exclusion.

Although blacks are increasingly moving to the suburbs, the black, suburban population constituted about 4.6% of the total suburban population in 1970 and 5.6% in 1977.<sup>24</sup> There was a 26.4% increase in the number of suburban blacks from 1960-1970 and 34.5% increase from 1970-1977.<sup>25</sup> However, in light of the black population in the central cities, the number of blacks residing in the suburbs was minuscule. In 1977, almost 75% of all metropolitan blacks resided in the central cities while approximately 37% of all metropolitan whites were central-city residents.<sup>26</sup> From 1960-1970, the number of central-city blacks increased by 32.3% and from 1970-1977 by 6.5%.<sup>27</sup> Obviously, the suburban, black population has been growing much more rapidly than the central-city, black population.

From 1960-1970 the white, central-city population remained nearly constant compared to a 26.1% increase in the suburban, white population for the same period.<sup>28</sup> The white, central-city population declined by 8.2% from 1970-1977.<sup>29</sup> In 1977, 63.1% of all metropolitan whites lived in the suburbs whereas only 25.2% of all metropolitan blacks lived outside of the central cities.<sup>30</sup> There was a 9.8% increase from 1970-1977 for the suburban white population.<sup>31</sup> Despite increasing black suburbanization, racial polarization between the central cities and suburbs persists. The current trend for metropolitan whites definitely reveals a pattern of white flight from the central cities. Many cities, in particular the older, eastern cities, are already over 50% black, and several others are approaching this figure.

Although the suburbs do contain substantial numbers of the poor, the distribution of metropolitan poverty is concentrated in the central cities. In 1977, 15.8% of all central-city residents were below the poverty level while only 6.9% of all suburban residents were within that category.<sup>32</sup> Of the total metropolitan poverty, 62.3% of all persons below the poverty level in 1976 were located within the central cities.<sup>33</sup>

The 1976 median income for families living in central cities with a population of one million or more was \$13,700 compared to \$18,419 in the suburbs.<sup>34</sup> For all metropolitan areas, the 1976 median income in central cities was \$13,952 and \$17,440 in the suburbs.<sup>35</sup> Slightly more than 60% of all suburban families earned \$15,000 or more in 1976.<sup>36</sup> In the central cities, approximately 45% of the population had incomes of \$15,000 or more.<sup>37</sup>

## A TABLE OF THE

Percentage of Metropolitan Families  
in the Suburbs by Race and Income

<u>Income</u>	<u>Black Families</u>	<u>White Families</u>
Under \$5,000	18.4%	50.8%
\$5,000 to \$6,999	24.0%	53.1%
\$7,000 to \$8,999	28.1%	59.1%
\$9,000 to \$11,999	26.6%	59.4%
\$12,000 to \$14,999	24.3%	61.9%
\$15,000 to \$24,999	30.6%	66.3%
\$25,000 and over	39.1%	71.4%

Source: U.S. Bureau of the Census, Consumer Income: Money Income in 1976 of Families and Persons in the United States 63-65 (Series P-60, No. 114, 1978).

The influence of both race and income revealed an even more exclusionary pattern of development in the suburbs. As in the case of white families, black families with relatively high incomes were more likely to reside in the suburbs, even though the effect of income upon black suburbanization was much less than upon white suburbanization. The percentage of white families earning \$25,000 or more living in the suburbs was approximately 1.8 times greater than the percentage of black families at that same income level and also living in the suburbs.<sup>38</sup> Black families earning \$25,000 or more were the most likely to reside in the suburbs, and then this figure was only 39.1%.<sup>39</sup> White families at all income levels were more than 50% suburban.<sup>40</sup> Only 18.4% of all metropolitan black families earning under \$5,000 lived in the suburbs.<sup>41</sup> A total of 50.8% of all metropolitan white families at that income level lived in suburbs, although this income group had the lowest percentage of white families living in the suburbs.<sup>42</sup>

The 1976 median income for metropolitan blacks was \$9,984 compared to \$16,767 for metropolitan whites.<sup>43</sup> Of all



metropolitan blacks, 28.6% were below the poverty level; this was more than three times the rate for metropolitan whites.<sup>44</sup> Regardless of the lower rate of poverty (7.9%), metropolitan whites still constituted 63.5% of all metropolitan poverty.<sup>45</sup> There were more poor whites than poor blacks in the suburbs as well as the central cities. However, black poverty was heavily concentrated in the central cities, which contained 81% of all metropolitan black poverty.<sup>46</sup> White poverty in the central cities amounted to 52% of all metropolitan white poverty.<sup>47</sup>

The trend in metropolitan population movement is the suburbanization of both wealthy blacks and whites. In addition to this income-selective characteristic of suburbanization, race still remains an important but somewhat diminishing factor. Income differences between cities and suburbs are considerable, especially in the larger metropolitan areas. The demographic pattern revealed from suburban population characteristics tends to support the perception of suburban development as discriminatory on both racial and economic grounds.

### Housing in the Suburbs

From 1960 to 1970, 65% of all new housing stock in metropolitan areas was being constructed in the suburbs.<sup>48</sup> The single-family residence accounted for 66% of the new housing in suburbia and 72% of the total suburban housing stock.<sup>49</sup> The 1970 to 1976 construction figures revealed a decline in the trend--the single family residence was 56.2% of all new suburban dwelling units.<sup>50</sup> The increase in multi-family housing

was due, in part, to the high cost of single family homes.

The single-family home as the predominant type of housing in suburbia has had tremendous socio-economic implications simply because of the rapid inflation in the cost of housing construction. The average sales price of a new, single-family house in 1970 was \$26,300 compared to the average sales price of \$44,200 in 1976.<sup>51</sup> Almost 47% of American families could afford a new house in 1970.<sup>52</sup> In 1976 only 27% of families had sufficient income to purchase a new home.<sup>53</sup> The average sales price of new single-family homes for the second quarter of 1978 was \$61,500.<sup>54</sup>

If the generally accepted rule that a house must be no greater than 2 to 2.50 times family income was applied, then the minimum income necessary to purchase a new house in 1978 was approximately \$24,000 to \$30,000. Approximately 80% of the American population did not have any choice but to seek housing other than the new single-family residence. To provide low and moderate-income housing necessarily means that apartments, other multi-family developments, subsidized housing, and mobile homes will house much of the population.

#### LAND-USE CONTROLS IN SUBURBIA

Metropolitan residential patterns are spatially differentiated by socio-economic status. Access to suburban communities where new housing and employment opportunities are the greatest is severely restricted to the low-income population, minority groups, and to a lesser extent even moderate-income groups:

Residents of the suburban communities are now almost exclusively white and affluent--a product of land availability and speculation, of federal policies toward subsidized housing and the interstate highway system, of population growth and dispersion patterns, of the practices of real estate, banking, and home building industries. All the prevailing forces have tended to keep out low-income families, regardless of race or origin.<sup>55</sup>

Land-use controls are a potent instrument in the hands of suburban municipalities. When these land-use controls are used to limit the availability of low and moderate-income housing, the suburban municipalities are, in effect, controlling whom will reside in their communities. Although suburban racial exclusion is also a recognized problem, the most effective means of excluding both the poor and the black has been primarily local zoning laws which have tended to promote low-density, single-family residential developments--most importantly, relatively expensive housing.

In terms of the absolute number of people potentially affected by suburban land-use decisions, low-income, central-city whites are the largest group affected. In terms of proportionate impact, however, low-income, central-city blacks are more adversely affected simply because they constitute a larger proportion of the central-city black population than do low-income whites of the central-city white population. The local land-use policies of suburban municipalities are affecting a large number of the metropolitan, low and moderate-income population, who have had no representation in this regional matter and consequently are largely confined to the central

cities. As Michael Danielson noted:

Land is the most valuable resource  
in the suburbs. Its control by local  
government is the key to suburban exclusion.<sup>56</sup>

Suburban municipalities have at their disposal a panoply of zoning laws, subdivision regulations, and building codes--all police power functions intended to promote the health, safety, and general welfare. Even when the intent of local land-use controls constitutes a legitimate exercise of the police power, the effect of these land-use controls may be to keep the cost of housing unnecessarily high or to prohibit or severely restrict various housing types. Exclusionary zoning practices have become much more complex and inventive since the 1950's and 1960's when the minimum lot size and minimum floor area were heavily relied upon techniques. Consequently, it is generally difficult to point at one single law or regulation as exclusionary when the total effect of a municipality's land-use controls is economically discriminatory.

Zoning laws which serve to increase the cost of housing may entail a minimum lot size, a minimum floor area, or a maximum residential density. If apartments or other multi-family dwellings are permitted, often a very minimal area is zoned for multi-family use--a practice which forces the price of land to increase due to the restricted supply and ultimately raises the cost of housing. Minimum parking requirements, design standards, and building codes also can be utilized to increase the rental price of apartments. Subdivision regulations may

require mandatory dedications of land or buildings, or other expensive specifications which are all costs eventually passed on to the consumer. Regardless of a municipality's intent, land-use controls may involve both rather simple and sophisticated techniques which tend to increase the cost of housing and thus exclude a significant portion of the population.

Total prohibition of apartments, other multi-family types, and mobile homes is quite common in many suburbs. Multi-family dwellings, when they are permitted, may be restricted to largely efficiency and one-bedroom units in order to exclude families with children. Municipalities also have the power to veto in many federally-subsidized housing programs. To avoid the appearance of a total prohibition in low and moderate-income housing, areas may be zoned for such use but zoning policies and procedures may place so severe restrictions that the effect is tantamount to total exclusion. When low and moderate-income housing types are permitted, these designated areas are often quite minimal compared to the area of the detached, single-family districts. There may be overzoning for industrial use in order to prevent low and moderate-income housing. Even low-income, elderly housing may be used to circumvent requirements for the inclusion of low-income housing within a municipality. The timing of capital improvements, such as roads, sewers, and water lines, can also be utilized to exclude low and moderate-income groups. Increasingly, delays in administrative and procedural decision-making are being employed to place financial burdens on low and moderate-income housing developers.

Rarely do zoning ordinances express an intent to exclude, even though the effect of exclusion may be quite explicit. Many state and federal court cases have set precedents for broad interpretations of the legitimate purposes of zoning as they relate to the health, safety, and general welfare of the public.

The most common justification of exclusionary zoning is the maintenance of the fiscal integrity of the community. Low and moderate-income housing developments are viewed as bad ratables, which tend to require more municipal services and to produce more children, possibly placing a burden on local schools. Higher property taxes are thought to result when low and moderate-income housing is allowed within the community. The reliance upon the local property tax for municipal revenues creates a tendency of permitting only good ratables, or single-family residences, commercial and industrial development, which all most probably will generate more tax revenues than municipal services required. As Norman Williams wrote:

...the system provides a subsidy for antisocial conduct, particularly by the more prosperous communities.<sup>57</sup>

Protection of property values is another defense used to justify exclusion of low and moderate-income housing. A similar justification is the preservation of the "character" of an area. Even the protection of the environment is used to exclude low and moderate-income housing. Whether the maintenance of fiscal integrity, the protection of property values, the preservation of the community character and environment, or other similar justifications are legitimate purposes of zoning remain unsettled

issues in both the state and federal courts. There are numerous court decisions that both tend to approve as well as invalidate these local justifications of zoning. However, the state courts, which have adopted a regional approach to housing, have rejected many of these typical defenses of suburban zoning.

### Exclusion and Ideology

Economic discrimination is generally a way of life for the suburban municipalities utilizing land-use controls for purposes of social control in respect to which socio-economic groups will reside within their community. Because housing selection obviously involves distinctions of social class and status, exclusion of the low and moderate-income population transcends the property tax justification of local zoning practices. Many suburbanites view central-city dwellers, especially the poor, as an affront to their relatively affluent socio-economic status.<sup>58</sup> Low-income people are often perceived as largely "undesirables," who could threaten the livability of any community where they reside. Furthermore, poor people are often held to be individually responsible for their economic condition and tend to be feared by suburbanites.

Any low and moderate-income housing in the suburbs is thought to be the harbinger of crime and other social disorders. Therefore, the vehement opposition to low-cost housing in the suburbs is as much a response to isolate social disorder in the central cities as it is to exclude the low-income population from the suburbs. A major function of local government, as

perceived by suburbanites, is the exclusion of undesirables from their community.<sup>59</sup> The trend in suburbia is to resist change and to preserve the status quo; exclusionary zoning represents one of the best methods of attaining these ends.

#### SCOPE AND METHODOLOGY

Judicial decisions on land-use regulation and fair share allocation are limited to fairly well-defined geographic areas in the United States. The "key" decisions have occurred in the more densely populated states experiencing rapid suburban development and are basically confined to California, New Jersey, New York, and Pennsylvania. Federal court decisions, although they conform to districts or circuits, have also tended to occur within the same geographic areas or in the larger metropolitan areas of the United States.

State and federal court decisions have often taken conflicting approaches in exclusionary zoning litigation. The state courts that have followed a metropolitan approach to housing have defined exclusionary zoning as a question of economic discrimination. The federal courts which have refused to recognize economic discrimination as unconstitutional or invalid, have been limited entirely to the question of racial discrimination. In contrast to the state courts adopting a regional housing approach, the federal courts have tended to show deference for local land-use decisions and to hear cases involving specific-site projects. Not only have the state court decisions invalidated zoning in specific-site cases but



also in general practice suits based on the rights of future residents. Since the federal courts have limited cases to questions of racial discrimination in specific housing projects, the effect has been to shift the forum in regional housing allocation disputes to the state courts where a broader, regional perspective of zoning has been applied.

The scope of this thesis will extend to the "key" decisions, both state and federal, that deal with regulatory questions of regional housing allocation. The scope will not necessarily be limited to the fair share approach since other court decisions may provide models or insights into the problem under investigation. Only appellate decisions will be utilized in the analysis of zoning models.

The methodologies utilized in this thesis will be case study, content analysis, and case comparison. Judicial decisions will be analyzed for content and meaning and will then be compared with similar cases for contrast. The court cases will also be examined to determine if any planning concepts in land-use regulation may be derived. Reviews, comments, and critiques of these cases appearing in secondary works and scholarly periodicals will be used to supplement the author's analysis and interpretations.

The rationale for the methodologies to be employed can be justified on the following premises:

- a. The case study approach can trace the historical development of relevant court decisions and relate them to land-use practices.

- b. The time frame involved and institutional constraints make participant-observer methods impractical within the legal framework.
- c. Empirical case comparison is not feasible because of the divergent decisions of the state and federal courts.
- d. Content analysis can extract both general principles and exact meanings.
- e. The use of secondary data and multiple cases allow for a broad comparison of many different decisions so that a more effective model can be constructed.

Data extracted from the case study, case comparison, and content analysis will be used to develop models or "policy principles" for guides in formulating fair share allocation plans. To establish empirical confirmation of these models, the model[s] may either be used to test or measure the effectiveness of a fair share housing allocation plan or be used inductively to construct such a plan. The methodological process, then, will move from research to product in three distinct steps:

1. Construction of a model of zoning as it presently functions in the metropolitan or regional areas of the United States.
2. Construction of a model of zoning to include the fair share allocation approach provided by various state court decisions.
3. Construction of a comparative model of zoning which incorporates regional responsibility for metropolitan housing needs and also explores future implications of the fair share plan.

## Footnotes Chapter 1

<sup>1</sup>See, e.g., P. Davidoff, L. Davidoff, and N. Gold, "Suburban Action: Advocate Planning for an Open Society," 34 Journal of the American Institute of Planners 12 (1970); A. Downs, Opening Up the Suburbs (1973); J. Mollenkoph, "The Post-War Politics of Suburban Development," in Cities in Change 549 (J. Walton and R. Carns, ed. 1977).

<sup>2</sup>See, e.g., W. Randall, ed., Management and Control of Growth (1975) and United States Commission on Civil Rights, Equal Opportunity in Suburbia (1974) for a "liberal perspective" of metropolitan inequality; for a "conflict" perspective, see, e.g., M. Castells, The Urban Question (1977) and W. Tabb and L. Sawers, eds., Marxism and the Metropolis (1978).

<sup>3</sup>M. Danielson, The Politics of Exclusion 22 (1976).

<sup>4</sup>R. Hill, "Separate and Unequal: Governmental Inequality in the Metropolis," 68 The American Political Science Review 1557 (1974).

<sup>5</sup>Danielson, supra note 3, at 17.

<sup>6</sup>M. Burns, "Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor," 2 Hastings Constitutional Law Quarterly 179, 180 (1975).

<sup>7</sup>S. MacManus, Revenue Patterns in the U.S. Cities and Suburbs 119 (1978).

<sup>8</sup>Id. at 99.

<sup>9</sup>E. Bergman, Eliminating Exclusionary Zoning 39 (1974).

<sup>10</sup>Danielson, supra note 3, at 22.

<sup>11</sup>See, e.g., J. Rose "Conflict between Regionalism and Home Rule: The Ambivalence of Recent Planning Law Decision," 31 Rutgers Law Review 1 (1978) and J. Payne, "Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning," 29 Rutgers Law Review 803 (1976).

<sup>12</sup>A. Polikoff, Housing the Poor 61 (1978).

<sup>13</sup>Id.

<sup>14</sup>42 U.S.C. § 5301(c)(6) (1974).

<sup>15</sup>Polikoff, supra note 12, at 78.

<sup>16</sup>N. Williams, "Planning Law and Democratic Living," 20 Law and Contemporary Problems 315, 318 (1955).

<sup>17</sup>U.S. Bureau of the Census, Current Population Reports, Population Profile of the United States: 1977 32 (Series P-20, No. 324, 1978).

<sup>18</sup>Id.

<sup>19</sup>Id.

<sup>20</sup>Id.

<sup>21</sup>Downs, supra note 1, at 25.

<sup>22</sup>Planning for People, "Position Paper," in Your Community and Beyond 27 (J. Cheever ed. 1975).

<sup>23</sup>Downs, supra note 1, at 21.

<sup>24</sup>U.S. Bureau of the Census, supra note 17, at 32.

<sup>25</sup>Id.

<sup>26</sup>Id.

<sup>27</sup>Id.

<sup>28</sup>Id.

<sup>29</sup>Id.

<sup>30</sup>Id.

<sup>31</sup>Id.

<sup>32</sup>U.S. Bureau of the Census, Consumer Income, Characteristics of the Population Below the Poverty Level: 1976 (Series P-60, No. 115, 1978).

<sup>33</sup>Id.

<sup>34</sup>U.S. Bureau of the Census, Consumer Income: Money Income in 1976 of Families and Persons in the United States 63 (Series P-60, No. 114, 1978).

<sup>35</sup>Id.

<sup>36</sup>Id.

<sup>37</sup>Id.

<sup>38</sup>Id. at 64, 65.

<sup>39</sup>Id. at 65.

<sup>40</sup>Id. at 65.

<sup>41</sup>Id. at 64.

<sup>42</sup>Id. at 65, 65.

<sup>43</sup>U.S. Bureau of the Census, supra note 32, at 7.

<sup>44</sup>Id.

<sup>45</sup>Id.

<sup>46</sup>Id.

<sup>47</sup>Id.

<sup>48</sup>U.S. Bureau of the Census, Census of Housing 1970: Components of Inventory Change, United States and Regions 10 (1972).

<sup>49</sup>Id.

<sup>50</sup>U.S. Bureau of the Census, Annual Housing Survey: 1976, Part A, General Housing Characteristics 19 (1978).

<sup>51</sup>"Average Cost of Dream House Seen at \$78,000 by Mid-1980s," Kansas City Star, 7 March 1977, at 32.

<sup>52</sup>Id.

<sup>53</sup>Id.

<sup>54</sup>U.S. Bureau of the Census, Construction Reports: Price Index of New One-Family Houses Sold, Second Quarter 3 (1978).

<sup>55</sup>C. Haar and D. Iatridis, Housing the Poor in Suburbia 14 (1974).

<sup>56</sup>Danielson, supra note 3, at 50.

<sup>57</sup>N. Williams, 3 American Land Planning Law 295 (1975).

<sup>58</sup>See C. Perrin, Everything in Its Place: Social Order and Land Use in America (1977).

<sup>59</sup>Danielson, supra note 3, at 42.

## Chapter 2

### THE HISTORICAL BACKGROUND OF ZONING AND OVERVIEW

The physical development of the city unfolded as a field of inquiry for urban reformers in the late 19th century. As the problems of health, sanitation, congestion, pollution, and physical blight were recognized as pressing community issues, efforts to regulate the exercise of private property rights were made in response to these externalities of the laissez faire land market. These consequences of urban development were perceived largely as physical problems, requiring physical solutions. Regulation restricting the exercise of private property rights was proposed as the most appropriate method of controlling the physical development of the city.

Zoning regulations were developed at a time when the concept of land ownership was highly individualistic. Land was viewed essentially as a commodity to be exploited for personal gain. Prior to zoning, the only public restraint upon the use of land was nuisance law, which controlled those activities resulting in an unreasonable interference with the use and enjoyment of another owner's property. The inadequacy of nuisance law became apparent when the problems of urban development were acknowledged as being more than just the elimination of offensive land uses.

Private land-use controls were utilized by various property owners to exclude certain uses, generally in residential areas.

These private land-use arrangements were usually in the form of restrictive covenants prohibiting activities which, while undesirable to property owners in a certain area, did not constitute public nuisances. Although restrictive covenants in residential subdivisions were effective in controlling land use, these private controls covered only a part of the city.

Nuisance law and private land-use controls were limited in their applicability to the city as a whole. The effect was largely uncontrolled urban development in the absence of private restrictive covenants or a finding that a particular activity was nuisance. In context of the inadequacies of these two zoning land-use control devices, the need arose for a comprehensive land-use scheme covering the entire urban area and range of land uses.

### The Rise of Public Land-Use Controls

The initial attempts at public land-use regulation in urban areas were piecemeal and often utilized to control only those uses deemed to be public nuisances such as stables, taverns, or dance halls. Several cities also adopted ordinances regulating building height and bulk and minimum construction standards. The U.S. Supreme Court approved these piecemeal land-use regulations in several cases that held the exclusion of certain land uses relating to the public health and safety was within the scope of the police power.<sup>1</sup> These decisions and numerous other state court decisions marked the expanding role of local government regulation in land use.

There were no comprehensive zoning ordinances encompassing the total physical development of a city until the state of New York adopted the first zoning enabling legislation, which granted the power to zone to municipalities. In 1916 New York City became the first municipality to pass a comprehensive zoning ordinance. With most of the states following the example of New York, zoning had become a common practice in nearly all the cities of the nation by the 1920's.<sup>2</sup>

Theoretically, zoning was intended to be a positive tool to shape orderly growth rather than just a response to undesirable activities. The introduction of zoning marked a changing concept of land ownership in which the right to develop land was no longer considered absolute. Instead, there was a balancing of private property rights against the public interest or general welfare. Nevertheless, protection of private property rights was the essence of zoning. John Delafons wrote concerning the origin of zoning law:

...it was a means of strengthening the institution of private property in the face of rapid and unsettling changes in the urban scene that zoning won such remarkable acceptance in American communities.<sup>3</sup>

Zoning attempted to establish a hierarchy of land uses, to separate incompatible land uses, and to provide standards for various uses within their respective districts. As originally conceived, zoning constituted not only a means of segregating divergent land uses but also an inclusionary device allowing for all types of land-use activities within a municipality.<sup>4</sup> However, the practice of total exclusion of many uses within a municipality developed into the commonplace despite this



inclusionary nature of zoning. Land uses such as junkyards, dumps, drive-in theatres, motels, and mobile home parks were often excluded entirely from municipalities. Housing types other than the single-family residence were also lumped together with this group of totally prohibited uses. Many of the courts were quite willing to accept the concept that a municipality was under no duty to provide for every kind of use within its boundaries.<sup>5</sup>

The Standard State Zoning Enabling Act, the pattern for most of the states' zoning enabling legislation, detailed the purposes of zoning:

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such a municipality.<sup>6</sup>

Zoning was able to provide a sense of stability and order in urban land-use allocation on the municipality level. With the advent of zoning, competition among land developers on the local level was reduced from the chaotic pre-zoning period where unregulated land-use decisions were only subject to nuisance law and private controls. However, these local land-use controls shifted the land-use competition to the inter-community level.

in which local land-use decision-making had the potential to affect the metropolitan region as a whole. New communities within a metropolitan region were competing with each other for desirable land uses and good ratables. The power to zone was delegated by the states to the local governmental units which were thought to be the most suited for controlling urban growth. Robert Anderson noted:

Zoning severely restricted landowners but left individual units of government relatively free to employ the zoning power in the provincial interest of the zoning municipalities. Each unit of local government, large or small, was empowered to restrict the use of land within its borders to achieve objectives which were within the reach of the police power, with little or no regard for the needs of the broader community.<sup>7</sup>

#### Judicial Approval of Zoning

In 1926 zoning was given constitutional approval in Village of Euclid v. Ambler Realty Co.<sup>8</sup> A local zoning ordinance had been challenged as a taking of private property without compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The Supreme Court upheld the zoning ordinance as a proper exercise of the police power and also established a presumption of legislative validity in zoning law. The burden to demonstrate an ordinance to be invalid was therefore placed on the challenger rather than the municipality. The result of this decision was that a zoning ordinance was to be presumed valid even if the validity of the ordinance was debatable. This presumption of validity made it very difficult

to challenge any zoning enactment. For a zoning ordinance to be struck down, it would have to be an "arbitrary and capricious" exercise of the police power having no substantial relation to the public health, safety, morals, or general welfare. In Nectow v. City of Cambridge,<sup>9</sup> the Supreme Court established the principal that while zoning per se was not unconstitutional, zoning as applied to a particular piece of property could be unconstitutional. The Court in the Euclid decision did provide for an exception to the municipality's power to zone:

It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.<sup>10</sup>

### The Present Trend in Zoning

Although zoning predated city planning as a municipal function, it has remained or at least has maintained the potential to be a principal implementation tool of comprehensive planning. In theory, the comprehensive plan represented the formulation of a municipality's physical development goals and was to be the basis of local land-use decisions. All too often in practice, however, zoning, particularly in the suburbs, has constituted the antithesis of comprehensive planning.<sup>11</sup> Many of the suburbs have rejected the concept of inclusionary zoning as a positive, development-shaping force in land-use allocation. Rather than provide a regulatory pattern for future development, zoning has emerged as a legal institution utilized to prevent development.

The relationship between zoning and comprehensive planning has often been non-existent or quite minimal at best. Planning has often been utilized as a public relations device for local political figures or else as a defense of land-use decisions as opposed to a rational basis for these decisions.<sup>12</sup> Planning certainly has not been a neutral instrument in which technical experts purportedly would make the land-use decisions according to some rational criteria. If a municipality had a comprehensive plan and could demonstrate that its land-use decisions were "in accordance with the comprehensive plan," then generally a court challenge to the local decision would be unsuccessful. Robert Nelson concluded:

...Many new comprehensive plans are predestined to fail, because their most essential practical purpose is not to provide the policy principles for community land-use controls but to camouflage these principles. Overly explicit descriptions of community land-use policies might endanger the planning link in the legal reasoning that sustains the policies, and in some instances it might also be considerably at odds with the community self-image.<sup>13</sup>

Zoning has enjoyed limited success in that it did produce general improvements in living conditions such as the segregation of incompatible land uses, the lessening of congestion and transportation problems, and the more efficient location of public facilities.<sup>14</sup> What the proponents of the first zoning ordinances did not anticipate was the fragmentation of local governments within a metropolitan area, the increasing inter-relatedness of the municipalities composing a metropolitan area, and the ways in which a municipality could pervert the original

purposes of zoning to serve exclusionary purposes. There was a conflict between the legal theory of zoning and the political system in which it was to exist:

The theory upon which the imposition of zoning restrictions is based varies to a remarkable degree from the real world in which zoning operates. Theory is divergent from practice in that it collides with the procedures followed by zoning authorities and the uses to which zoning laws are put.<sup>15</sup>

#### EXCLUSION: THE AMERICAN WAY

Exclusion of various socio-economic groups from discreet geographical areas certainly has not been a contemporary phenomenon but rather is deeply ingrained in American urban history. Even at the time zoning was first proposed in New York City, this discriminatory history was reflected. Despite the urban reformers' concern for the poor physical conditions, what perhaps really prompted the first comprehensive zoning ordinance was the Fifth Avenue merchants' fears that the immigrants employed in the garment factories would encroach upon their business district.<sup>16</sup> Moreover, the trial court which had invalidated the Euclid zoning ordinance was well aware of the exclusionary potential of zoning and labeled it a form of economic segregation.<sup>17</sup> Anderson wrote:

The use of governmental power to protect private interests by preserving the status quo, at the expense of preventing the solution of problems which involve the public welfare, was not invented in the 1960's. Before zoning began, local residents employed the powers of government to exclude outsiders and preserve local amenities.<sup>18</sup>

Blatant statutory discrimination against racial minorities, either expressly stated in a statute or carried out in the administration of a seemingly fair law, has been subject to constitutional attack under the equal protection clause of the Fourteenth Amendment. For example, in San Francisco during the late 1800's, a city ordinance regulating laundries was utilized to discriminate expressly against Chinese and thus was held unconstitutional since white owners of laundries had been exempted from this ordinance.<sup>19</sup> Although the Court recognized that the regulation of this land use was a legitimate police power function, the discriminatory administration of a racially-neutral law was nevertheless in violation of the equal protection clause.

Had the city enforced the ordinance in a non-discriminatory manner, the effect would still have been to exclude Chinese who at that time owned most of the laundries in San Francisco. Therefore, a city by prohibiting or restricting a particular land use through the exercise of the police power could limit the access of a particular racial group, so long as the ordinance was applied equally.<sup>20</sup> The non-discriminatory administration of an ordinance restricting the land use that a racial minority was most likely to occupy would not be subject to constitutional challenge. This was an indirect but just as effective exclusionary device.

A zoning ordinance that established separate residential districts for blacks and whites was also found to be unconstitutional.<sup>21</sup> Enforcement of racially restrictive covenants

was likewise held unconstitutional.<sup>22</sup> As these cases demonstrated in land-use regulation, any law or state action that expressly discriminated against a racial minority would not withstand a constitutional challenge.

Discrimination in explicit terms was abandoned by suburban governments in favor of an indirect but equally as effective method. Rather than restrict in less than subtle terms the access of a particular socio-economic group and thus show a discriminatory intent, a municipality could prohibit or restrict particular land uses such as low and moderate-income housing. This was a more sophisticated strategy which could nevertheless have the same end result as the more blatant forms of discrimination. By focusing upon the type of land use which may be suitable for certain socio-economic groups and thereby cloaking the exclusionary zoning ordinance with a police power rationale, denial of the intent to exclude "undesirables" could be made even though the ultimate effect was quite obvious. One urban planner observed:

The words incompatible and undesirable, so frequently heard among zoning advocates, must be candidly recognized as referring primarily to people and social class and racial groupings and only secondarily to structures and uses.<sup>23</sup>

Municipalities have an abundance of reasons at their disposal to justify most zoning ordinances as a legitimate exercise of the police power. Any police power rationale would generally suffice to ward off a legal challenge since the state courts have been quite willing to interpret the municipality's power to zone very broadly. The precedent value of the presumption

of validity in the Euclid decision became an invaluable shield for zoning ordinances. If some police power argument could be made in support of a zoning ordinance, then the excluded group would probably be unsuccessful in challenging the ordinance due to the presumption of validity unless a "suspect class," e.g., race or a "fundamental right" was involved. Because the real purpose behind a zoning law might be nearly impossible to determine and also the relative ease in providing a police power rationale, some courts have been reluctant to invalidate zoning which has an exclusionary impact on a particular socio-economic group.

#### Zoning to Meet Local Desires

Zoning must be recognized as an intensely political process reflecting the political power discrepancies among the various socio-economic groups of a metropolitan region. In this setting the widespread suburban practice of exclusionary zoning should not be viewed as some aberrant form of behavior. Undoubtedly, suburban land-use practices have fulfilled local desires. While zoning theory may suggest otherwise, zoning has not been a non-political, neutral device in which the technical decisions of land-use allocation were made by the professional planners:

American land-use controls, in effect, were designed to promote private property interests which may have little to do with what planners would regard as a desirable pattern of land use.<sup>24</sup>



## A LOCAL MODEL OF ZONING

A local model of zoning has been the predominant viewpoint of municipal land-use regulation in most of the state courts as well as the United States Supreme Court. The justifications of exclusionary zoning practices have generally been upheld when examined from a local perspective. This may be due, in part, to reliance upon outdated zoning precedents and legal principles in an urban environment vastly changed from the one in which zoning was formulated. Consequently, the majority of courts adhering to a local model of zoning has exhibited a deferential attitude toward suburban zoning practices.

Minimum lot sizes, minimum floor areas, prohibition of multi-family housing and mobile homes, bedroom restrictions in multi-family housing, unnecessarily expensive PUD and subdivision requirements, and many other exclusionary land-use techniques that have an adverse effect upon lower-income housing opportunities have been upheld in various state and federal courts. With the federal courts and almost all the state courts adhering to the Euclid decision, suburban zoning has been subject to a presumption of validity and would only be invalidated if no rational relationship to a governmental interest could be demonstrated. Under this test, very few zoning ordinances have not been able to pass.

A local model of zoning has not been able to account for the interests of the low and moderate-income population of the metropolitan area. Suburban zoning practices when challenged

as a form of economic discrimination have been regarded in the same manner as any other municipal ordinance. A suburban municipality would be able to offer several zoning objectives that would meet the requirements of a rational relationship test applied by the courts maintaining a local perspective of zoning. Zoning would be permissible to protect property values, the residential character, the environment, the rural character, neighborhood stability and quality, and the community appearance; a municipality could also zone to avoid financial burdens, to strengthen the tax base, to promote good ratables, and to provide adequate municipal services as well as municipal revenues. From a local perspective of zoning, these objectives would not be scrutinized in relation to the regional impact on housing.

A local model of zoning would consider only the interests of the municipality in its land-use practices. Any challenge to a zoning ordinance would generally be limited to property owners. Most of the courts have followed the Nectow decision which allowed a property owner to challenge the validity of a zoning ordinance only as it applied to a particular piece of property and upon assertion of some resultant injury. As a basic principle, the Supreme Court and most of the state courts have disallowed legal challenges based on injury to the community or region in general without any property interest involved.<sup>25</sup> The rights of low and moderate-income individuals have sometimes been permitted to be asserted in conjunction with the rights of the property owner, especially in cases of racial discrimination.<sup>26</sup> However, the courts adhering to a local perspective

have usually failed to address the issue of the rights of low and moderate-income persons to housing opportunity or, at best, tangentially addressed the rights of this group. A local model of zoning simply has not provided the framework for analyzing the effect of a zoning ordinance on the regional housing need for low and moderate-income individuals.

The United States Supreme Court has been a leading proponent of a local model of zoning. Unlike matters of racial discrimination, the Court has been unwilling to extend the equal protection clause of the Fourteenth Amendment to exclusionary zoning practices when challenged as a matter of economic discrimination. A major impediment to a regional perspective of zoning in the federal courts has been that the Supreme Court has considered suburban land-use regulation to be like any other police power function. In Village of Belle Terre v. Boraas,<sup>27</sup> the Court followed the precedent established in the Euclid decision. A zoning ordinance excluding households of more than two unmarried persons from this entirely single-family municipality could not be demonstrated to lack a rational relationship to a state objective. In deference to local desires, the Court stated: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."<sup>28</sup> Unfortunately, these objectives approved by the Supreme Court were the ones that exclusionary suburbs have utilized to defend their land-use practices.

### Equal Protection and Exclusionary Zoning

The Supreme Court held that housing for low-income groups was not a fundamental right to be protected by the equal protection clause of the Fourteenth Amendment.<sup>29</sup> As a result, a zoning ordinance prohibiting or severely restricting low and moderate-income housing would be presumed valid and subject to a rational relationship test. If low-income housing had been regarded as a fundamental right, then the Supreme Court would have employed a "strict scrutiny" test in which the municipality would have had to demonstrate a "compelling state interest" in the exclusionary zoning ordinance. This procedural matter of placing the burden on the suburban municipality to demonstrate a compelling state interest would almost invariably result in the invalidation of that ordinance. However, in the federal courts, suburban zoning practices concerning low-income housing have been presumed to be valid with the burden to demonstrate the ordinance has no rational relationship to any legitimate governmental interest placed on the challenger.

The Supreme Court ruled that economic discrimination was not a violation of the equal protection clause so long as the discrimination was not directed at a racial minority.<sup>30</sup> Poverty did not constitute a "suspect classification" that required strict judicial scrutiny of the ordinance. Provided a rational relationship could be demonstrated, a suburban zoning ordinance that had an exclusionary effect upon housing opportunity for the low and moderate-income population would be a perfectly valid

legislative enactment since discrimination on the basis of wealth was permissible. On the other hand, exclusionary zoning challenged as racial discrimination, as opposed to economic discrimination, placed the burden on the municipality to demonstrate a compelling state interest. Such a burden placed on the municipality usually could not be overcome.

The use of local referenda for the authorization of only public housing projects<sup>31</sup> and also for any change in the zoning ordinance<sup>32</sup> was approved by the Supreme Court even though the purposes were to exclude low-income and multi-family housing. The Court in both decisions held that the use of the referendum displayed a devotion to democratic principles. The Court's conclusion must be regarded as rather tenuous when viewed in context of this practice of the relatively affluent suburbanites being able to decide whether low and moderate-income housing should be permitted in their municipality to serve the needs of the less affluent.

The Supreme Court's view of the equal protection clause has been very supportive of a local model of zoning. A suburban municipality, without any constitutional violation, would be able to advance purely local interests by exclusionary zoning practices and zoning referenda affecting the housing opportunity for the low and moderate-income population of the metropolitan region. An American Bar Association report criticized the Supreme Court's deference toward local land-use decisions:

Lower income groups are not generally able to make their influence felt in the political processes of the nation, and thus

need judicial protection from laws and other official acts that are targeted directly against their interests. There can be no greater justification for upholding a law that purposefully disadvantages lower income groups than for upholding a law intentionally harmful to racial minorities. Government actions that intentionally impose unequal burdens on lower income persons, or deny them significant opportunities made available to wealthier people, should require some greater justification in the public interest than simply that they bear a rational relationship to a legitimate government interest.<sup>33</sup>

### The Requirement of Intent to Exclude

In Village of Arlington Heights v. Metropolitan Housing Authority,<sup>34</sup> the city refused to rezone a tract of land on which a developer had wanted to build low and moderate-income housing. The developer alleged the refusal to rezone was racially discriminatory and violated the equal protection clause. The land in question had been zoned single-family as was most of the other residential areas. The Court held that a racially discriminatory intent or purpose must be demonstrated and that a disproportionate racial impact simply would not be sufficient grounds to invalidate the zoning ordinance.

The burden of proving that a discriminatory purpose was a motivating factor in the land-use decision was placed on the challengers. Such factors as the historical background of the decision, the specific sequence of events in the refusal to rezone, and the legislative or administrative history could be examined to determine if a racially discriminatory purpose was present. The Court concluded that since the city had planned the area as single-family residential in advance and that this

policy favoring single-family residential had been consistently applied, no racially discriminatory intent could be demonstrated.

The Arlington Heights case did not fully consider the regional impact of suburban land-use decisions. The ordinance and the city's refusal to rezone were viewed as being rationally related to a government interest, i.e. the promotion of single-family residences. This Chicago suburb's policy of favoring single-family residence to the detriment of metropolitan housing opportunities for low and moderate-income minorities was considered an acceptable objective of the police power. A suburban municipality could refuse to zone land for low and moderate-income housing provided the municipality was not foolish enough to act in a blatantly discriminatory manner that would provide evidence of intent. If a city could plan its exclusionary zoning practices in advance before any challenges were ever made, then any challenge to the zoning practices would be unable to demonstrate the racially discriminatory intent even though the discriminatory impact might be quite apparent. The Supreme Court was quite willing to accept exclusionary zoning if the suburbs could justify their land-use practices with a plan in advance of a challenge.<sup>35</sup>

In United States v. City of Black Jack,<sup>36</sup> a 1974 decision in which the Arlington Heights test for discriminatory intent most likely would have been met, the Eighth Circuit Court of Appeals found a city ordinance to be in violation of Title VIII of the Civil Rights Act of 1968, the Federal Fair Housing Act. Upon learning the Department of Housing and Urban Development had approved funding for subsidized housing to be built on a

site located in an unincorporated area of St. Louis County, Missouri, residents in this area organized a campaign to incorporate Black Jack. The proposed site for the housing project had previously been zoned by the county for multi-family dwellings. Two months after Black Jack had become incorporated, a city zoning ordinance prohibiting any new multi-family dwellings was enacted. The United States alleged that the city had denied persons housing on the basis of race and had interfered with the exercise of the right to housing opportunity.

The Court of Appeals held only a racially discriminatory effect would have to be demonstrated for a claim under Title VIII. After examining the effect of the city's ordinance on housing for the metropolitan region of St. Louis, the court found that a racially discriminatory impact had been demonstrated. Thus, the burden shifted to the city to demonstrate a compelling governmental interest in the zoning ordinance. The city's justifications for the ordinance--road and traffic control, prevention of overcrowding in the schools, and the preservation of property values of adjacent single-family homes--did not meet the requirements of a compelling governmental interest because no factual basis for these justifications was ever established.

The specific sequence of events, a factor cited in Arlington Heights to be used in determining intent, would have been quite applicable to Black Jack. The city's sudden incorporation and adoption of a zoning ordinance would have met the Arlington Heights test for discriminatory intent under the Fourteenth



Amendment. As Daniel Mandelker noted, Black Jack was not particularly helpful in determining permissible zoning practices because the city had been quite blatant in its racially discriminatory motive.<sup>37</sup> What suburban zoning practices that do not violate the equal protection clause but still violate Title VIII of the Civil Rights Act of 1968 is unsettled in the federal courts.

#### The Restriction on the Type of Suit

In Warth v. Seldin,<sup>38</sup> the Supreme Court disapproved the use of a general practice suit to challenge the overall exclusionary pattern produced by a suburban zoning ordinance. Among the challengers who alleged the zoning ordinance had the purpose and effect of excluding low and moderate-income housing were a non-profit corporation promoting low and moderate-income housing and several area residents who were members of minority groups and also had low or moderate incomes. Only .3% of the land available for residential use was zoned multi-family compared to 98% of the land zoned single-family. The plaintiffs had not attempted to build low or moderate-income housing in this suburb but were concerned with the suburb's zoning policies in general. In denying the challengers standing to sue, the Supreme Court stated that the plaintiffs "...must allege specific concrete facts demonstrating that the challenged practices harmed him, and that he personally would benefit in a tangible way from the court's intervention."<sup>39</sup> Since no action had been taken toward the construction of low or moderate-income housing, the Court

refused to hear the merits of the case.

The Arlington Heights and Warth decisions demonstrated the Supreme Court was only willing to review exclusionary zoning cases in which specific sites were proposed for low and moderate-income housing, and racial discrimination was allegedly the reason for excluding that housing. If a racially discriminatory intent to exclude could be proved, then relief would only be considered in context of the proposed site for the housing. The specific-site suit would be dependent upon the desires and limited resources of a developer who might not wish to put the time and expense into a specific-site suit. The interests of the low and moderate-income population in meeting regional housing needs could not be asserted in suits attacking the general exclusionary land-use practices in a municipality.

Specific-site relief, in cases of racial discrimination only, would fail to account for regional housing needs as well as comprehensive planning on the local level. To provide for low and moderate-income housing needs on the metropolitan level, a regional plan allocating the housing among the various local governments would be necessary. Specific-site relief would only involve the offending suburb which upon meeting the requirements of the specific-site relief, could continue its exclusionary practices until there was another successful challenge to the municipality's zoning ordinance. Any of the other suburbs in the metropolitan area would not be included in the specific-site suit, even though the same exclusionary practices might exist. The particular location in a specific-site suit might not be the most appropriate area within that suburb, but the

municipality could nevertheless be compelled to approve the proposed site. The general-practice suit could avoid many of the problems associated with specific-relief. The general-practice based upon the exclusionary residential pattern rather than a specific-site, developer-initiated suit could provide for sound planning of low and moderate-income housing on the local level and also a regional plan to allocate housing units on the metropolitan level.

In Hills v. Gautreaux,<sup>40</sup> the Supreme Court allowed a metropolitan remedy in the location of public housing. The Chicago Housing Authority and the U.S. Department of Housing and Urban Development were found to be racially discriminatory in public housing site selection. Regardless of the metropolitan perspective of the housing market area, the Supreme Court concluded that no element of coercive relief was to be granted since these Chicago suburbs still should have the power to reject any proposed public housing. Suburban land-use practices were affecting the entire metropolitan region, but yet would be allowed to continue with virtual immunity. There was no obligation on the part of the suburbs to provide low-income housing. A local perspective of zoning practices and promotion of strictly local interests were again sanctioned by the Supreme Court.

In contrast to the Supreme Court's approach to exclusionary zoning were the state court decisions which recognized economic discrimination in suburban land-use practices and required that the suburbs take affirmative steps in providing their fair share of low and moderate-income housing. Most of the state courts

have not adopted a regional perspective of zoning and have generally followed the same standards as the Supreme Court in determining the validity of a zoning ordinance. The presumption of legislative validity and the application of the rational relationship test almost always resulted in too great a burden for the challenger to overcome.

In its refusal to validate suburban zoning on the basis of economic discrimination, the Supreme Court has failed to examine the broader policy implications of suburban land-use decisions and the interests of a substantial portion of the population, those qualifying as low and moderate income. The Supreme Court's perception of exclusionary zoning as a matter of racial discrimination and then only if discriminatory intent could be proved was far too limited a definition of this problem. Race has not been so much the motivating factor in suburban exclusion as income has. Suburban blacks when compared to suburban whites have been equally adamant in their opposition to low and moderate-income housing in the suburbs.<sup>41</sup> The Supreme Court by foreclosing for the most part an attack on the exclusionary residential patterns produced by suburban zoning has abandoned the housing needs of the low and moderate-income population of the vast majority of states in which their courts likewise have rejected a regional perspective of zoning.

...Continued adherence to Euclidian zoning principles, with the presumption of validity applying to "debatable" ordinances, means that surface justifications will continue to prevail and the underlying problem may never be resolved.<sup>42</sup>

## CONCLUSION

A local model of zoning is predicated upon the protection of private property interests--a purpose which has often conflicted with the regional need for low and moderate-income housing. The protection of private property interests such as the single-family residential character of a municipality, the tax base, and property values has been the essence of zoning from a local perspective. A local model of zoning would restrict the inquiry of land-use practices to the municipal level and the promotion of only local interests. Regional impact resulting from the operation of local zoning ordinances would not be a relevant matter to courts proceeding from a local model of zoning. A local perspective of zoning would reinforce a purpose commonly attributed to local government--the exclusion of "undesirables" from a municipality.

## Footnotes Chapter 2

<sup>1</sup>See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), a brick kiln in a residential area; *Reinman v. City of Little Rock*, 237 U.S. 171 (1915), stables in a commercial district; *Fischer v. St. Louis*, 194 U.S. 361 (1904), a dairy in a residential area.

<sup>2</sup>S. Toll, Zoned American 188 (1969).

<sup>3</sup>J. Delafons, Land-Use Controls in the United States 24 (1969).

<sup>4</sup>R. Anderson, 2 American Law of Zoning 123 (2d ed. 1976).

<sup>5</sup>Id. at 128.

<sup>6</sup>U.S. Department of Commerce, Advisory Commission on Zoning, A Standard State Zoning Enabling Act § 3 (1926).

<sup>7</sup>Anderson, supra note 4, at 78.

<sup>8</sup>272 U.S. 365 (1926).

<sup>9</sup>277 U.S. 183 (1928).

<sup>10</sup>272 U.S. at 390.

<sup>11</sup>D. Moskowitz, Exclusionary Zoning Litigation 7 (1977).

<sup>12</sup>Delafons, supra note 3, at 13.

<sup>13</sup>R. Nelson, Zoning and Property Rights 81 (1977).

<sup>14</sup>E. Reiner, "Traditional Zoning: Precursor to Managed Growth," in 1 Management and Control of Growth 211, 215 (R. Scott ed. 1975).

<sup>15</sup>Moskowitz, supra note 11, at 5.

<sup>16</sup>Toll, supra note 2, at 110.

<sup>17</sup>*Village of Euclid v. Ambler Realty Co.*, 297 F. 307, 316 (N.D. Ohio 1924).

<sup>18</sup>Anderson, supra note 4, at 2.

<sup>19</sup>*Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

<sup>20</sup>Delafons, supra note 3, at 19.

<sup>21</sup>*Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>22</sup>Shelly v. Kraemer, 334 U.S. 1 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953).

<sup>23</sup>C. Hartman, Housing and Social Policy 47 (1975).

<sup>24</sup>Delafons, supra note 3, at 33.

<sup>25</sup>R. Babcock and F. Bosselman, "Land Use Controls: History and Legal Status," in 1 Management and Control of Growth 196, 199 (R. Scott ed. 1975).

<sup>26</sup>See Village of Arlington Heights v. Metropolitan Housing Authority, 429 U.S. 245 (1977).

<sup>27</sup>416 U.S. 1 (1974).

<sup>28</sup>Id. at 9.

<sup>29</sup>Lindsey v. Normet, 405 U.S. 56 (1972).

<sup>30</sup>James v. Valtierra, 402 U.S. 137 (1971).

<sup>31</sup>Id.

<sup>32</sup>City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

<sup>33</sup>American Bar Association, Housing for All Under Law 91 (R. Fishman ed. 1978).

<sup>34</sup>429 U.S. 245 (1977).

<sup>35</sup>On remand, 558 F.2d 1283 (7th Cir. 1977), the Court of Appeals held that the Arlington Heights zoning ordinance by its discriminatory effect violated Title VIII of the Civil Rights Act of 1968.

<sup>36</sup>508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

<sup>37</sup>D. Mandelker, "Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights," 55 Texas Law Review 1217, 1251 (1977).

<sup>38</sup>422 U.S. 490 (1975).

<sup>39</sup>Id. at 508.

<sup>40</sup>425 U.S. 284 (1976).

<sup>41</sup>M. Danielson, The Politics of Exclusion 124, 125 (1976).

<sup>42</sup>H. Polsky, "Exclusionary Zoning: Will the Law Provide a Remedy?," 8 Indiana Law Review 995, 1001 (1975).

## Chapter 3

### A REGIONAL MODEL OF ZONING

A regional model of zoning is based upon the premise that the general welfare supposedly advanced by the land-use practices of a municipality does not terminate at the boundaries of that municipality. While some aspects of zoning must be viewed as only local in impact, those local land-use policies affecting the development of housing must be recognized as regional in impact. A suburban municipality must not be allowed to isolate itself from the other municipalities of the region and, therefore, must be responsive to the housing needs of the low and moderate-income population of the region. Despite the numerous arguments maintained from a local perspective in favor of exclusionary land-use practices, a suburban municipality must be placed under an affirmative obligation to provide, by its zoning practices, its fair share of the regional low and moderate-income housing needs.

A regional perspective of suburban land-use practices has differed greatly from the local perspective in the manner of examining zoning ordinances. Exclusionary zoning, from a regional perspective, has been viewed largely as a matter of economic discrimination in which the intent or purpose to exclude would be irrelevant. The regional impact or effect of local land-use practices would be the key determinant of whether a municipality's zoning ordinance was, in fact, exclusionary. From a regional perspective, the judicial deference traditionally



given to local zoning practices has been held inapplicable unless the municipality has demonstrated that its land-use practices have not had an exclusionary effect on low and moderate-income housing and that its fair share of the regional housing need has been met. The typical justification for exclusionary zoning practices--inadequacy of services, maintenance of the tax base, preservation of community character, and protection of the environment--have been generally rejected when the regional impact on the low and moderate-income population has been considered.

A regional model of zoning that imposes on the part of a suburb a fair share obligation to provide the opportunity for a variety and choice of housing presently exists in only one state, New Jersey. Pennsylvania has offered a somewhat modified version of the fair share approach. A few other states have adopted a regional perspective of zoning practices without any fair share obligation. The regional approach to zoning and housing opportunity has generated as many questions as answers to the problems of exclusionary zoning. Questions concerning how to define a region, how to determine a fair share obligation, and what municipalities should have a fair share obligation have remained areas of controversy in this field of zoning law.

#### THE NEW JERSEY APPROACH

In Southern Burlington NAACP v. Township of Mount Laurel,<sup>1</sup> the New Jersey Supreme Court construed exclusionary zoning as

a matter of economic discrimination: "... the effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of income and resources."<sup>2</sup> Intent to exclude was not a necessary element in challenging the township's land use practices. The challengers were minority group poor who were living in inferior housing in the township or were forced to move elsewhere because of a housing shortage, nonresidents living in substandard housing in the region and who wanted housing elsewhere in the region and also three interest groups concerned with housing and civil rights. It was sufficient that the suit be aimed at the general land-use practices in relation to the housing opportunity. This was a departure from the generally accepted view that a specific site must be proposed for lower-income housing before the court would recognize the rights of the challenging parties. Although these parties were granted standing to sue, the court acknowledged that exclusionary zoning affected more than just the housing opportunities for the low-income minorities.

Mount Laurel contained about 14,000 acres and was located in a growth area between Camden, New Jersey, and Philadelphia. The township population had doubled from 1960 to 1970. Vacant, developable land constituted 65% of the township's area. Approximately 29% of the total land area was zoned industrial, although only 100 acres were actually put to that use. The rest of the township, except for a very small amount zoned retail business, was zoned for single-family detached housing.

Mobile homes and any type of multi-family housing were prohibited in the township. Over half the total land area had a 20,000 square feet minimum lot size and a 1,100 square feet minimum floor area. A cluster zoning provision allowed for lots of 10,000 square feet and also required the developer dedicate 15 to 25% of the total area for public facilities. A planned unit development ordinance which was later repealed provided for multi-family housing but restricted the number of units with more than one bedroom. The developer was required to pay the cost of educating any children in excess of .3 school children per dwelling unit and also to make contributions for fire stations, libraries, schools, and community centers.

The court stated that every zoning ordinance must promote the general welfare, which must be examined from a regional context in situations where "... regulation does have a substantial external impact."<sup>3</sup> Housing was defined by the court as a "basic human need," of which the provision was an "... absolute essential in promotion of the general welfare."<sup>4</sup> When a municipality's land use practices were demonstrated to have an exclusionary impact on low and moderate-income housing, the burden was to be shifted upon the municipality to justify those practices. Contrary to a local perspective of zoning, the court's approach was to define housing to be a matter of state constitutional dimension. Those zoning ordinances affecting housing opportunity for the low and moderate-income population would not be subject to the presumption of validity and would have to advance the general welfare of the region, a concept not to be defined in terms of the municipality's own interest.

The court concluded Mount Laurel's zoning ordinance was contrary to the general welfare and could not be justified by any reason. The court rejected the "protection of the tax base" argument as well as an environmental argument based on inadequate sewage disposal and water supply. Before the court would accept an environmental argument, the environmental harm would have to be more substantial than merely inadequate utilities that the municipality was capable of providing.

The court held the zoning ordinance served to increase the cost of housing in addition to the prohibition on multi-family housing and thus permitted only middle- and upper-income housing. The amount of land zoned industrial was viewed as excessive and also exclusionary by removing an "unreasonable amount" of land from any future residential development. The planned unit development ordinance was also invalid since it was used to limit the number of children by bedroom restrictions.

The court in invalidating the exclusionary portions of Mount Laurel's ordinance declared:

... 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. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.<sup>5</sup>

Mount Laurel was required to amend its zoning ordinance to allow for multi-family housing, without the cost-generating

features and bedroom restrictions, small houses on very small lots, high density housing, and other lower-cost housing. The obligation to allow low and moderate-income housing was defined by the court as the "...municipality's fair share of the present and prospective regional need."<sup>6</sup> The court was unwilling to specify what factors should be used to delineate a "region" and upon what criteria a "fair share" allocation must be based. These responsibilities were given to Mount Laurel. Also the issue of whether every municipality or just a "developing municipality" such as Mount Laurel was required to provide its fair share of the regional housing need was not resolved.

#### FURTHER DEVELOPMENTS IN FAIR SHARE

In Oakwood at Madison, Inc. v. Township of Madison,<sup>7</sup> a developer and six low-income persons challenged the validity of the township zoning ordinance. The original suit, instituted in 1970, resulted in the invalidation of the zoning ordinance, which the trial court concluded had placed single-family homes beyond the reach of 90% of the population, allowed only a minimal amount of multi-family housing, and had failed to consider regional needs.<sup>8</sup> The second suit resulted in the invalidation of the 1973 amended ordinance by the trial court, which ruled the township had not met its fair share of regional housing needs.<sup>9</sup> The New Jersey Supreme Court ruled the 1973 ordinance was exclusionary, i.e. whether or not the effect was intended, it "...operate(d) in fact to preclude the opportunity

to supply any substantial amounts of new housing for low and moderate income households now and prospectively needed in the municipality and in the appropriate region of which it forms a part."<sup>10</sup>

Madison Township, with an area of 25,000 acres, of which 40% was vacant, developable land, had experienced rapid population growth, was located close to highly organized areas and could generally be described as a "developing municipality." One- and two-acre minimum lot sizes were required in 80% of the vacant, developable single-family zones or 58% of all vacant, developable land in the township. Another 7% of vacant, developable land was zoned for one-half acre lots; lot size requirements of 15,000 and 10,000 square feet constituted 5% of the land. The smallest lot size requirement permitted lots of 7,500 square feet and two-family dwellings. This zone amounted to only 2% of the vacant, developable acreage.

Multi-family apartments, which were limited largely to efficiency and one-bedroom units, constituted 2.3% of the vacant, developable land. The zoning ordinance also provided for planned unit developments, accounting for nearly 10% of the land area. However, the developer was subject to numerous restrictions. For example, the developer was required to maintain as undeveloped open space 12.5% of the total project area and 7.5% as developed open space. The developer was not only required to dedicate land for a school but also to build a school to hold .5 child per dwelling unit. Streets and utility hookups were to be provided by the developer. A

cluster zoning provision allowed higher densities upon meeting open space and public purpose space requirements and also dedicating land to the township. A maximum of 2.4% of the vacant, developable residential area was zoned for multi-family housing.

The court found that the zoning ordinance made no effort to permit "least cost" housing or multi-family housing and also contained numerous cost-generating provisions. As in Mount Laurel, an ordinance shown to be exclusionary was presumed to be contrary to the general welfare. The burden of justifying the ordinance was shifted to the township which, in the judgment of the court, had no valid reasons in support of its land-use practices. The ordinance simply did not meet the township's obligation as a developing municipality to provide its fair share of the low and moderate-income housing need for the region. The fair share concept required zoning for "least cost" housing, defined as that housing "... consistent with minimum standards of health and safety."<sup>11</sup>

The court acknowledged that no zoning ordinance could provide for the construction of low and moderate-income housing but could nevertheless "preclude the opportunity" for this housing to be constructed. Although developing municipalities were not obligated to participate in lower income housing programs, their zoning ordinances must not prohibit or militate against the construction of "least cost" housing.

Notwithstanding a developing municipality's obligation on the basis of Mount Laurel to zone in a manner providing for a variety and choice of housing, the court was reluctant to

mandate a specific fair share formula to determine the appropriate region, the housing needs of that region, and the fair share to be allocated to the municipality. The relationship between a zoning change and the actual housing built was too indefinite for the court to impose a specific fair-share formula. There were also too many fair share allocation formulas to label one as the most correct methodology. Therefore, the court did not require the township to meet a specific fair share quota. Rather, the township must "... permit the opportunity to provide a fair and reasonable share of the region's need for housing for the lower income population."<sup>12</sup>

The court's approach to exclusionary land-use practices of Madison Township was focused on "... the elimination or minimization of undue cost-generating requirements" and "... the inadequacy or non-existence of areas zoned for homes on very small lots or for multi-family housing."<sup>13</sup> Although fair share housing plans were not mandatory, these certainly could be utilized to measure exclusion or to defend zoning ordinances. Madison Township was required to provide substantial areas for single-family homes on very small lots, to increase substantially the area for single-family homes on moderate sized lots, to enlarge substantially the area for multi-family housing, to decrease the area zoned for one and two acre lots, to modify the restrictions which induced the construction of almost entirely efficiency and one-bedroom units in planned unit developments and multi-family zones, to eliminate the cost-generating features in the PUD ordinance, and to eliminate or



minimize in general the undue cost-generating requirements in the lower-income housing zones.

The developer was granted specific-site relief provided the multi-family project was environmentally sound. Invalidation of the zoning ordinance would have required the township to zone land for multi-family housing but not necessarily the developer's land. A common occurrence had been the municipality's failure to rezone the tract which was the subject of a successful suit brought by developer and thus a revenge motive could have been fulfilled. The court noted lower-income housing developers were relatively scarce, and that the township would not be allowed to prevent this project which would serve regional housing needs.

#### Municipalities Having a Fair Share Obligation

In Pascack Association, Limited v. Mayor and Council of the Township of Washington,<sup>14</sup> the New Jersey Supreme Court addressed the question of whether all municipalities, regardless of the state or character of development, should have an obligation to zone for the low and moderate-income housing need for the region. Washington Township, in which vacant land constituted only 2.3% of the area, was almost entirely single-family residential. The court held the fair share obligation imposed by Mount Laurel was limited to developing municipalities and reasoned only those municipalities of a sizeable area could adequately provide for a variety of housing. Developed municipalities, such as central cities and older suburbs, and

also rural municipalities not likely to be in the path of urban growth, were exempted from the fair share obligation. Among the factors in determining whether a suburb was a developing municipality were: a sizeable land area, location outside the central city and older built-up suburbs, the loss of rural characteristics, great population increases since World War II, incomplete development, and location in the path of inevitable future growth.<sup>15</sup>

#### ANALYSIS OF THE NEW JERSEY APPROACH

The New Jersey approach offered flexibility in dealing with exclusionary zoning. It was possible for a developing municipality to have comprehensive planning on the local level that still embodied regional housing needs. Urban League of Greater New Brunswick v. Mayor and Council of the Borough of Carteret<sup>16</sup> represented one of the best possible judicial approaches to exclusionary zoning. All the suburban municipalities of a region, as opposed to the usual single municipality, were joined in a suit challenging their zoning ordinances. Plaintiffs sought as a remedy an allocation to each of the 23 municipalities of its fair share of low and moderate-income housing needs for the county.

Eleven of the municipalities were required to amend their zoning ordinances in order to eliminate the exclusionary features. However, since these eleven municipalities had minimal vacant land, no fair share requirement was imposed,

but the ordinances were still required to be reasonable. One municipality was dismissed because it had provided for its fair share. The remaining eleven municipalities with large amounts of vacant land were subject to a fair share obligation. On the basis of 15% low and 19% moderate income for the county population, the Supreme Court allocated an equal number of lower-income housing units to each municipality. Although the zoning ordinances of each municipality were to be amended to allow for the allocation of lower-income housing, the court emphasized that the municipalities could be flexible and utilize many approaches such as higher densities, density incentives, diversity of housing type, mobile homes, PUDs, and very small lots, to provide their fair share of low and moderate-income housing.

The exemption of the "developed municipality" from a fair share obligation was condemned as a loophole in eliminating exclusionary zoning. Justice Pashman in the dissenting opinion of the Washington Township decision stated that developed municipalities must also have a role in providing low and moderate-income housing.<sup>17</sup> The limited application of fair share to just developing municipalities would allow the political subdivision of counties into several small townships to justify the neglect of regional housing needs. Washington Township contained a small area but combined with the areas of the other townships in the county, amounted to a substantial, vacant area. Public facilities such as roads, schools, and

sewage disposal would be more readily available for multi-family housing in a developed municipality compared to a developing municipality with large areas of land unserved by public facilities. Land in developed municipalities might still be available for re-use as multi-family housing. The provision of lower-income housing could be done less expensively by utilizing existing public facilities in the already developed suburbs and also could decrease the amount of urban sprawl and automobile commuting.<sup>18</sup>

The lack of a specific fair share formula by the New Jersey courts was criticized for failing to provide a reliable test for measuring exclusionary zoning or for determining a fair share.<sup>19</sup> A fair share allocation process would include three basic steps: the identification of the relevant region, the determination of present and future housing needs of the regions, and the allocation of those needs among the various municipalities in the region.<sup>20</sup>

The approach in New Jersey avoided the problems of a specific-site suit in requiring a municipality to provide its fair share of the regional housing need. However, if the other municipalities of the region were not parties to the suit, then only one municipality out of several municipalities in the region would be required to eliminate its exclusionary zoning practices. Unless a suit such as the one in Urban League of Greater New Brunswick v. Mayor and Council of the Borough of Carteret was brought, the possibility of conflicting decisions in subsequent litigation involving the other municipalities

would always be present. The essential characteristics of fair share allocation--that each municipality must provide for its fair share of regional housing--would be negated when only one municipality of the region would be required to meet its fair share obligation. To be effective as well as equitable, a fair share allocation would have to include minimally all the developing municipalities of a particular region.

Perhaps an ideal solution to exclusionary zoning from the court's viewpoint would entail some type of regional mechanism that would be able to implement a fair share housing allocation plan. Zoning has been a local function delegated by the state legislature which has the potential to address this conflict between regional needs and local interests. The state legislature could establish statewide regional planning that could comprehensively and immediately counteract exclusionary land-use practices and thus obviate the necessity for costly, time-consuming law suits that would be limited to a few municipalities. State funding for implementation of regional housing plans and the state agencies available to administer such a program would offer advantages over a judicial remedy. However, the New Jersey legislature has been unable to approach the issue of exclusionary zoning. When the courts invaded an area thought to be the domain of the legislature, the usual criticism that the courts have been acting as super-zoning bodies and have usurped a legislative function arose. The New Jersey Supreme Court, in adopting the fair share approach to exclusionary zoning attempted to remedy a problem that very

few state legislatures or local governments have ever been willing to acknowledge.

#### THE PENNSYLVANIA APPROACH

The Pennsylvania courts have adopted a regional perspective of housing but have approached the issue of what the appropriate remedy should be in a different manner than the New Jersey courts. Pennsylvania courts have invalidated exclusionary zoning ordinances but affirmative relief has only been conferred in those suits in which the developer has proposed a housing project at a specific site. This procedural approach has precluded a general-practice suit brought by low and moderate-income persons challenging the exclusionary land-use practices of a municipality without relating those practices to a particular housing development.

In Commonwealth of Pennsylvania v. County of Bucks,<sup>21</sup> low and moderate-income individuals who were unable to find housing in Bucks County and two corporations wishing to build low and moderate-income housing challenged the county zoning ordinances but were denied standing. The individuals had not made applications or tried to obtain permits for a low and moderate-income housing development, and the two corporations did not own or acquire land for such housing. The Commonwealth Court stated affirmative relief could be granted only in a specific-site suit and would not be granted to require the county to prepare a plan for low and moderate-income housing.

In National Land and Investment Co. v. Kohn,<sup>22</sup> a developer who wanted to build single-family housing on one-acre lots

challenged the zoning ordinance requiring four-acre lots. The Pennsylvania Supreme Court declared the ordinance unconstitutional and rejected the township's arguments in favor of the four-acre lot requirement. The township's reasons were to insure proper sewage disposal, to protect the historic sites, to preserve the rural character, and to prevent overloading the already inadequate road system. The court concluded that the four-acre lot size provision attempted to exclude people and to avoid future burdens; the general welfare was not promoted by an exclusionary zoning ordinance.

In Appeal of Girsh,<sup>23</sup> a developer wanted to build luxury high-rise apartments on land zoned as single-family residential. Apartments were not expressly provided for in the zoning ordinance and could only be built by a variance. The court held that the failure of the township to provide for apartments in its zoning ordinance was unconstitutional. The effect of the zoning provision was to exclude those who would live there if apartments were available. In support of a regional viewpoint the court stated: "Municipal services must be provided somewhere, and if Nether Township is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden."<sup>24</sup>

In another developer-initiated suit, Appeal of Kit-Mar Builders,<sup>25</sup> a township refused to rezone a tract from a 2-acre to 1-acre minimum lot requirement. The court ruled a 2-acre lot size requirement was unconstitutional due to the exclusionary purpose or result of the zoning ordinance. Municipalities were required to cope with population growth and were not "to zone

out growth at the expense of neighboring communities."<sup>26</sup>

In Township of Willistown v. Chesterdale Farms, Inc.,<sup>27</sup> a developer proposed to build apartments in a single-family residential zone. The township denied the request for a building permit even though only 80 acres out of 11,589 acres in the township were zoned for apartments. The court concluded that the zoning ordinance was "... exclusionary in that it does not provide for a fair share of the township acreage for apartment construction."<sup>28</sup> The court declared the ordinance unconstitutional and granted specific-site relief to the developer.

In Surrick v. Zoning Hearing Board of the Township of Upper Providence,<sup>29</sup> a property owner sued to obtain a building permit for apartments in a residential district having a one-acre minimum lot size. The Pennsylvania Supreme Court held the township ordinance unconstitutionally excluded multi-family housing. In a township approximately 25% undeveloped, only 43 acres or 1.14% of the total area was zoned multi-family. Even with this minimal amount of land for multi-family housing, other more profitable uses were allowed in the zone and consequently prevented multi-family housing from ever being constructed. The court concluded the township had not "...provided a fair share of its land for development of multi-family dwellings."<sup>30</sup>

In analyzing the effect of zoning, the extent of the exclusion--either total or partial--must be considered. If exclusion of multi-family housing was total, then on the basis of Girsh, the zoning ordinance would be invalid. When the exclusion was partial as in the Upper Providence zoning



ordinance, the court suggested several, not necessarily exclusive, factors of which a municipality should be cognizant in the operation of its zoning ordinance. A specific formula for determining a "fair share" or regional housing need in general was unnecessary to evaluate the exclusionary impact of the township's zoning ordinance. The court stated that its review would be limited "... to determining whether the zoning formulas fashioned by these entities reflect a balanced and weighted consideration of the many factors which bear upon local and regional housing needs and development."<sup>31</sup>

Among the factors cited were: whether the municipality was a logical area for development and population growth, proximity to a large city, and the projected population of the municipality and the region.<sup>32</sup> If the municipality was demonstrated to be a part of the larger metropolitan growth pattern, then the development pattern of that municipality would be examined. The factors included in this step of analysis were the amount of undeveloped, vacant land, the amount of land zoned for multi-family housing, and the population density.<sup>33</sup> Thus, a developing suburb in the path of metropolitan growth must provide a fair share of land zoned for multi-family housing. All the factors utilized to determine the exclusionary impact of a zoning ordinance must be applied to a specific site proposed for multi-family housing. The overall land-use policies of a municipality were not required to meet the regional need for low and moderate-income housing and could only be challenged in relation to a specific site.

## ANALYSIS OF THE PENNSYLVANIA APPROACH

The Pennsylvania Supreme Court, by requiring a specific-site suit brought by the developer, did not provide an adequate regional framework to analyze local land-use practices.<sup>34</sup> Reliance upon the specific-site suit would be incapable of fulfilling regional housing needs for the low and moderate-income population. The emphasis in exclusionary zoning suits was placed on the type of housing available in a municipality without regard to the lower-income housing needs for the region. The court's definition of exclusionary zoning addressed the effect of local land-use practices which did not provide for various types of housing. Consequently, a Pennsylvania municipality could meet its "fair share" obligation to zone for multi-family housing by permitting multi-family housing accessible only to the relatively wealthy. However, a municipality's zoning ordinance which allowed several types of housing could still be exclusionary in its failure to meet the regional housing needs for the low and moderate-income population. This possibility was not addressed by the Pennsylvania Supreme Court. Although an exclusionary provision of a zoning ordinance could be invalidated as applied to a developer's property, any other exclusionary provisions would remain intact. In a specific-site suit, the overall land-use practices of a municipality would not be considered nor could the remedy take into account the effect of those practices on regional housing needs.

A developer-initiated suit challenging a zoning ordinance as exclusionary could result in interests conflicting or incompatible with those of persons excluded from a municipality. The developer's primary interest would be to use the proposed site of the housing in the most profitable manner. A zoning amendment allowing multi-family housing or single-family housing on smaller lots would most likely produce higher profits for the developer but not necessarily housing for the low and moderate-income population. The developer's interests would be in seeking invalidation of the exclusionary zoning affecting his own property rights and no further. The interests of the low and moderate-income population for the region would extend beyond the property interests of the developer. Yet, the rights of those excluded would be restricted to a specific-site suit, instituted by the developer. This confusion concerning whose rights were really at issue in a specific-site suit prompted one land-use attorney to write:

It raises the issues of racial and economic discrimination in an oblique fashion. It requires that the excluded wait for a developer not only to propose a project but also to litigate the prohibition upon his constructing such a project. It requires that the rights of the excluded be dependent upon the fortuity of a claim to be made by a third party. It ignores the general pervasive impact of the overall restrictions in an entire region.<sup>35</sup>

The regional approach of the Pennsylvania courts served to negate the role of comprehensive planning on the local level. Upon demonstration of the exclusionary effect of a zoning ordinance, a municipality would be forced to allow construction

at the site proposed by the developer. Planning criteria that would enter into the municipality's comprehensive planning process would not be utilized by the court in granting specific-site relief. A municipality with an exclusionary zoning ordinance would be subject to the whims of a developer whose housing project, regardless of the location, could not be refused on the basis of a comprehensive plan. Consequently, housing could be built at unsuitable locations where the relationship between factors such as the environment, traffic circulation, access to facilities within the municipality, and availability of public facilities on one hand and the type of housing on the other hand would not be contemplated. If a municipality was required to meet regional housing needs, then comprehensive planning, in theory, could determine the most suitable areas for all types of housing within the municipality. Concerning the specific-site suit, Michael Feiler wrote: "These piecemeal efforts are not conducive to a planned society nor do they lend credence to a constructive judicial role in resolving regional land-use controversies."<sup>36</sup>

Compared to the Pennsylvania approach, the New Jersey "fair share" housing approach was much more effective in shaping a remedy to address all the exclusionary land-use practices of a municipality. Regional housing needs were construed in terms of low and moderate-income housing rather than housing type alone. Under the "fair share" obligation in New Jersey, a municipality would be able to zone for a variety of housing so long as the regional need for low and moderate-income housing

was realized. The interests of the region's low and moderate-income persons were recognized as the real issue in exclusionary zoning. There was no confusion on the part of the New Jersey courts as to the matter of whose rights were at stake.

The general-practice suit in which low and moderate income individuals challenged the pattern of local land-use policies established a means for meeting regional housing needs. Each municipality was to zone for its fair share of the regional need for low and moderate-income housing. Comprehensive planning on the local level would be able to determine the most appropriate areas for a municipality's fair share obligation. Unlike Pennsylvania, the New Jersey "fair share" requirement provided a method to insure local land-use practices were meeting regional needs and at the same time recognized the role of comprehensive planning in achieving an inclusionary zoning ordinance. The specific-site suit simply was unable to provide an adequate, efficient, and equitable remedy to exclusionary zoning.

#### THE CALIFORNIA APPROACH

The California Supreme Court developed a regional perspective of zoning in Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore.<sup>37</sup> An ordinance must reasonably relate to the public welfare. However, the court applied a standard other than the "reasonable relationship" test to those zoning ordinances that had an impact beyond the municipal boundaries and affected the interests of nonresidents. The

court acknowledged the issue of whose general welfare an ordinance must serve and stated:

But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus, an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.<sup>38</sup>

The court offered the test of "... whether the ordinance reasonably related to the welfare of those whom it significantly affects."<sup>39</sup> If the ordinance did not have an impact beyond the city boundaries, then a "reasonable relationship" test would apply, and the burden would be on the challenger to demonstrate otherwise. However, if the ordinance had a substantial regional impact on the supply and distribution of housing, the regional welfare would have to be examined. The court held that the traditional practice of judicial deference to the local legislative body was not applicable to an inquiry whether the regional welfare was being served. Still the burden to show that the zoning did not reasonably relate to the regional welfare and had a substantial regional impact was placed on the challenger.

The test for determining whether an ordinance reasonably relates to the regional welfare involved three steps. The first step was "... to forecast the probable effect and duration of the restriction."<sup>40</sup> If inadequacy of public facilities was the justification for the zoning restriction, then questions concerning the duration of these restrictions and when the city would make improvements must be asked. The second step was "... to identify the competing interests affected by the

restriction."<sup>41</sup> Such areas of importance as the environment, adequacy of public facilities, and overpopulation must be balanced against housing shortages and population pressures. The final step was "... to determine whether the ordinance, in light of its probable impacts, represents a reasonable accommodation of the competing interests."<sup>42</sup>

The regional perspective of the California Supreme Court must be considered to be at an incipient stage of development. Whether this approach will be adequate to deal with exclusionary zoning is unresolved. Further litigation will be necessary to develop this approach.

#### THE NEW YORK APPROACH

Property owners sought to have a zoning ordinance declared unconstitutional because it excluded multi-family housing as a permitted use in Berenson v. Town of New Castle.<sup>43</sup> The municipality, 35 miles north of New York City and experiencing rapid population growth, refused to allow any multi-family housing. Most of the town was zoned for one- and two-acre residential lots. In reference to exclusionary zoning the New York Court of Appeals stated: "... the primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land."<sup>44</sup>

The court held that although no quantitative or "fair share" requirement should be imposed, the types of housing, the quantity and quality, and present and future housing needs must be considered in analyzing a zoning ordinance. This process

would necessarily take into account regional needs. Unlike the "fair share" approach, a municipality would not be obligated to provide for regional housing needs if another municipality in the region had already built enough multi-family housing to meet the regional needs. Only when there was an overriding regional need would the court require a municipality to rezone for multi-family housing.

The New York Court of Appeals, with no other case law to elucidate its regional perspective, would apparently allow regional considerations to be a defense for exclusionary zoning practices. One municipality could become the dumping ground for the low and moderate-income housing of the region, and thus the other municipalities of the region would not be obligated to zone for multi-family or "least cost" housing. According to David Listokin, "regionalism, then, is a double-edged sword; it can be used to attack localities having exclusionary zoning or ignoring regional needs, and at the same time it can justify restrictive local practices."<sup>45</sup>

#### EXCLUSION AND TIMED GROWTH CONTROLS

Time development ordinances were approved by the courts so long as they were not used as exclusionary devices. The suburban fear of being overcome by too rapid population growth was recognized as a legitimate concern of zoning. However, the problem of uncontrolled growth in a developing suburb would not be permitted to serve as camouflage for the exclusion of low and moderate-income housing.



In Golden v. Planning Board of the Town of Ramapo,<sup>46</sup> a zoning ordinance established a "phased growth" plan in which residential development was severely restricted for a period of 18 years. The plan did provide for low and moderate-income housing on a large scale. The court stated that Ramapo's zoning ordinance was able "... by the implementation of sequential development and timed growth, to provide a balanced, cohesive community dedicated to the efficient utilization of land."<sup>47</sup> The court issued the caveat that only those "timed development ordinances providing for low and moderate-income housing would be approved.

In Construction Industry Association of Sonoma County v. City of Petaluma,<sup>48</sup> the city had adopted a 5-year plan which fixed the housing development rate at not more than 500 dwelling units per year. Housing permits were to be evenly divided between single-family and multi-family units, and 8 to 12% of the housing units were to be low and moderate-income. The court concluded the plan did not have an exclusionary effect against a particular income group or racial minority.

#### HOW SUBURBS MAY AVOID COURT INTERVENTION

Suburban municipalities throughout most of the states have been permitted to ignore regional housing needs and conduct land-use practices from an entirely local perspective. On the other hand, some suburbs have not wished to take the risk of litigation concerning their land-use practices and, therefore, have participated in regional planning bodies and adopted fair share

housing allocation plans. This, of course, has not meant that an exclusionary suburb would change its land-use practices merely by adopting a fair share plan. Particularly in the states where the courts have adopted a regional perspective of housing, a suburb's participation in a fair share allocation plan would be a prudent strategy whether or not the plan was ever intended to be implemented. The plan could always have utility as a defense of a zoning ordinance alleged to be exclusionary.

A fair share housing allocation plan would involve three basic steps: (1) identification of the appropriate region; (2) determination of present and future housing needs of the region; (3) allocation of these housing needs among the various municipalities of the region.<sup>49</sup> Although the methodology in this process may range from the simple to the highly complex, no single fair share formula has emerged as superior to the rest. The unsettled methodology has left the courts in a precarious position in formulating remedies to exclusionary zoning. The New Jersey Supreme Court was well aware of the uncertainty in fair share formulas and, therefore, refused to require a suburb to use a specific one.<sup>50</sup>

A region could be delineated by a locality, county, multi-county area, SMSA, or housing market area. For a very large metropolitan area, subregions might be necessary. One of the more popular methods of identifying the region has been the housing market area analysis which has utilized the journey-to-work as a principle factor.<sup>51</sup> In this method, employment

opportunity, transportation availability, and housing location would be used to determine the geographical area or region in which all the housing units would be in competition with each other. Regardless of the method of identifying the region, exclusionary suburbs will attempt to limit the area of the region, i.e. omit the housing needs of the central city in order to minimize the regional fair share obligation of each municipality.

To project the regional housing need for low and moderate-income housing, definitions of low-income and moderate-income must be established. The amount of substandard or over-crowded housing, future income levels, income levels necessary for newly constructed housing, and housing turnover would be among the factors to be considered.

Fair share housing allocation could be executed on the basis of equal share, need, distribution, or suitability. These criteria would be, by no means, independent of one another and could be combined to provide a fair share formula.

The equal share criterion, the easiest to incorporate in a formula but perhaps too simplistic, would establish the same quota of low and moderate-income housing units for all municipalities. The biggest drawback would be its inflexibility to account for the suitability of a municipality and equitable matters such as the concentration of lower-income people or the relative wealth of a municipality.

Need as a criterion for housing allocation would offer a greater degree of flexibility. However, this criterion, alone,

would result in the concentration of low and moderate-income housing in the central city due to its greater number of lower-income people and inferior housing units. If this factor of need included future population trends and employment opportunities, then the suburbs would not be able to avoid their "fair share" of low and moderate-income housing.

A fair share allocation based on distribution would attempt to promote greater economic integration of the metropolitan region. Those municipalities with relatively high incomes and low minority population would receive the largest allocations of low and moderate-income housing units. This approach undoubtedly would be the most unacceptable to the suburbs.

Suitability would be a criterion that could significantly promote comprehensive planning. Among the areas examined in order to ascertain the suitability of a municipality for low and moderate-income housing would be availability of land, environmental impact, adequacy of municipal facilities and services, employment opportunities, and fiscal impact. A land survey would determine the location and amount of vacant, developable land, the location of undeveloped areas relative to each other and the developed areas, and environmentally sensitive areas. Public facilities and services would be analyzed to determine present and future adequacy for low and moderate-income housing. Employment opportunities would include future commercial and industrial development and would demonstrate if a municipality was a suitable location on the basis of future employment trends. An analysis of the fiscal impact would

project future municipal revenues and expenditures and the effect upon these resulting from low and moderate-income housing development.

Many exclusionary suburbs will try to use arguments based on suitability to delay, to reduce, or to avoid housing allocation quotas. Of course, inadequate municipal facilities and services and also adverse fiscal impact were rejected as excuses for failing to meet regional housing needs in New Jersey and Pennsylvania.<sup>52</sup> In New Jersey, developing municipalities would have a fair share obligation simply on the basis of the amount of vacant, developable land with no other factors except the environment in very extreme cases.<sup>53</sup>

Several regional planning bodies have adopted fair share plans on their own initiative free of judicial involvement. However, implementation has often been lacking. One problem has been the availability of funds for housing subsidies. More importantly, the function of the regional housing plans might not actually be to allocate housing units to suburban municipalities but instead to appease potential challengers of exclusionary land-use practices and to comply with the requirements of the Department of Housing and Urban Development.<sup>54</sup> Until there is judicial intervention, the fair share housing plan might be for the most part nothing more significant than pieces of paper.

#### JUDICIAL APPROACHES TO FAIR SHARE HOUSING PLANS

On the basis of the state court decisions adopting a regional perspective of zoning, it would be quite questionable

that the state courts would ever become directly involved in what has been termed "statistical warfare" and require the suburbs to use a specific fair share formula. Certainly, suburban municipalities have the option of devising a fair share formula and may transform their low and moderate-income housing quotas into specific provisions of their zoning ordinances. The courts have not been so concerned with the actual number of low and moderate-income housing units allocated to suburbs as they have been in the effect of suburban zoning ordinances. Simply stated, a zoning ordinance must not isolate a municipality from the rest of the region by neglecting regional housing needs.

The Pennsylvania Supreme Court developed a much less intricate concept of fair share than the New Jersey Supreme Court. A zoning ordinance, without regard to low and moderate-income housing needs for the region, must provide for a variety of housing types. A zoning ordinance requiring lots greater than one acre might be unconstitutional depending on the particular circumstances and the effect of the zoning ordinance. The total prohibition of multi-family housing in a municipality would be invalid as an exclusionary zoning practice. A suburban municipality within the sphere of metropolitan growth would have to provide for a fair share of its land for multi-family housing. This fair share obligation would be similar to a "reasonableness" requirement in that the amount of vacant developable land, the amount of land zoned for multi-family housing, and the population density would be examined.

The New Jersey Supreme Court offered the most extensive guidelines in what a "fair share" of the regional housing need encompasses. The fair share obligation applied only to a developing municipality, one of sizeable undeveloped land area in the path of urban growth. A developing municipality must, through its land-use regulation, provide for a variety and choice of housing that necessarily included the regional need for low and moderate-income housing. Conversely, a developing municipality must not preclude the opportunity for "least-cost" housing to be constructed.

In order to comply with the fair share obligation in New Jersey, a developing municipality should consider the present and future housing needs for the municipality, present and future housing needs for the region, and what constitutes the appropriate region. Although a fair share formula was not mandatory, a zoning ordinance would have to provide for present and future housing needs of not only the municipality but also the region. Those zoning provisions which would increase the cost of housing or prohibit multi-family housing would be invalidated due to the exclusionary effect. A municipality would have to zone substantial areas for single-family homes on very small lots and moderate-sized lots and also multi-family housing. A zoning ordinance must not discourage the construction of multi-family housing with two bedrooms or more. A zoning ordinance must not contain undue cost-generating provisions that would preclude the opportunity for least-cost

housing. A municipality should determine what types of least-cost housing could be constructed.

#### CONCLUSION

The state court decisions embracing a regional perspective of housing must be viewed as significant advances in the evolution of zoning law. While some decisions might be too limited or even inadequate to deal with such a complex issue as exclusionary zoning, the judicial activism sanctioned in New Jersey might be too much to expect from other courts in an area of immense political controversy. The general welfare, supposedly advanced by all zoning ordinances, has been recognized as regional in nature. The regional perspective of zoning has questioned the assumption that the protection of private property interests and other local concerns would be a legitimate objective of zoning. The protection of private property rights has been viewed as conflicting with the general welfare, when regional housing needs have been frustrated. A regional model of zoning would recognize the right of low and moderate-income persons to housing opportunity in the suburbs and that the general welfare would require that this right be incorporated into suburban zoning ordinances.



## Footnotes Chapter 3

<sup>1</sup>67 N.J. 151, 336 A.2d 713 (1975).

<sup>2</sup>336 A.2d at 717.

<sup>3</sup>Id. at 726.

<sup>4</sup>Id. at 727.

<sup>5</sup>Id. at 728.

<sup>6</sup>Id. at 732.

<sup>7</sup>72 N.J. 481, 371 A.2d 1193 (1977).

<sup>8</sup>117 N.J. Super. 11, 283 A.2d 353 (1971).

<sup>9</sup>128 N.J. Super. 438, 320 A.2d 223 (1974).

<sup>10</sup>371 A.2d at 1199.

<sup>11</sup>Id. at 1207.

<sup>12</sup>Id. at 1222.

<sup>13</sup>Id. at 1213.

<sup>14</sup>74 N.J. 470, 379 A.2d 6 (1977).

<sup>15</sup>J. Rose and M. Levin, "What Is a 'Developing Municipality' Within the Meaning of the Mount Laurel Decision?," 4 Real Estate Law Journal 359 (1976).

<sup>16</sup>142 N.J. Super. 11, 359 A.2d 526 (1976).

<sup>17</sup>67 N.J. 151, 336 A.2d 713, 735-750 (Pashman, J., concurring) (1975).

<sup>18</sup>B. Ackerman, "The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform," 1976 University of Illinois Law Forum 1, 14 (1976).

<sup>19</sup>72 N.J. 481, 371 A.2d 1193, 1229-1261 (Pashman, J., dissenting) (1977).

<sup>20</sup>371 A.2d at 1243.

<sup>21</sup>8 Pa. Cmwlt. 295, 302 A.2d 897 (1973).

<sup>22</sup>419 Pa. 504, 215 A.2d 597 (1966).

<sup>23</sup>437 Pa. 237, 263 A.2d 395 (1970).

<sup>24</sup>263 A.2d at 398, 399.

<sup>25</sup>439 Pa. 466, 268 A.2d 765 (1970).

<sup>26</sup>268 A.2d at 769.

<sup>27</sup>462 Pa. 445, 341 A.2d 466 (1975).

<sup>28</sup>341 A.2d at 468.

<sup>29</sup>476 Pa. 182, 382 A.2d 105 (1978).

<sup>30</sup>382 A.2d at 112.

<sup>31</sup>Id. at 109, 110.

<sup>32</sup>Id. at 111.

<sup>33</sup>Id.

<sup>34</sup>D. Moskowitz, Exclusionary Zoning Litigation 284 (1977).

<sup>35</sup>Id. at 286.

<sup>36</sup>M. Feiler, "Metropolitanization and Land-Use Parochialism: Toward a Judicial Attitude," 69 Michigan Law Review 655, 681 (1971).

<sup>37</sup>135 Cal. Rptr. 41, 557 P.2d 473 (1976).

<sup>38</sup>557 P.2d at 487.

<sup>39</sup>Id.

<sup>40</sup>Id. at 488.

<sup>41</sup>Id.

<sup>42</sup>Id.

<sup>43</sup>38 N.Y.2d 102, 341 N.E.2d 236 (1975).

<sup>44</sup>341 N.E.2d at 241.

<sup>45</sup>D. Listokin, Fair Share Housing Allocation 17 (1976).

<sup>46</sup>30 N.Y.2d 359, 285 N.E.2d 291 (1972).

<sup>47</sup>285 N.E.2d at 302.

<sup>48</sup>522 F.2d 897 (9th Cir. 1975).

<sup>49</sup>Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 747 (1975).

<sup>50</sup>Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1193, 1200 (1977).

<sup>51</sup>U.S. Department of Housing and Urban Development, Federal Housing Administration, Economic and Market Analysis Division; FHA Techniques in Housing Market Analysis (1970).

<sup>52</sup>Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), and National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966).

<sup>53</sup>J. Rose, "A New Test for Exclusionary Zoning: Does It Preclude the Opportunity for Least Cost Housing?," 6 Real Estate Law Journal 91, 97 (1977).

<sup>54</sup>M. Danielson, The Politics of Exclusion 260 (1976).

## Chapter 4

### FAIR SHARE AND BEYOND

#### The Case for Judicial Involvement in Meeting Regional Housing Needs

In 1968 the National Commission on Urban Problems, commonly known as the Douglas Commission, perceived the problem of suburban exclusionary land-use practices and recommended reorganization of local land-use decision-making in order to disperse low and moderate-income housing within the metropolitan area.<sup>1</sup> Housing opportunities for low and moderate-income groups were to be expanded by mandatory local planning which was to be in accordance with a regional housing plan. This proposal was dependent upon state governments enacting legislation that would require regional or state review of local land-use policies. The American Law Institute's Model Land Development Code contained many of the recommendations in the Douglas Commission Report.

However, most of the state legislatures have chosen not to follow the recommendations of the Douglas Commission Report. Although there have been a few well-intended, but inadequate attempts by state legislatures, no state legislation has even approached the problem of exclusionary zoning in a manner advocated by that Commission. Of course, there have been numerous programs of federal and state involvement requiring a regional approach in activities other than lower-income housing, e.g. environmental protection, transportation, health care, and education. But the issue of dispersing low and moderate-income housing in the suburbs has remained politically untenable in the state legislatures.

In 1969 Massachusetts enacted the Zoning Appeals Law that allowed developers of subsidized housing to appeal to a Housing Appeals Committee upon a municipality's prohibition of such development or policy of severely restricting this type of housing.<sup>2</sup> Although this legislation contained numerous loopholes for suburbs to avoid regional housing needs for the lower-income population, this regional concern was at least being assessed by a review agency. The class of challenger to public agencies, limited dividend sponsors, and non-profit organizations which would not necessarily be inclined to engage in a long and costly appeals process. Another problem in Massachusetts has been that no affirmative duty would be placed upon a municipality to zone for lower-income housing. Rather, the issue of exclusion would be raised when a developer of a specific project initiated a suit according to his own interests.

In 1968 New York established the Urban Development Corporation which was to have the authority to override local zoning ordinances in its housing developments. The UDC had planned to disperse low and moderate-income housing in several suburbs which vehemently opposed this strategy. This suburban recalcitrance to the UDC's plans prompted the revocation of the override power by the state legislature in 1973. The New York experience plainly demonstrated the highly political nature of dispersing lower-income housing in the suburbs and offered convincing support for the position that only the courts have the capacity to deal with this issue of suburban exclusion.

Numerous regional planning bodies whose membership included the area suburbs have quite admirably examined regional housing needs and produced regional housing plans. The Miami Valley Regional Planning Commission for the Dayton, Ohio metropolitan area was the first to adopt a regional housing allocation plan. Although subsidized housing was dispersed in the suburbs of Dayton, nearly all the units were moderate-income and served suburban needs. Therefore, the objective of dispersal of central-city poor in the suburbs simply was not attained.<sup>3</sup> The nature of exclusionary zoning dictates that the voluntary participation by the suburbs in these regional housing plans be viewed with skepticism. Since participation by suburbs in regional planning places no affirmative duty upon them to do anything at all, the effectiveness of these arrangements must be questioned.

For a fair share strategy meeting regional housing needs to be implemented, there must be definitive guidelines for suburban zoning ordinances. The results in New York and Massachusetts indicate that the state legislatures are largely ineffectual in their attempts to address regional housing needs for the low and moderate income. The regional planning commissions lack mandatory standards in allocating housing units to suburbs whose participation does not make the fair share quota binding in any sense. A few of the state courts have shown that guidelines can be judicially developed in exclusionary zoning litigation. In light of the importance of regional housing needs, a recent ABA report concluded that the state

courts were quite capable of handling regional housing remedies in exclusionary zoning suits.<sup>4</sup>

#### TOWARDS A COMPARATIVE MODEL OF ZONING

The state court decisions have indicated a trend that judicial scrutiny of suburban land-use practices will perhaps rely more on a balancing test than on any complicated fair share formula. Courts so far have avoided the prescription of specific fair share methodologies although specific criteria have been provided to guide in the formulation of local land-use policies. For any judicial test in land-use regulation, the effect of suburban zoning ordinances will be examined in relation to the regional housing needs.

The emphasis on the effect of local zoning practices will allow more options on the part of a suburb in transforming its zoning ordinance to reflect regional interests. Consequently, the role of planning will be enhanced by the use of a balancing test, since the definition of region and regional housing needs, and the fair share methodology will have to be determined by comprehensive planning on the local level. State courts will probably refuse to act as a super-zoning body and will avoid involvement in the actual planning process by utilizing a balancing test, which primarily examines the effect of land-use policies.

#### Criteria for a Balancing Test

When state courts have been able to determine the effect of a zoning ordinance to be exclusionary, the traditional

presumption of validity has been reversed and the burden has been placed on the suburban municipality to justify those zoning practices affecting regional housing opportunity. For example, when timed growth controls have been implemented by a suburb, this restrictive growth policy has been held permissible provided the ordinance has allowed substantial areas for low and moderate-income housing. Likewise, environmental protection may justify the excusion of low and moderate-income housing from certain sensitive areas within a municipality but never the entire municipality. Zoning purposes which are routinely accepted as legitimate in most of the state courts will not be permitted to justify restrictions or prohibitions on low and moderate-income housing meeting the metropolitan needs.

Not all municipalities will be required to zone for their fair share of lower-income housing. Those suburban municipalities with substantial areas of vacant, developable land in the path of urban development will have to be aware of the fair share obligation. The older, almost-completely-developed suburbs will be able to escape the affirmative duty to include regional housing needs in their zoning ordinances. Of course, there will be numerous law suits determining just which suburbs do have to provide for regional housing needs. This most likely will require a case-by-case analysis on the types of suburbs that will have this affirmative duty.

The fair share obligation of suburbs has brought about a modification in the traditional concept of property rights.



A few of the state courts have been quite willing to consider the rights of parties other than the property owners. The right of access to suburban housing opportunities for low and moderate-income persons of the region is being recognized as a requirement of the general welfare presumed to be advanced in all zoning ordinances. This expanding concept of the general welfare in land-use regulation is not limited to the protection of only lower-income, racial minorities but also includes the general economic category of low and moderate-income persons. However, a suburban municipality must only provide by its zoning ordinance for its fair share of the regional housing need. After that objective has been attained by a suburb, then prohibitions or restrictions may once again be placed on low and moderate-income housing.

#### Comprehensive Planning and Regional Needs

The role of comprehensive planning as a policy guide for suburban governments in their land-use controls is being increasingly emphasized by the state courts.<sup>5</sup> Local governments most probably will continue to be responsible for land-use regulation provided that regional housing needs are not being frustrated. State courts will scrutinize a suburban community's comprehensive plan and its relationship to its land-use controls and lower-income housing opportunities. Comprehensive planning will be required to support and promote inclusionary zoning practices in regard to low and moderate-income housing.

A fair share standard for metropolitan housing needs may be determined by several methodologies which depend largely upon

what allocation criteria are to be stressed. The planning process enters at this stage by providing a methodology in defining the region, regional need, and appropriate areas for low and moderate-income housing development. Comprehensive planning by local units of government would then be able to encompass local interests in determining the most appropriate locations within the municipality but without neglecting regional housing concerns.

The fair share obligation is a standard that state courts can administer since they limit their examination to the impact of zoning practices on low and moderate-income housing. No absolute numbers of low and moderate-income housing units will be required to be allocated to suburban municipalities. While comprehensive planning by a suburban government will not be allowed to ignore regional housing needs, comprehensive planning potentially offers a great amount of flexibility for a suburb in meeting its fair share of regional housing needs. A mix of housing types, densities, and lot sizes as well as incentives to build low and moderate-income housing could be incorporated into a land-use scheme that promotes regional responsibility.

#### A Duty of Regional Responsibility

Suburbs with substantial amounts of vacant, developable land will be required to include these guiding principles in their land-use decision making:

a. the present and future housing needs for the low and moderate-income population of the region have been analyzed.

b. the zoning ordinance has established areas for a variety of housing types without cost-generating provisions beyond the minimum standards for health and safety.

c. the zoning ordinance does not place unnecessary restrictions on multi-family housing and mobile homes.

d. the zoning ordinance provides for single-family homes with small floor areas and on small lots.

e. the zoning ordinance has allocated reasonable amounts of land to meet future regional housing needs and has not over-zoned for non-residential uses in order to prevent housing developments.

f. In general, those land-use policies or procedures having the effect of excluding low and moderate-income housing have been eliminated.

## THE SOCIETAL IMPLICATIONS OF THE FAIR SHARE APPROACH

### The Spatial Distribution Approach to Urban Problems

A popular viewpoint has been that the elimination of resistance to low and moderate-income housing development in the suburbs and the resultant dispersal of the lower-income population from the central city would provide a solution to what is loosely referred to as the "urban crisis."<sup>6</sup> The problems of housing, segregation, unemployment, poverty, municipal finance, transportation, education, and other services are certainly symptomatic of the "urban crisis." If this "urban crisis" is defined as a matter of poor spatial distribution of physical design, then perhaps the fair share housing approach of opening the suburbs to the lower-income population would be an appropriate

remedy. However, the fundamental question is whether the spatial distribution of the metropolitan population should be examined as a dependent or independent variable. Regional planning literature seems to express that spatial distribution is an independent variable, that is at the root of many urban problems.<sup>7</sup> The spatial distribution of housing is therefore viewed as the problem rather than just a characteristic of a larger systemic problem.

The proponents of fair share housing do acknowledge the stratification within a metropolitan area, the unequal fiscal resources available to local units of government, and the generally disparate quality of environment between the inner-city and suburb. Equal opportunity in housing is thought to be the panacea of many of these urban ills. The economic integration of the low and moderate-income population into the suburbs would be the primary goal of the movement to open up the suburbs.<sup>8</sup> Suburban housing opportunities for the low and moderate-income, it has been argued, would allow for the dispersal of central-city problems throughout the metropolitan region and thus alleviate the "urban crisis," whatever the term entails.<sup>9</sup>

It has been reasoned the fair share housing approach would allow low and moderate-income housing to be constructed where the job opportunities are the greatest. Potential workers have simply not been allowed to reside near the places of employment in the suburbs. The result has been labor shortages in the suburbs, particularly in the lower paying jobs, and a labor

surplus in the central cities.<sup>10</sup> The reliance upon the car and the lack of adequate public transportation to the suburbs have done little for the inner-city poor who may desire employment in suburbia. Without housing in the suburbs, the journey-to-work for the lower-income residents of central cities has been costly, time-consuming, and difficult.<sup>11</sup>

It has also been contended the concentration of poverty and other social disorders in the central cities could be reduced by lower-income housing development in the suburbs.<sup>12</sup> A fair share approach would prevent the creation of suburban slums since a suburb need only meet its quota of lower-income units and then no more. Dispersal of the low and moderate-income population in the suburbs has been proposed as a means of both relieving the financial burden of central-city services and also providing more equitable levels of services in the central cities.<sup>13</sup> Many hold the view that until the number of poor in the central-cities has been reduced, no solution to the urban crisis can be expected.

From a fair share housing approach, the problem in metropolitan America is the spatial distribution of the low and moderate-income population. In context of its development in zoning law, this approach has viewed the metropolis in physical terms and has set forth a physical solution just as the approach of the zoning pioneers of the early 1900's also did. Obviously, many of the same urban problems exist as they also did when land-use controls were first proposed, and the physical design approach to urban problems is still being promulgated in the fair share housing strategy. In addition, the fair share concept, as a

physical solution, has not really proposed any change in the existing political or economic structure.

The strategy of opening the suburbs to the low and moderate-income population would represent basically a "blocked-opportunity" approach to urban problems. The lower-income population largely confined to the central cities has been viewed as the people left out of the mainstream of American life.<sup>14</sup> The exclusion of this group from the suburbs has supposedly denied them the opportunity for economic advancement. This group is believed to have values and aspirations of the mainstream population, but they lack the economic opportunities available to the rest of the population.

Although the institutions are assumed to be essentially sound under a "blocked-opportunity" approach, maladjustments within that structure of institutions do occur such as the poor spatial distribution of the lower-income population. Presumably, the lower-income population can be made more functional within the existing institutional framework by eliminating the exclusionary development practices of the suburbs. Implicit in the fair share approach is a definition of poverty in individualistic terms: if only the lower-income people could be given equal opportunities to reside in suburbia, they, too, could be successes.

The goal of economic integration or equality of housing opportunity in the suburbs does not necessarily mean the achievement of equality of results. Many writers have questioned the concept of assimilation into the mainstream of American life

in the suburbs.<sup>15</sup> Although the opposition in the suburbs to low and moderate-income housing is well documented, the lower-income population has also expressed serious reservations concerning the fair share housing approach. The fair share housing approach has been perceived by the poor and in particular the black as a more sophisticated version of their removal from the inner city.<sup>16</sup> The political power base of the inner-city poor may also feel threatened. The central-city governments may not wish to lose the federal funds for subsidized housing, that would instead be allocated to suburban governments. Many of the inner-city poor have taken exception to this notion of participation in the mainstream of life in the suburbs. Neighborhood control by the poor in the inner cities has been advocated by some as an alternative to dispersal of the lower-income in the suburbs.<sup>17</sup>

#### An Urban Stratification Approach

An alternative method of analyzing the metropolis would concentrate on the distribution of power rather than the spatial attributes of the metropolitan population. In essence, this approach would focus on urban stratification and would attempt to examine whose interests are being served by suburbanization. The fragmented metropolitan governments would be viewed as a means of reinforcing the unequal distribution of economic, social, and political resources in respect to location within a metropolitan area. Richard C. Hill wrote about the nature of exclusionary suburbs:

Intergroup conflict in the metropolis resides in an attempt of group members to gain access to or control over, those institutions which govern the distribution of symbolic and material advantages. The social relations among classes and among status groups, imbedded in the means of economic production and exchange in the metropolis, structure differential access to income and economic goods and services. The unequal distribution of income and social status among groups fosters an unequal system of social relationships in the urban housing market and local government institutions resulting in differential individual access to housing, neighborhood and "municipal life style."<sup>18</sup>

Urban stratification approaches have not perceived the spatial segregation of the lower-income population as a causal factor in urban problems. The suburbs have been able to force the less affluent to finance central-city services, to exclude those high-cost residents who require more services, to attract the relatively affluent, and in general to isolate the wealthy from the poor. Suburban land-use controls have played an integral part in this process, which cannot be defined simply in terms of locational differentiation. Under an urban stratification approach, the suburb has been recognized as a part of the social stratification system in its role of perpetuating inequality within a metropolitan area.

If the fair share housing approach is examined from a perspective of urban stratification, then perhaps dispersal of the low and moderate-income population would diminish any political or economic power generated by those people in the central cities and would be adverse to their interests. Once the lower-income population would be dispersed equally throughout the suburbs, the distinct possibility would exist that they



would be in an even worse position. Whereas in the central cities, the lower-income population would at least have some political clout based solely on their number and their potential disruptive force. It perhaps would be better for the lower-income population to be concentrated in the central cities than to be still poor but scattered among the suburbs. At least in the central cities, the poor remain potentially a force to contend with and thus cannot be ignored.

Inequality must be viewed as the real issue in the spatial differentiation of metropolitan areas. Nowhere in the fair share approach is the vast inequality of wealth in the United States or the functioning of the institutional structure ever questioned. The strategy of opening the suburbs to the lower-income population constitutes nothing more than altering the spatial patterns of the metropolitan region and leaves the institutional structure intact. At the most, the fair share housing approach may result in more cooperation of suburban governments in providing areas for lower-income housing. Whether this approach would alter patterns of social and economic inequality is quite dubious.

#### METROPOLITAN SOLUTIONS

Metropolitan solutions have become quite fashionable in the field of urban studies. Where urban renewal, the Community Action Program, and Model Cities left off, the metropolitan planning approach has moved into the vanguard to save the cities.<sup>19</sup> Certainly, there is appeal in what is arguably the

rather simplistic approach of metropolitan planning to urban problems. With its emphasis on the spatial distribution of the population, this approach does not dispute the institutional structure. A typical metropolitan planning approach described the "urban crisis" in this manner:

The causes of these problems are not found only with residents of the so-called problem areas, nor are all of the problems located solely within the jurisdictional boundaries of the cities. It is unreasonable, therefore, to look only in the cities for their solutions. Rather, we must enlist the resources of the entire metropolitan area in solving problems that exist within that area.<sup>20</sup>

The question must be posed as to what the above description really meant. Undoubtedly, the political fragmentation and spatial differentiation of metropolitan regions were perceived as the ultimate cause of many urban problems that would have to be examined on the metropolitan level. Government intervention at the metropolitan level would be a solution based on this description of the "urban crisis." One group of authors labeled this approach to urban problems as hardly a novel one:

The term "metropolitan problem" has often been affixed to any situation requiring cooperation or interaction between adjacent units of government in urban areas. Problems are usually identified on a service basis, and there is hardly any governmental activity which has not been identified as constituting a metropolitan problem.<sup>21</sup>

### The Future of Fair Share

The fair share approach as delineated by the state courts has been directed at the physical development of the metropolis and has been consequently limited to a physical solution, the spatial redistribution of the population within a metropolitan

region. When placed within the framework of zoning litigation, any other possible solution than a physical one would be beyond the scope of the courts. The courts are only able to remedy the problem of suburban exclusion in relation to local zoning ordinances. The socio-economic factors responsible for urban spatial differentiation are beyond the ambit of zoning law.

At least three factors make the fair share approach a desirable course to pursue. The population pressures of the metropolitan area, the availability of land in the central cities, and the cost of reconstruction in the central cities necessitate the fair share housing approach. However, those advocating the fair share housing approach as the panacea to urban ills in general have at minimum been guilty of oversell. There are sufficient grounds to doubt the strategy of opening the suburbs as a solution to central-city poverty and other problems that can be analyzed in terms of institutional structure.

For an organization such as the Suburban Action Institute to expend the amount of resources in zoning litigation with the hope of eventually solving the "urban crisis," this may be an erroneous path. The spatial distribution is just one manifestation of the uneven development of American cities. When a strategy to solve the "urban crisis" does not even challenge the unequal distribution of goods, services, and income in the United States, then it must be asked from whose viewpoint does opening the suburbs seem to make sense. Any solution to suburban exclusion based almost entirely on the regulation of

the physical development of metropolitan areas is far too limited in perspective. The strategy of opening the suburbs has embraced an ideological element in that this approach signifies the preservation of the status quo when scrutinized from a viewpoint of the impact on the institutional framework.

Before the fair share housing approach can be recognized for its worth in metropolitan planning, proponents of this strategy must acknowledge that inequality will remain relatively untouched by suburban housing development for the lower-income. At the same time, the problem of where the lower-income population will reside within a metropolitan area may be addressed by the fair share housing approach. An inclusionary zoning requirement for low and moderate-income housing in the suburbs at least forces the allocation of areas for this housing. This is a significant departure from traditional zoning practices that have promoted exclusion.

Urban planners must strive to keep the ideological element often used to support fair share housing separate from the pragmatic element. It would be simply inconceivable for low and moderate-income housing needs to be met entirely within the central cities. That remains the substantive problem. However, the fair share housing strategy degenerates into an ideological device when it is adorned with "equality of opportunity" and is hailed as the solution to the "urban crisis." This "inequality of opportunity" ideology must be severed from the fair share housing strategy as a planning technique:

The phrase, "equality of results," or "full equality," suggests several ideas that have not been widely accepted by the American experience. Traditionally, we have been satisfied to choose "equality of opportunity" as a goal, and to assume that it is right and just that vast inequalities of income be allowed to result as long as the race is fairly run from an even start. Of course, we have never been able to achieve the fair and even start imagined by those who talk about equal opportunity.<sup>22</sup>

Planners must re-examine planning paradigms and the assumptions upon which they are based. The limitations of a spatial distribution approach to urban problems are apparent in the lack of institutional analysis. The strategy of opening the suburbs to the lower-income population likewise does not question the American socio-economic structure. Such an approach wrapped in "equality of opportunity" may be attacked as an ideology justifying the status quo and deflecting criticism from the institutions. Before the "urban crisis" can be solved, the issues of why social inequality exists, and more importantly, whom does it serve, must be addressed. The fair share housing approach, as a planning technique, is incapable of answering those issues. Planners must always be aware of that inherent limitation.

Perhaps the ultimate conflict confronting planners was expressed when David Harvey wrote:

Part of the planner's task is to spot both present and future dangers and to head off, if possible an incipient "crisis of the built environment." In fact the whole tradition of planning is progressive in the sense that the planner's commitment to the ideology of social harmony--unless it is perverted or corrupted in some way--always

puts the planner in the role of "righter of wrongs," "corrector of imbalances" and "defender of the public interest." The limits to this progressive stance are clearly set, however, by the fact that the definitions of the public interest, of imbalance and of inequality are set according to the requirements for the reproduction of the social order which is, whether we like the term or not, a distinctively capitalistic social order.<sup>23</sup>

### CONCLUSION

Although the fair share concept imposes an affirmative obligation on suburbs to provide in their zoning for low and moderate-income housing, the basic conflict between local responsibility and regional needs still exists, despite the state court decisions attempting to resolve that issue. It must be conceded that the fair share approach as developed by the courts in New Jersey and Pennsylvania has yet to become truly operational. Without a system of regional government, the zoning power will still remain under local control. Implementation of fair share housing perhaps will result only from a succession of protracted legal battles in which the suburbs will attempt all possible ways to delay their affirmative duty. Nevertheless, the courts have had no other alternative than to adopt this regional approach to exclusionary zoning since the other branches of government have refused to act.

The courts have always tended to examine zoning in relation to the rights of property owners. Under a regional approach to zoning, some state courts, however, have attempted to examine zoning from a perspective of the rights of the low and moderate-

income population of a metropolitan area. These state courts have demonstrated their ability to analyze local land-use controls and to identify exclusionary zoning practices. But the remedies have lagged behind. Perhaps, the fair share approach in promoting the goal of equal housing opportunity in the suburbs comes too close to the politically-sensitive issues of inequality in American society. However, the fair share approach as adopted by the state courts has provided guiding principles in suburban land-use practices and must be acknowledged as a significant development having a major impact on metropolitan planning.

## Footnotes Chapter 4

<sup>1</sup>National Commission on Urban Problems, Building the American City. Report of the National Commission on Urban Problems 242 (1968).

<sup>2</sup>Mass. Gen. Laws ch. 40B, §§ 20-23 (1969).

<sup>3</sup>M. Danielson, The Politics of Exclusion 274 (1976).

<sup>4</sup>American Bar Association, Housing for All Under the Law 211 (R. Fishman ed. 1978).

<sup>5</sup>D. Mandelker, "Role of Local Comprehensive Plan in Land Use Regulation," 74 Michigan Law Review 899 (1976).

<sup>6</sup>See, e.g. A. Downs, Opening Up the Suburbs (1973); P. Davidoff, L. Davidoff, and N. Gold, "Suburban Action: Advocate Planning for an Open Society," 36 Journal of the American Institute of Planners 12 (1970); A. Polikoff, Housing the Poor (1978).

<sup>7</sup>See, e.g. R. Scott ed., Management and Control of Growth (1975).

<sup>8</sup>Downs, supra note 6, at 131.

<sup>9</sup>American Bar Association, supra note 4, at 420.

<sup>10</sup>J. Levy, "Exclusionary Zoning: After the Walls Come Down," in Land Use Controls: Present Problems and Future Reform 179 (D. Listokin ed. 1974).

<sup>11</sup>E. Kalachek, "Ghetto Dwellers, Transportation and Employment," in The Modern City 72 (D. Rasmussen and C. Haworth eds. 1973).

<sup>12</sup>Polikoff, supra note 6, at 108.

<sup>13</sup>American Bar Association, supra note 4, at 420.

<sup>14</sup>Downs, supra note 6, at 30.

<sup>15</sup>See, e.g., A. Shostak, J. Van Til, and S. Van Til, Privilege in America: An End to Inequality (1973) and C. Hampden-Turner, From Poverty to Dignity (1975).

<sup>16</sup>R. Babcock and C. Weaver, "Exclusionary Suburban Zoning: One More Black Rebuff to the Latest Liberal Crusade," in The Urban Scene in the Seventies 207 (J. Blumstein and E. Martin eds. 1974).

<sup>17</sup>See, e.g. M. Kotler, Neighborhood Government (1969); D. Morris and K. Hess, Neighborhood Power (1975); A. Altschuler, Community Control: The Black Demand for Participation in Large American Cities (1970).



<sup>18</sup>R. Hill, "Separate and Unequal: Government Inequality in the Metropolis," 68 American Political Science Review 1557, 1558 (1974).

<sup>19</sup>J. O'Connor, The Fiscal Crisis of the State 136 (1973).

<sup>20</sup>Suburban Action Institute, Open or Closed Suburbs: Corporate Location and the Urban Crisis 8 (1971).

<sup>21</sup>O. Williams, H. Herman, C. Liebman, and T. Dye, "Suburban Differences and Metropolitan Policies," in Perspectives on the American Community 142 (R. Warren ed. 1973).

<sup>22</sup>Shostak, Van Til and Van Til, supra note 15, at 137.

<sup>23</sup>D. Harvey, "On Planning and Ideology," in Planning Theory in the 1980s: A Search for Future Directions 213, 224 (R. Burchell and G. Sternlieb eds. 1978).

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ZONING MODELS AND FAIR SHARE HOUSING: THE CONFLICT  
BETWEEN LOCAL RESPONSIBILITY AND REGIONAL NEEDS

by

THOMAS W. MCNISH

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The relationship between local land-use policies and regional housing needs is examined in several court decisions. Zoning as it presently functions in the nation's suburbs has had an impact affecting the entire metropolitan development. A local model of zoning--adhered to by the U.S. Supreme Court and most of the state courts--has been supportive of the exclusionary land-use practices in many of the suburbs. Protection of private property interests has been the essence of zoning--a purpose which has had the effect of excluding the low and moderate-income population from many developing suburbs. Under a local model of zoning, a municipality has no duty to provide for regional housing needs.

A few state court decisions, most notably in New Jersey, have adopted a regional model of zoning which imposes a fair share requirement on developing suburbs to provide for regional housing needs. A regional model of zoning has rejected the traditional presumption of legislative validity generally given to suburban zoning ordinances having an economically-discriminatory effect. Decisions of the various state courts are compared and analyzed to extract guiding principles in suburban zoning practices which must incorporate regional housing needs.

A comparative model of zoning that incorporates regional responsibility is synthesized from the relevant case law, and the future implications of the fair share housing approach are examined. The general welfare, which is to be advanced in

zoning as a police power function, will be viewed as a regional, rather than local, concept. State courts utilizing a regional approach to zoning most likely will apply a balancing test rather than statistical formulas. The effect of local zoning ordinances will be the key factor in identifying exclusionary zoning practices. A balancing test, with its emphasis on effect, will allow more options on the part of a suburb in transforming its zoning ordinance to reflect regional interests. The role of planning will also be enhanced in implementing regional housing plans. Due to the extremely controversial nature of fair share housing, the state courts will continue their supervision of local land-use policies in the suburbs which will be required, at least, to meet a minimum quota for low and moderate-income housing units.

