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REMEDYING EXCLUSIONARY ZONING PRACTICES IN SUBURBIA

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INTRODUCTION: MT. LAUREL — A STEP FORWARD

The township of Mt. Laurel, a New Jersey suburban municipality located near Philadelphia, has recently been the scene of important land-use control litigation. The township, larger in area than most New Jersey townships,[1] experienced a doubling of its population from 1960-1970 despite the fact that toward the end of this period over 70 percent of its land remained vacant.[2] During the 1960's household income in Mt. Laurel increased by 42 percent as the township attracted households headed by engineers, computer programmers, scientists, and other professionals.[3] Utilizing exclusionary zoning practices, the township attempted to limit its growth to upper middle class white residents having few or no public school children.[4]

Located in the eastern corner of Mt. Laurel, however, is a tract of land known as Springfield that is populated by low income residents. This prematurely subdivided area, the product of land speculation in the 1920's,[5] represented a critical problem to the rest of the township. The tract was characterized by low quality housing, confused ownership status, and a variety of structural problems; moreover, many of the lots were without means of egress or ingress. Furthermore, various types of exclusionary land use ordinances[6] prevented the low income residents of Springfield from moving to other sections of Mt. Laurel.

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1. The township comprises 22 square miles. Southern Burlington NAACP v. Mt. Laurel, 67 N.J. 151, 161, 336 A.2d 713, 718 (1975).

2. From 1960-1970 Mt. Laurel's population increased from 5,249 persons to 11,221 persons. *Id.*

3. In part, households headed by professionals were drawn to Mt. Laurel due to its proximity to industries such as an RCA plant. However, Stephen Sussna Associates, the planning firm with which the author is associated, has projected tremendous growth for Mt. Laurel. The firm predicts that by 1985 Mt. Laurel will have experienced increases of 329% in office employment, 181% in retail and service employment, and 119% in educational employment. Mt. Laurel's tax base should experience a corresponding increase from $123 million in 1975 to a projected $207 million in 1980. STEPHEN SUSSNA ASSOCIATES, MASTER PLAN FOR MT. LAUREL (1969).

4. One condition for the granting of a particular planned unit development was a complex agreement in which the developer guaranteed that there would be a severe limitation on the number of public school children residing in the development.

5. *See* Sussna, *Remedying Premature Subdivision*, 17 N.Y. L. FORUM 1050 (1972). See text accompanying note 26 *infra*.

6. " 'Exclusionary zoning' is a phrase popularly used to describe suburban zoning regulations that have the effect, if not also the purpose, of preventing the migration of low and middle income persons." Construction Indus. Ass'n v. Petaluma, 522 F.2d 897,

In *Southern Burlington County NAACP v. Mt. Laurel*,[7] the trial court found that the township's zoning ordinance, which was highly exclusionary, discriminated against the poor and was therefore unconstitutional.[8] In barring multi-family housing and mobile homes from the area, the ordinance had effectively prevented people who could not afford single-family homes from residing in Mt. Laurel. Finding that the township had failed to condemn substandard housing in Springfield because it would have been forced by state law to relocate the displaced residents, the court determined that the township was following a policy designed both to force low income residents to voluntarily relocate and to exclude these residents from other areas of Mt. Laurel.[9] In ordering various administrative remedies, the court considered the effect of the zoning scheme on the availability of housing for the poor. Thus, the court ordered Mt. Laurel to join with the plaintiffs in conducting a study to identify and remedy substandard housing in the area and to justify any impediments to achieving that goal.[10]

On appeal, the New Jersey supreme court affirmed, invalidating all zoning laws that effectively excluded from a specific area low to middle income persons.[11] The court specifically rejected Mt. Laurel's zoning ordinances that prohibited all forms of housing other than detached, single-family homes.[12] Stressing the welfare of the people of the entire state rather than that of the people already firmly established in an attractive suburban municipality, the court found that the satisfaction of housing needs was an important component of the state's duty to protect the general welfare.[13] Notwithstanding fiscal and environmental arguments to the contrary,[14] zoning could not be the panacea for municipal finance problems caused by a heavy reliance on local property taxes.[15] Any new ordinances drafted by Mt. Laurel planners would have to comply with the court's prohibition against exclusionary practices.[16]

905 n.10 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976). *See generally* Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

7. 119 N.J. Super. 164, 290 A.2d 465 (Sup. Ct. 1972), *modified in part*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 96 S. Ct. 18 (1975).

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

9. *Id.* at 168-71, 290 A.2d at 467-69.

10. *Id.* at 178-80, 290 A.2d at 473-74.

11. Southern Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

12. *Id.* at 181-84, 336 A.2d at 729-30.

13. *Id.* at 179, 336 A.2d at 727.

14. See text accompanying notes 20-29 *infra*.

15. The court noted that if the adopted regulation was not reasonably necessary for public protection of a vital interest, then additional problems of a "taking" of a property owner's land might arise. 67 N.J. at 187, 336 A.2d at 731. Such a "taking" comes under the fifth amendment requirement that a state must pay compensation if the act of the state causing the loss is not done pursuant to the state's police power to protect the general welfare. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

16. 67 N.J. at 187, 336 A.2d at 734.

EXCLUSIONARY ZONING RESTRICTIONS

Municipalities derive their power from the states; thus, state regulation of municipal zoning efforts involves no usurpation of the latter's sovereignty. Enabling legislation for municipal zoning generally requires that land use curtailments be based on objective, thorough, and careful plans. Consequently, there exists a historical basis for current state requirements that zoning be in accordance with a comprehensive plan.[17]

Recently, there have been many changes involving state control of land use planning and zoning practices.[18] This legislative activity reflects a concern for environmental issues rather than an attempt to remedy the economic effects of exclusionary zoning.[19] Statewide legislative efforts to curtail local exclusionary zoning practices have been largely piecemeal and ineffective.[20] Judicial efforts directed toward the same goal have not enjoyed great success.[21]

Bedroom Composition, Density, and Minimum Size Restrictions

In *Molino v. Borough of Glassboro*,[22] a New Jersey court held invalid an

17. For the historical requirement that zoning be in accord with a comprehensive plan see, Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1171 (1955), *citing* Harris v. Village of Dobbs Ferry, 208 App. Div. 853, 204 N.Y.S. 325 (1924); Hecht-Dann Constr. Co. v. Burden, 124 Misc. 632, 208 N.Y.S. 299 (Sup. Ct. 1924). This article by Professor Haar and a later one by him and a co-author should be consulted for discussions concerning the legal significance of zoning in accord with a plan. *See* Haar and Hering, *The* Lower Gwynedd Township *Case: Too Flexible Zoning or an Inflexible Judiciary*, 74 HARV. L. REV. 1552 (1961). *See also* Smeltzer v. Messer, 311 Ky. 692, 225 S.W.2d 96 (1949).

18. *See, e.g.*, Sussna, *Remedying Land Use Control Ills*, 63 N.J. STATE B.J. (1973) (discussion of Hawaii's statewide zoning, Florida's prototype of national land use policy legislation sponsored in Congress by Senator Henry Jackson, Maine and Vermont's site location legislation, Minnesota's "share the growth" statute, and other state land use control endeavors).

19. *See, e.g.*, Patton, *State Experience in Land Use*, 46 STATE GOVERNMENT 134, 134-35 (1973) (special issue devoted to survey of recent state land use control efforts). *See also* U.S. COMMITTEE ON COMMUNITY DEVELOPMENT — THE DOMESTIC COUNCIL, NATIONAL GROWTH AND DEVELOPMENT 63-84 (1974).

20. For example, the New York State Urban Development Corp. was stripped of much of its power to oversee local zoning efforts by the 1973 state legislature. *See generally* N.Y. UNCONSOL. LAWS §§6251-85 (McKinney Supp. 1975). In New Jersey, a voluntary housing allocation plan designed by former Governor William T. Cahill permitted the New Jersey Department of Community Affairs to determine the required number of low and moderate income housing units and to allocate these units among New Jersey counties on the basis of demographic, economic, housing, and site data. The state legislature quickly killed the proposal. *But cf.* MASS. ANN. LAWS ch. 40B, §§20-23 (Supp. 1971) (developers of low income housing who are denied a special "comprehensive permit" by a municipality can appeal to a state agency to direct the issuance of a permit if its denial was not "reasonable and consistent with local needs").

21. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Construction Indus. Ass'n v. Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 95 S. Ct. 1148 (1976); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Southern Alameda Spanish Speaking Organizations v. Union City, 424 F.2d 291 (9th Cir. 1970); Oakwood at Madison, Inc. v. Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971); DeSimone v. Greater Englewood Housing Corp., 56 N.J. 428, 267 A.2d 31 (1970); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970).

22. 116 N.J. Super. 195, 281 A.2d 401 (1971).

exclusionary zoning restriction that required 70 percent of the proposed apartments in an area to be one-bedroom units. Such a restriction, coupled with the additional requirement that new apartment complexes contain swimming pools or tennis courts, severely limited the possibility that more families with school-age children would be added to the local public school system. The *Molino* court reasoned that even with an added tax burden the municipality could not use its zoning power to restrict its population to adults or to discriminate on the basis of economic status.[23] Although the court recognized that a municipality must be concerned with governmental costs, the attempt to limit expenditures should not be used to the extent that it determines who lives in a municipality. Zoning was not regarded as an appropriate solution to a municipality's collateral problems.[24]

In addition to regulating bedroom composition percentages, zoning ordinances frequently attempt to limit the number of apartment units to a particular percentage of single-family residences in the muncipality. In *J.D. Construction Corp. v. Board of Adjustment*,[25] the court invalidated an ordinance of the Township of Freehold that limited the number of apartment units to 15 percent of the single-family residences in the township. While control of density is a proper zoning objective, the court held that this type of provision did not serve such a purpose since "with each increase in the number of single-family residences the number of available apartment units likewise increases."[26]

Another exclusionary zoning practice involves ordinances imposing unreasonably high minimum square footage requirements for lot development in certain areas. Besides its apartment restrictions, the township of Freehold also engaged in this practice by enacting a minimum square footage requirement of 40,000 square feet in areas surrounded by manufacturing establishments and small residences.[27] In *Schere v. Township of Freehold*,[28] a New Jersey court held that fiscal considerations, although entitled to some weight in establishing zoning regulations, cannot justify the imposition of standards that result in the functional nonutilization of plaintiff's lands. Moreover, the court found that the township deliberately attempted to prevent the use of the land for low and middle income residences in order to reserve this property for more affluent residents. The practice revealed an

23. *Id.* at 203-04, 281 A.2d at 405-06.

24. *Id.* at 204, 281 A.2d at 406.

25. 119 N.J. Super. 140, 290 A.2d 452 (1972).

26. *Id.* at 149, 290 A.2d at 457.

27. On a comparative basis, Stephen Sussna Associates determined the costs of land, development, and home sales on the basis of a 40,000 square feet minimum and a more reasonable minimum lot size of 20,000 square feet. Using conservative real estate and engineering figures, it was demonstrated that if lots of a minimum of 40,000 square feet were required, the prices of homes would be prohibitively expensive. Such housing would not be constructed; thus, the land would lie fallow. A situation worse than confiscation would then ensue: the owners not only would be unable to use their land but also would be obligated to continue to pay their property taxes.

28. 119 N.J. Super. 433, 292 A.2d 35, *cert. denied*, 62 N.J. 69, 299 A.2d 67 (1972), *cert. denied*, 410 U.S. 931 (1973).

inappropriate relationship between zoning policy and housing needs.[29] Confiscation was established in that the ordinance prohibited reasonable use of the property. The municipality's alleged need for one-acre lots at some point in the future was dismissed by the court as sheer speculation.[30]

Attempts to effect exclusionary zoning through the use of minimum lot sizes illustrate the conflict between nonexclusionary zoning advocates and environmentalists. Resolving environmental impact issues such as the handling of surface drainage, sanitary sewage, potable water, noise, and traffic generation through the use of exclusionary zoning will have the net effect of further handicapping low income persons, especially members of minority groups, from gaining access to suburbia. According to a task force report sponsored by the Rockefeller Fund,[31] the goals of each group appear at times to be mutually exclusive. The study noted that "no growth is simply not a viable option in the country for the remainder of the century."[32] Further, there is little local resistance to regional environmental quality control since such regulations operate primarily to the disadvantage of nonresidents;[33] however, there has also been greater opposition to proposals for apartment projects in suburban areas than in the pre-ecology era.

Large Lot Zoning vs. Multi-family Housing

In the view of many local officials, factors such as rising school costs, diminishing tax bases, dwindling resources, and fears of invasion by disadvantaged residents contribute to the general desirability of the large residential lot. Many Americans believe that the large lot is also beneficial to the extent that it produces "an aesthetically pleasing environment, protects residential areas from the noise and dangers of heavy vehicular traffic, and provides space for privacy and leisure activities of both adults and children."[34] The prospective homebuyer's desire for neighborhood privacy may also explain in part his acceptance of uniformity in lot size. Such a concern would motivate both the buyer who plans to spend the rest of his life in a certain neighborhood and the buyer who intends to resell his house within a few years. The Douglas Commission Report indicates that if a purchaser buys in a community where a large lot zoning policy is maintained, he anticipates that later residential development will be priced at least as high as his own property.[35]

29. *Id.* at 437, 292 A.2d at 37.

30. *Id.* at 436, 292 A.2d at 36-37.

31. THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 15 (W. Reilly ed. 1973).

32. *Id.* at 19.

33. "[L]ocal government resistance to regional edicts involving [environmental] subjects will not be intense because the local constituencies, at least in the suburbs, will generally agree with the regional goals. Agreement, in fact, will be easy because the regional regulations will operate primarily to the disadvantage of nonresidents who might like to move in; existing homes and businesses will be largely unaffected." Heyman, *Legal Assaults on Municipal Land Use Regulating*, 5 URBAN LAWYER 1, 20 (1973).

34. NATIONAL COMMISSION ON URBAN PROBLEMS, FRAGMENTATION IN LAND USE PLANNING AND CONTROL 13 (Research Report No. 18 1969).

35. *Id.* at 20.

The goals of large lot zoning, however, could often be better served by the use of principles of design. Despite the many attempts of the National Association of Home Builders and the Urban Land Institute to apprise developers of the importance of this factor,[36] development layouts are often mediocre. Harold Miller, the Tennessee State Planning Commissioner, reflects the opinion of many on this point when he states that: "[M]ost developers do not want to understand. They are after prompt profit and do not want to tie up capital."[37] Since land speculation continues to be a dominant feature of the land market mechanism, sensible site planning and engineering have too often suffered as a consequence.[38]

The use of minimum lot size and related exclusionary zoning policies often reflect a community concern over the encroachment of apartment buildings. Even the United States Supreme Court, in *Village of Euclid v. Ambler Realty Co.*,[39] recognized that apartment houses under certain circumstances "come very near to being nuisances."[40] Since *Euclid*, the question of the constitutionality of state zoning appears to have been settled. In addition, until recently, courts have generally ignored the requirement that zoning be in accordance with a comprehensive plan.[41] It has been observed that courts for the most part have used "an inward set of restrictions adopted to abet a municipality's fiscal and social views without regard to the effect of the policies on the urban society."[42] For example, judges have traditionally remained unsympathetic to the situation of the immigrant occupant of a tenement. Professors Babcock and Bosselman have noted:

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36. *See, e.g.*, URBAN LAND INSTITUTE, NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT: A STUDY OF CONCEPTS AND INNOVATIONS (Technical Bulletin 40, 1961).

37. NATIONAL COMMISSION ON URBAN PROBLEMS, PROBLEMS OF ZONING AND LAND USE REGULATION 42 (Research Report No. 2, 1968).

38. Sussna & Kirchoff, *The Problems of Premature Subdivision*, 39 APPRAISAL J. 592 (1971).

39. 272 U.S. 365 (1926).

40. *Id.* at 395.

41. *See* Blucher, *Is Zoning Wagging the Dog?*, in PLANNING 1955. at 96, 100 (1956).

42. Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URBAN LAWYER 344, 347 (1971). In Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d, 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972), the town of Ramapo's timed development ordinance was upheld by the court. Ramapo, confronted with growth problems typical of many suburban communities, enacted the ordinance as a control measure in 1969. It provided that a residential developer must secure a special permit from the town board prior to applying for subdivision approval. The town board could either grant or deny such a permit by measuring availability of five essential public services: sanitary sewer or substitute disposal means; drainage facilities; public schools and parks; fire department protection; and state, county, and town roads. Points were assigned for the degree of availability of each service, and permit issuance was contingent on the cumulative effect of such service availability. Thus, the density of residential development was linked directly to the practical provision of necessary public services. The New York Court of Appeals stressed the desirability of avoiding premature subdivision and urban sprawl in such a fast-growing community. *See also* Watson v. Mayflower Property, Inc., 223 So. 2d 368 (4th D.C.A. Fla. 1969) (upholding the city of Ft. Lauderdale's zoning power and stressing the municipal objectives of avoiding extremely dense population patterns and excessive traffic).

> [W]hile to the immigrant the tenement was "home," to the landlord it was a piece of income producing real estate; only the single-family house was home. The judges absorbed the landlords' viewpoint.[43]

Courts have also found that multi-family housing produces congestion and other undesirable features.[44] These judicial attitudes have resulted in condoning the practice of segregating apartment buildings from single-family residences.[45] Municipalities have often sought to prevent the integration of apartments and single-family dwellings by designating a zone for apartments that was completely undesirable for single-family or other residential use.[46] Many municipalities and counties have virtually excluded multi-family dwellings.[47] Assuming that the most needed housing type is the multiple dwelling, the exclusion of multi-family housing is the most troublesome feature of the various exclusionary devices.[48] Recognizing this fact, some courts have begun to address the problem.[49] In fact, according to two recent studies, public receptivity to high-density living situations appears to be quite good.[50]

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43. Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1044, 1044-45 (1963).

44. City of Jackson v. McPherson, 162 Miss. 164, 138 So. 604 (1934); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

45. Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N.Y.S. 168 (1931), *aff'd per curiam*, 261 N.Y. 506, 185 N.E. 714 (1933); Ralph Peck Holding Corp. v. Burns, 16 Misc. 2d 256, 181 N.Y.S.2d 737 (Sup. Ct. 1958).

46. *See, e.g.*, Speroni v. Board of Appeals, 368 Ill. 568, 572, 15 N.E.2d 302, 304 (1938) (zoning ordinance that was upheld by the court permitted construction of apartment buildings in commercial or industrial districts).

47. For example, a study of exclusionary zoning in suburban northeastern New Jersey revealed the following county-wide percentages of multi-family housing: Morris, 0.8%; Somerset, 1.0%; Middlesex, 0.006%; and Monmouth, 0.004%. These four highly accessible counties comprise 1,003,904 acres; the total acreage allocated to multi-family housing is 2,262. Williams & Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey*, 22 SYRACUSE L. REV. 475, 486-87 (1971).

48. *Id.* at 485-88.

49. *See, e.g.*, Appeal of Girsh, 427 Pa. 237, 263 A.2d 395 (1970) (every municipality in state must have at least one acre in which multi-family dwellings are permitted). This represents a good start toward achieving a solution to a nationwide problem. *See* J. FRIED, HOUSING CRISIS, U.S.A. 48 (1971).

Courts have dealt not only with the problem of modest single-family homes and apartments but also with the location of mobile home parks. For example, a Michigan court has invalidated various municipal schemes that attempted to use ordinances to prohibit the location of mobile home parks within city boundaries. Criticizing the use of the term "general welfare" when it is a catchword to permit the effectuation of narrow desires, the court concluded that people have the right to be decently housed within their means. This right, noted the court, must be considered when assessing the reasonableness of local zoning restrictions. Moreover, the court declared that a zoning restriction may never stand, if its primary purpose is shown to operate for the exclusion of a certain class of residential dwellers. Bristow v. Woodhaven, 35 Mich. App. 205, 192 N.W.2d 548 (1972).

50. In one study, investigators of the University of Michigan's Survey Research Center assessed overall responses to selected, planned residential environments and to specific features within these environments. A total of 1,253 interviews were taken from people throughout the nation in communities with densities ranging from 2.7 to 14.1 dwelling units per acre. At every density level, about two-thirds of the respondents with children under 12 rated outdoor parks near their residences as "good" or "excellent." The data also

A Harvard Graduate School of Design study indicates that "our society can tolerate and, indeed, needs numbers of high-density situations, and we are singularly deficient in knowledge about that end of the scale."[51]

REMEDIES: NATIONAL, STATE, AND LOCAL PARTICIPATION

Paramount among the many possible remedies for exclusionary land use policies is the proposed federal land use legislation.[52] This legislation, which is designed to achieve environmental protection and provide for a more concentrated population in suburbia, would grant the states a total of $100 million annually for eight years to prepare comprehensive land use planning programs. The legislation would deal primarily with development in such critical areas as wetlands, flood-plains, land adjacent to highway interchanges, and airports. There are two main drawbacks to the proposed legislation. First, the paperwork and procedural complexity that builders encounter in acquisition, control, and development of real estate will be further aggravated by federal land use legislation.[53] Second, the administrators of a new program must avoid the mistakes made in past federal programs in this area, such as the so-called "701" program,[54] which, though designed to provide federal assistance to municipalities engaged in comprehensive planning, has often been used to frustrate multi-family housing.[55]

Another remedy to exclusionary zoning recommended by the Rockefeller Fund is that "state legislation should deprive local governments of the power to establish minimum floor area requirements in excess of a statewide minimum established by statutes."[56] The purpose of such local minimum floor area requirements is often to establish a minimum price per dwelling unit within a particular zone. To prevent this type of local zoning practice, some states in the late 1960's adopted statewide legislative remedies. The New York State Urban Development Corporation, for example, had the power to transcend local zoning. In the wake of the corporation's first exercise of its

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corroborated three other assumptions: 1) notwithstanding different densities, neighborhood satisfaction is related to good design; 2) the general level of maintenance is important; and, 3) provision for adequate outdoor space is significant. J. LANSING, R. MARANS, & R. ZEHNER, PLANNED RESIDENTIAL ENVIRONMENTS 106-34 (1970). Reaching a similar conclusion with respect to high density housing for the aged, a report by the University of Pennsylvania's Fels Center of Government found that "high-rise housing, designed specifically for the elderly, and low-rise retirement villages with a wide range of facilities and services have both been judged successful." THE FELS CENTER OF GOVERNMENT, UNIVERSITY OF PENNSYLVANIA, STANDARDS FOR SUBURBAN HOUSING MIX 129 (1971).

51. HARVARD GRADUATE SCHOOL OF DESIGN, 12TH URBAN DESIGN CONFERENCE, NEW COMMUNITIES: ONE ALTERNATIVE 123 (1968).

52. *Hearings on S. 268 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 1-183 (1973).

53. *See generally* Sussna, *Apartment Zoning Trends*, 5 URBAN LAWYER 120 (1973); PROFESSIONAL BUILDER, April 1974, at 7.

54. *See* 40 U.S.C. §461 (1970).

55. *See generally* Sussna, *Environmental Grantsmanship* in ENVIRONMENTAL LAW: PRACTICE AND PROCEDURE HANDBOOK 150-63 (A.B.A. ed. 1976).

56. THE USE OF LANDS: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 239 (W. Reilly ed. 1973).

powers, however, the 1973 New York legislature stripped it of much of its authority to regulate local zoning.[57]

A more successful Massachusetts anti-snob zoning statute enacted in 1969 empowered local boards of appeals and the State Housing Appeals Committee to override local zoning ordinances.[58] The Massachusetts statute provides that a qualified applicant — a public agency or a nonprofit or limited dividend organization — who proposes to build low or moderate income housing may file an application with the local board of appeals and may appeal an unfavorable decision to the State Housing Appeals Committee. After a hearing, the Committee then must decide whether the municipality's rejection of the applicant's proposal to build low or moderate income housing was "reasonable and consistent with local needs."[59]

In *Board of Appeals v. Housing Appeals Committee*,[60] the Massachusetts supreme court upheld the statute. Reviewing the legislative history, the court concluded that the legislature's intent in adopting the anti-snob zoning statute was to afford relief from exclusionary practices that prevented construction of badly needed low and moderate income housing. The court found that the legislation did not violate the home rule amendment in the Massachusetts state constitution.[61] In addition, the statute was not invalid as "spot zoning" since it served the public welfare rather than merely provided economic advantage to the landowner.[62] Recognizing that municipal zoning obstructed development of low and moderate income housing in the suburbs at a time when such housing needs could not be provided in the central cities, the court reasoned that:

> [T]his housing crisis demands a legislative and judicial approach that requires the strictly local interests of the town to yield to the regional need for the construction of low and moderate income housing. [The anti-snob zoning statute] represents the Legislature's use of its own zoning powers to respond to this problem.[63]

The court found that by limiting the extent to which a local board of appeals may override municipal zoning regulations, the legislature recognized that local interests must at some point yield to the general public need for housing.[64] This balancing test established the principle that each municipality must shoulder a share of the responsibility necessary to mitigate the housing crisis that confronted Massachusetts.

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57. *See generally* N.Y. UNCONSOL. LAWS §§6251-85 (McKinney Supp. 1975).
58. MASS. ANN. LAWS ch. 40B, §§20-23, ch. 23B, §5A (1973).
59. MASS. ANN. LAWS ch. 40B, §23 (1973).
60. Mass. , 294 N.E.2d 393 (1973).
61. *Id.* at , 294 N.E.2d at 407-10.
62. *Id.* at , 294 N.E.2d at 411. Spot zoning was defined as "'singling out . . . one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, *all for the economic benefit of the owner* of that lot.'" *Id.* at , 294 N.E.2d at 410 (emphasis original), *citing* Lamarre v. Commissioner of Pub. Works, 324 Mass. 542, 545-46, 87 N.E.2d 211, 213 (1949).
63. Mass. at , 294 N.E.2d at 423-24.
64. *Id.* at , 294 N.E.2d at 413.

Another example of a state policy against exclusionary zoning was reflected in an administrative agency's rejection of one township's bid for state funds. Although Upper St. Clair Township, a suburb of Pittsburgh, had been very successful in the past in getting state aid, the Pennsylvania Department of Community Affairs' administrative panel recently rejected Upper St. Clair's application for additional state recreation funds on the ground that the township practiced exclusionary zoning and was thus ineligible to receive state assistance.[65]

State and federal efforts to improve regional planning and land use control are not sufficient; local governments must be involved in this effort as well. There are recent indications that local governments are willing to take efforts to remedy exclusionary land use control practices. One central city blocked funds sought by a suburb that had engaged in unfair housing practices. New Britain, Connecticut, an aging central city, challenged the propriety of the proposed use of federal funds for its suburban neighbor, Berlin. Officials of New Britain maintained that Berlin's inequitable restriction on the natural growth of the regional housing market placed unnatural pressure on the central city's housing and sewer resources.[66] Opposing the construction of a system to reduce water pollution in Berlin, New Britain officials argued that their jobless residents, who were excluded from Berlin, would benefit little from the decreased water pollution in the Berlin area. As a result of the challenge, Berlin officials have undertaken a serious study of the issue of providing apartments in their suburban confines.[67]

There have been many local efforts to encourage the development of more equitable housing patterns. In a San Diego experiment, for example, a developer was required to monitor the city's progress toward achieving a balanced community, to seek professional assistance from an experienced behavioral science service research group, and to keep the city advised of the situation. Community design, school location, advertising and sales methods, community identity, and analysis of housing needs were some of the key determinants in achieving a balanced community.[68] In a similar effort, the Metropolitan Council of the Twin Cities of Minneapolis and St. Paul prepared a plan allocating low and moderate income housing. In identifying areas of high priority necessary to implement this plan, the Council stressed factors such as the availability of mass transit; employment concentration; location of major shopping centers; presence of highways, sewage, and utility systems; and the placement of schools.[69]

RECOMMENDATION

In the 1960's federal grants for land use control projects were made con-

65. Sussna, *Exclusionary Zoning* in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 118 (1974).

66. *Id.* at 118-19.

67. *Id.*

68. *See* COUNTY OF SAN DIEGO ENVIRONMENTAL DEVELOPMENT AGENCY, ENVIRONMENTAL QUALITY INDEX — A FEASIBILITY STUDY, COUNTY OF SAN DIEGO, REGIONAL ISSUES 111-15 (1972).

69. *See* METROPOLITAN COUNCIL OF THE TWIN CITIES AREA — METROPOLITAN DEVELOPMENT GUIDE, MAJOR DIVERSIFIED CENTERS — POLICIES, SYSTEMS PLAN PROGRAM 30 (1970).

tingent on area-wide planning for open-space acquisition.[70] It would appear that housing and community development goals of the 1970's could be effectuated by similar federal involvement. At the same time, however, greater state and local participation in land use problems will be necessary to solve our current problems.[71] In our efforts to achieve more equitable housing patterns in our communities, there are many tools available,[72] but as a first step, we must begin now to rid ourselves of one of our most serious housing ills — exclusionary zoning.[73]

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70. 40 U.S.C. §461 (1970). *See also* U.S. Dep't of Housing and Urban Development, *Comprehensive Planning Assistance Requirements and Guidelines for a Grant* in HUD HANDBOOK ch. 4, §5 (1972).

71. See text accompanying notes 57-69 *supra*.

72. *See* Badler, *Municipal Zoning — Liability in Damages — A New Cause of Action*, 5 URBAN LAWYER 25 (1973). As a more affirmative device, the idea of using special districts in financing and facilitating urban growth deserves further study and possible application. *See* Mitchell, *The Use of Special Districts in Financing and Facilitating Urban Growth*, 5 URBAN LAWYER 185 (1973). *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (the Texas system of financing public schools largely dependent on local property taxes does not violate the equal protection clause of the fourteenth amendment).

73. For thorough discussions of techniques to foster inclusionary land use control, *see* H. FRANKLIN, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 1-17 (1974); C. HARR & D. IATRIDES, HOUSING THE POOR IN SUBURBIA 283-430 (1974); L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES 7-45, 201-66 (1974).