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Exclusionary Zoning's Compromise of First Amendment Values

Introduction

Exclusionary zoning is defined as a set of governmental land use regulations which have the intended or unintended consequences of keeping vast segments of the population out. Courts to address the issue have cast the matter in terms of constitutional due process, equal protection and general welfare considerations. This paper argues that exclusionary zoning compromises first amendment associational protections, insofar as it can work to create an individual and collective deprivation of associational opportunity and freedom.

I. The 1st Amendment Associational Values are Compromised When Zoning Is Exclusionary

Exclusionary zoning is any regulation, rule, or practice “that may prevent certain populations from being able to live in a specific area.”¹ It has been a controversial practice and it has been litigated many times in both state and federal court, though more often in state courts. The first amendment right to association has also been litigated numerous times. However, there are no cases where a plaintiff has argued that his or her first amendment right to association has been violated by a municipality’s exclusionary zoning ordinance that excludes low income people. It is appropriate however, to consider framing the issue of land use exclusion with reference to first amendment values.

A. Right to Association

The Supreme Court has construed the first amendment to include the right to freedom of association, even though the actual text of the first amendment does not explicitly mention this

¹Nicole Sagullo, *Exclusionary Zoning: Unequal Unequal Opportunities*, THINGS I THINK (Sep. 16, 2012), <https://commons.trincoll.edu/nsagullo/2012/09/16/exclusionary-zoning-unequal-opportunities/>.

right.² “In 1958, the Court noted in *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958) that freedom of association is a ‘peripheral’ first amendment right. The first amendment protects two types of associations: the right of ‘intimate’ association and the right of ‘expressive’ association.”³ The right to freedom of association is closely intertwined with freedom of expression.

The right of “intimate association protects a private realm of family life from interference by the state unless there is a compelling justification.”⁴ The Supreme Court decided that familial relationships are an important individual freedom that falls under the first amendment.⁵ “In this respect, freedom of association receives protection as a fundamental element of personal liberty.”⁶ “Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”⁷ “Determining the limits of state authority over an individual’s freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal

² See Laura Curry Sloan, *Constitutional Law-First Amendment Right of Association-Roberts v. United States Jaycees*, 33 U. KAN. L. REV. 771, 772 (1985).

³ *Id.*

⁴ *Id.* at 773.

⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 3249, 82 L. Ed. 2d 462 (1984).

⁶ *Jaycees*, 468 U.S. at 618.

⁷ *Id.* at 619.

attachments.”⁸ The courts have protected the intimate right to association in several kinds of family relationships: marriage, raising and education of children, and living with relatives.⁹ While the court has not previously expanded the intimate right to association to a relationship with a business, there are other relationships that the court may protect.¹⁰

The Court has also recognized a right to associate to partake in activities that are expressly protected by the first amendment, such as the exercise of religion, speech, assembly, and petition for redress of grievances.¹¹ “The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.”¹² For example, in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 3249, 82 L. Ed. 2d 462 (1984), the Court held that “the intrinsic and instrumental features of constitutionally protected association may, of course, coincide.”¹³ In particular, when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated.”¹⁴ The Supreme Court has noted that relevant factors in determining expressive association “include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.”¹⁵ There are limitations to the right to association and “infringements on that right may be justified by regulations adopted to

⁸ *Id.* at 620 (citing *Runyon v. McCrary*, 427 U.S. 160, 187–189, 96 S.Ct. 2586, 2602–2603, 49 L.Ed.2d 415 (1976) (POWELL, J., concurring)).

⁹ *Id.* at 619-20.

¹⁰ *Id.* at 620.

¹¹ *Id.* at 618.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 620.

serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹⁶

The Court has determined that “the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints.”¹⁷ The Supreme Court noted that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹⁸ Therefore, the organization or group that is claiming the right of expressive association can’t exclude whoever it wants just because it feels that those people are not in accordance with its message and then face no inquiry under antidiscrimination laws.¹⁹ The court will look at how the organization’s viewpoints would be compromised by the person or group of people being members of the organization.²⁰

In *Roberts v. US Jaycees*, two Minnesota chapters, Minneapolis and St. Paul, of the US Jaycees wanted to allow women as members of their local chapters.²¹ The US Jaycees is a national non-profit organization whose bylaws state that its goals are “such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary

¹⁶ *Id.* at 623.

¹⁷ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 120 S. Ct. 2446, 2451, 147 L. Ed. 2d 554 (2000).

¹⁸ *Id.* at 647.

¹⁹ *See Boy Scouts of Am.*, 530 U.S. at 653.

²⁰ *Id.*

²¹ *Jaycees*, 468 U.S. at 614.

education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation, and to develop true friendship and understanding among young men of all nations.”²² The US Jaycees organization allows men between the ages of 18 and 35 to be regular members and it has a separate category of associate members for women and men over 35.²³ An associate member is not the same as a regular member; an associate member may not vote, hold local or national office, or participate in certain leadership training and awards programs.²⁴

The national organization decided to revoke the charters of the Minneapolis and St. Paul chapters because these two chapters had added women as regular members.²⁵ The two Minnesota chapters sued the national organization for violating a Minnesota anti-discrimination statute.²⁶ The courts had to decide if the associational rights of the US Jaycees organization would be infringed upon if the organization had to abide by the Minnesota anti-discrimination statute and accept women as regular members.²⁷

The United States Supreme Court first looked at whether the Jaycees organization met the requirements for an intimate association.²⁸ The Court decided the Jaycees chapters were not

²² *Id.* at 612-13.

²³ *See Id.* at 613.

²⁴ *See Id.*

²⁵ *See Id.* at 614.

²⁶ *See Id.*

²⁷ *See Id.*

²⁸ *See Id.* at 620.

very selective in membership and the chapters were not small.²⁹ The Court also noted that strangers to the organization are involved in the formation and maintenance of the organization.³⁰ Therefore, the court decided that the chapters of the Jaycees cannot exclude women and have that decision protected under the constitutional protection of intimate association.³¹ The court then analyzed whether requiring the Jaycees to accept women as regular members in compliance with Minnesota's anti-discrimination statute would infringe upon the Jaycees' freedom of expressive association.³²

The right for a group to come together and exercise its rights to speak, practice religion, and petition the government naturally flows from an individual right to do those activities.³³ The Court observed that "[a]ffording protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."³⁴ Thus, the Court found that in addition to associating for activities explicitly stated in the first amendment, there is also the "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."³⁵ The Court held that although male members in the Jaycees organization had the right to expressive association, that right could be infringed upon because of Minnesota's antidiscrimination statute that protected women's rights and the

²⁹ *See Id.* at 621.

³⁰ *See Id.*

³¹ *See Id.*

³² *See Id.* at 622.

³³ *See Id.* (internal citations omitted).

³⁴ *Id.*

³⁵ *Id.*

antidiscrimination statute served a legitimate purpose.³⁶ The Court ultimately decided that the Jaycees had to allow women as full members.³⁷

In *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000), James Dale was an adult member of the Boy Scouts and he was an assistant scoutmaster of Troop 73 in New Jersey.³⁸ Dale was a gay man and a newspaper published an interview with Dale, which discussed his advocacy of gay role models for gay teenagers.³⁹ When the Boy Scouts organization found out about Dale's homosexuality, they sent him a letter revoking his adult membership and the reason was that they "specifically forbid membership to homosexuals."⁴⁰ Dale claimed that the decision of the Boy Scouts violated "New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation."⁴¹ The Boy Scouts argued that forcing them to have Dale as a member violated its first amendment right to association.⁴² The Court decided that it could not "compel the organization to accept members where such acceptance would derogate from the organization's expressive message."⁴³ Thus, the Court decided that the Boy Scouts could not be forced to accept Dale as an adult member and scoutmaster.⁴⁴

³⁶ *Id.* at 623.

³⁷ *Id.* at 629.

³⁸ *See Boy Scouts of Am.*, 530 U.S. at 644.

³⁹ *See Id.* at 645.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See Id.* at 645.

⁴³ *Id.* at 661.

⁴⁴ *See Id.* at 661.

B. Exclusionary Zoning

While all zoning ordinances exclude someone or something, exclusionary zoning ordinances are more sinister in that the group who is excluded is low-income and usually a member of a minority group.⁴⁵ Exclusionary zoning has been defined as “local land-use controls that have the effect of excluding most low-income and many moderate-income households from suburban communities and, indirectly, of excluding most members of minority groups....”⁴⁶ Exclusionary zoning has also been called “snob zoning” because it is zoning to exclude certain people, akin to how a snob would treat those deemed “less desirable people.”⁴⁷ A municipality will enact a zoning ordinance that keeps out buildings that are usually occupied by lower-income people or putting restrictions on single-family housing units that will make it impossible for lower-income people to afford a single-family house in the town.⁴⁸ Exclusionary zoning typically uses three techniques to keep out certain groups: (1) it raises the cost of housing generally, (2) it restricts the supply of low-income housing types and mandates minimum land and housing purchases, and (3) it zones out families with school-aged children.⁴⁹ For example, a municipality may only zone a small percentage of land “for certain types of housing that are generally less

⁴⁵ Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 8 (2001).

⁴⁶ Paula Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988) quoting D. MADELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 304 (1985).

⁴⁷ Equitable Housing Institute, *Exclusionary Housing Policies*, Center for Social Welfare Under the American Constitutions, http://cswac.org/index.php?option=com_content&view=article&id=47&Itemid=29.

⁴⁸ Span, *supra* note 45, at 8.

⁴⁹ Span, *supra* note 45 at 9.

expensive than single-family homes, such as apartment buildings, mobile homes, and attached townhouses.”⁵⁰

Some may assert that exclusion is simply a means of class-based ordering. But the problem is a serious one for everyone, including the people of that community who are seeking to keep some group out, the people who are excluded from that community, and even those in other communities who are not directly affected by the exclusionary zoning ordinance. Some of the negatives of exclusionary zoning are that it “might decrease housing supply and raise housing costs, contribute to urban sprawl, create a mismatch between supply and demand for local government services, create a mismatch between supply and demand for occupational opportunity, create concentrations of poverty with attendant feedback effects, and increase racial segregation with attendant negative effects on race relations.”⁵¹ “Even if exclusionary zoning’s primary effect is not on minorities and the poor, it still is unfair to those it does keep out, such as the teachers and police officers who work in towns where they cannot afford to live, as well as those of moderate means generally.”⁵²

There are other parties who lose out when a community engages in exclusionary zoning, such as “(1) developers who lose the potentially higher profits of building affordable housing, (2) landowners who must forgo higher land values that would result if higher-density development were allowed, and (3) those lower-income households who either become homeless or pay a higher proportion of their disposable income for housing than they would pay if adequate

⁵⁰ Span, *supra* note 45, at 8.

⁵¹ Span, *supra* note 45, at 15.

⁵² Span, *supra* note 45, at 22.

affordable housing were available.”⁵³ Additionally, the prices of home in an area with exclusionary zoning are raised.⁵⁴ So, those who purchase a home in a town which has enacted an exclusionary zoning ordinance pay a higher price on the home, in essence an economic rent.⁵⁵

While there are many negatives of exclusionary zoning, proponents of exclusionary zoning point out that setting density limits and other barriers to entry succeeds in “[p]reventing overcrowding and undue concentration, as well as lessening street congestion, obviously can justify the use of exclusionary techniques, but even the safety, light and air, and infrastructure clauses can do so.”⁵⁶ “Enacting zoning for the very purposes for which it was intended can raise obstacles to the construction of lower-income housing.”⁵⁷ “Local government officials benefit their constituents in two ways by engaging in exclusionary zoning: they increase existing home values within the jurisdiction and increase the ratio of services to property tax rates.”⁵⁸ “Socially, even though the benefits of diversity are widely touted, there is also evidence that economic homogeneity at the local level might have some beneficial effects. For example, some studies show that even when controlling for average income, racial composition, and population density, economic homogeneity is correlated with less violent crime, less property crime, and better

⁵³ See Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Winter 2003, at 229, 232-33.

⁵⁴ The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston Areas. Center for Housing Policy.
http://www.nhc.org/media/documents/IZ_in_SF,_DC,_Boston.pdf?phpMyAdmin=d3a4afe4e37aae985c684e22d8f65929.

⁵⁵ Lehmann, *supra* note 53, at 232-33.

⁵⁶ Span, *supra* note 45, at 10.

⁵⁷ Span, *supra* note 45, at 10.

⁵⁸ Lehmann, *supra* note 53, at 232.

academic performance by school students.”⁵⁹ In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), the United States Supreme Court recognized that in some instances there are sound reasons for zoning restrictions, such as when the public health, safety, morals, or general welfare requires these zoning restrictions.⁶⁰

In *Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 2207, 45 L. Ed. 2d 343 (1975), the United States Supreme Court addressed the issue of standing for an exclusionary zoning case.⁶¹ Just like any other court case, the plaintiff must have standing to bring the claim. The Court looked at whether “these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, ‘none may seek relief on behalf of himself or any other member of the class.’”⁶² “We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of ‘a real need to exercise the power of judicial review’ or that relief can be framed ‘no (broader) than required by the precise facts to which the court's ruling would be applied.’”⁶³ Therefore, it is important that any exclusionary zoning challenge is brought by a

⁵⁹ Span, *supra* note 45, at 11-12 (citing Judith R. Blau & Peter Michael Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114 (1982); David Jacobs, *Inequality and Economic Crime*, 66 SOCIOLOGY & SOCIAL RES. 12 (1981); Byron Brown, *Achievement, Costs, and the Demand for Public Education*, 10 *West. Econ. J.* 198 (1972).

⁶⁰ *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (1926).

⁶¹ *Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 2207, 45 L. Ed. 2d 343 (1975).

⁶² *Warth*, 422 U.S. at 502.

⁶³ *Warth*, 422 U.S. at 508 (internal citations omitted).

plaintiff who could realistically live in the community that has the exclusionary zoning ordinance if there was no ordinance.

Also, if low income people can't afford to live in a suburban community because of exclusionary zoning measures, then there is a serious problem for everyone that affects society as a whole. Society should be inclusionary, not exclusionary. "A few state and local governments have recently begun to acknowledge the relationship between urban blight and suburban zoning and respond to the inequities of the situation."⁶⁴ Some towns have not only ended exclusionary zoning, but have actually started inclusionary zoning ordinances, which are designed so that people of lower income levels are able to live in the community.⁶⁵ "Inclusionary zoning is a market-based approach, in which private developers are required or offered incentives to set aside a modest share of units in new developments for low- and moderate-income families."⁶⁶ Some examples of inclusionary zoning ordinances or plans are to require a certain percentage of a new building project to include low income housing and to offer a builder the ability to build more units than the ordinance would allow for as long as a certain number of units will be for low income housing.⁶⁷

Over 200 towns nationwide have enacted inclusionary zoning ordinances.⁶⁸ A municipality can develop a mandatory inclusionary zoning ordinance or a voluntary inclusionary zoning ordinance.⁶⁹ Under a mandatory inclusionary zoning ordinance, a town requires new

⁶⁴ Note, *Exclusionary Zoning*, 91 HARV. L. REV. 1624, 1632 (1978).

⁶⁵ *Id.*

⁶⁶ *Inclusionary Zoning*, CENTER FOR HOUSING POLICY, <http://inclusionaryzoning.org/> (last visited Apr. 29, 2013).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

developments to include a certain percentage of affordable housing. For a voluntary inclusionary zoning ordinance, a builder can elect to create affordable housing in a new development, usually because there is a benefit to the builder for doing so, but the builder is not required to create the affordable housing. Incentives for builders to create affordable housing include density bonuses and fast track permitting, which allow builders to build more units and quicker.⁷⁰

Montgomery County, Maryland enacted an inclusionary zoning law in 1974, ahead of the wave of exclusionary zoning cases that have shaped exclusionary zoning across the country.⁷¹ Currently, there are over 300 municipalities with inclusionary zoning ordinances.⁷² Inclusionary zoning is more attractive than traditional affordable housing programs for a town because it requires less direct public subsidy.⁷³

One of the leading states in affordable housing and inclusionary zoning is Massachusetts.⁷⁴ Even affluent suburbs of Boston have approved building for low-income housing.⁷⁵ Massachusetts's "Zoning Act has explicitly authorized the use of special permits to grant incentives for development of low- and moderate-income housing."⁷⁶ "Massachusetts' precedent-setting statute, Chapter 40B2, allows developers of affordable housing to sidestep

⁷⁰ *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston Areas*, CENTER FOR HOUSING POLICY, http://www.nhc.org/media/documents/IZ_in_SF,_DC,_Boston.pdf?phpMyAdmin=d3a4afe4e37aae985c684e22d8f65929.

⁷¹ *Inclusionary Zoning*, *supra* note 66.

⁷² *The Effects of Inclusionary Zoning*, *supra* note 70.

⁷³ *Id.*

⁷⁴ Clark Ziegler, *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC AFFORDABLE HOUSING POLICY REVIEW, available at http://www.nhc.org/media/documents/IZ_lessons_in_MA.pdf.

⁷⁵ *Id.*

⁷⁶ *Id.*

zoning and all other local regulations.”⁷⁷ It is encouraging that Massachusetts has been proactive in setting up inclusionary zoning measures, but there are still many states that have not gotten rid of exclusionary zoning measures.

C. The Most Significant State Challenge to Exclusionary Zoning: Mt. Laurel

The New Jersey Supreme Court has been a leading court in combating the problem of exclusionary zoning.⁷⁸ The Supreme Court heard three cases concerning exclusionary zoning over the span of eleven years, in what are now known as the Mount Laurel decisions.⁷⁹ The first landmark case, *Mount Laurel I*, was a major victory for those trying to eradicate exclusionary zoning and provide affordable housing. The Court held “that the state constitutional requirements of substantive due process and equal protection, as well as the state’s inherent police powers to regulate land use for the general welfare, mandate that every ‘developing municipality’ ensure a realistic opportunity for the construction of its ‘fair share of the present and prospective regional need’ for low and moderate income housing.”⁸⁰ In *Mount Laurel I*, the Court found the exclusionary zoning ordinance unconstitutional because the town had excluded low-income people by enacting the exclusionary zoning ordinance.⁸¹ The Court held that a town would “satisfy that constitutional obligation by affirmatively affording a realistic opportunity for the

⁷⁷ Philip B. Herr, *Zoning for Affordability in Massachusetts: An Overview*, NHC AFFORDABLE HOUSING POLICY REVIEW, available at http://www.nhc.org/media/documents/IZ_lessons_in_MA.pdf.

⁷⁸ Katrin C. Rowan, *Anti-Exclusionary Zoning in Pennsylvania: A Weapon for Developers, a Loss for Low income Pennsylvanians*, 80 TEMPLE L. REV. 1272, 1277-78 (2007).

⁷⁹ *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter *Mount Laurel I*]; *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) [*Mount Laurel II*]; *Hills Development Co. v. Township of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986) [hereinafter *Mount Laurel III*].

⁸⁰ Franzese, *supra* note 46.

⁸¹ *S. Burlington County N.A.A.C.P. v. Mount Laurel Twp.*, 92 N.J. 158, 204-05, 456 A.2d 390, 413 (1983).

construction of its fair share of the present and prospective regional need for low and moderate income housing,”⁸² but there were still many questions left for the towns as to how to meet the fair share requirements. When the legislative branch fails to enact legislation to combat exclusionary zoning, action by the judiciary, such as in the Mount Laurel cases, can prompt the legislative branch to delve into the problem and take action.⁸³

In Mount Laurel II, the New Jersey Supreme Court “established guidelines and procedures that would ensure active and detailed judicial supervision of local compliance.”⁸⁴ Mount Laurel II also set up an innovative way for the state to handle any Mount Laurel cases, by dividing the state into three regions and assigning a judge to each region.⁸⁵ The legislative branch had failed to act to create a system for low income housing, so the court stepped in and gave the three judges an assortment of remedies to alleviate any non-compliance.⁸⁶ The public’s reaction to Mount Laurel was mixed, and it led to both the executive and legislative branches taking a more active role in determining land-use policies and remedies.⁸⁷ Governor Thomas H. Kean then signed into law the Fair Housing Act.⁸⁸ The Fair Housing act created the Council on Affordable Housing, an administrative agency, which replaced the previous system of three judges deciding cases in their separate regions.⁸⁹

⁸² *Id.*

⁸³ Franzese, *supra* note 46.

⁸⁴ Tarr & Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 515 (1984).

⁸⁵ Mount Laurel II at 253-54, 456 A.2d at 439.

⁸⁶ Mount Laurel II at 352, 456 A.2d at 490.

⁸⁷ Franzese, *supra* note 46, at 35.

⁸⁸ *Id.* at 36.

⁸⁹ *Id.* at 36-37.

In Mount Laurel III, the New Jersey Supreme Court approved of the legislature's Fair Housing Act and strengthened the Council on Affordable Housing's power.⁹⁰ Scholars feel that the "[s]upreme Court's retreat in Mount Laurel III is both appropriate and predictable."⁹¹

After Mount Laurel III, there was about a twenty year period without any landmark New Jersey court cases concerning exclusionary zoning. There has been little in the media about exclusionary zoning problems and one would think that the problems have washed away, but that is far from the reality of the situation. Exclusionary zoning issues were thrust into the limelight in 2010 when New Jersey Governor Chris Christie announced that he wanted to abolish the Council on Affordable Housing (COAH).⁹² Christie wanted to transfer the responsibilities of the COAH to his cabinet, effectively giving the executive branch more control over exclusionary and inclusionary zoning and affordable housing decisions.⁹³ It has been noted that Christie is not a proponent of high density development, so bringing the function of the COAH under the executive branch would spell trouble for affordable housing and inclusionary zoning efforts.⁹⁴

Christie's decision to abolish the COAH has been met with stringent opposition and this has resulted in a legal battle that has reached the New Jersey Supreme Court.⁹⁵ On January 28,

⁹⁰ *Id.* at 40-42.

⁹¹ *Id.* at 49.

⁹² Bob Jordan, *Looking for Affordable Housing in NJ? Good Luck, Report Says*, COURIERPOSTONLINE.COM, http://fairsharehousing.org/pdf/071111_-_Looking_for_affordable_housing_in_N.pdf.

⁹³ Salvador Rizzo, *At N.J. Supreme Court, Lawyers Argue Over Christie's Power on Affordable Housing*, January 29, 2013, http://www.nj.com/politics/index.ssf/2013/01/at_nj_supreme_court_lawyers_ar.html.

⁹⁴ Timothy Lee, *Property Rights Apply to Poor People Too*, February 28, 2012, <http://www.forbes.com/sites/timothylee/2012/02/28/property-rights-apply-to-poor-people-too>.

⁹⁵ Rizzo, *supra* note 93.

2013, the New Jersey Supreme Court heard oral argument in this matter.⁹⁶ The Supreme Court has not issued a decision in this case yet. This Supreme Court decision is important not only for exclusionary zoning in New Jersey, but also for how much control the governor has to make other agencies fall under the executive branch.⁹⁷ “As the battle over COAH has worked its way to the Supreme Court, the Christie administration invoked a provision of Assembly bill A-500, which had been signed into law in July 2008 by then-Gov. Jon Corzine.”⁹⁸ Assembly bill A-500 changed affordable housing rules and required towns to spend the money it had collected within four years, which has left many towns in a state of limbo and uncertainty as they await the Supreme Court’s decision.⁹⁹

On November 14, 2012, the New Jersey Supreme Court heard oral argument in *In re N.J.A.C. 5:96 and 5:97*,¹⁰⁰ in what is likely to be another important exclusionary zoning decision that will shape the future of exclusionary zoning in New Jersey. New Jersey’s highest court heard over five hours of oral argument about what responsibilities municipalities have to accommodate low income people.¹⁰¹ The case concerns the third-round regulations that were put

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ NJ Spotlight, *With Future of COAH Still Cloudy, Many Towns Shelve Plans to Build Affordable Housing*, EAST WINDSOR PATCH, March 26, 2013, <http://eastwindsor.patch.com/articles/with-future-of-coah-still-cloudy-many-towns-shelve-plans-to-build-affordable-housing>.

⁹⁹ *Id.*

¹⁰⁰ Adam Gordon, *Future of Fair Housing in New Jersey at Stake; Supreme Court to Hear Argument November 14*, FAIR SHARE HOUSING CENTER, October 17, 2012, <http://fairsharehousing.org/blog/entry/future-of-fair-housing-in-new-jersey-at-stake-supreme-court-to-hear-argumen/>.

¹⁰¹ Hank Kalet, *Affordable Housing Argued Before State Supreme Court*, NEW MILFORD PATCH, November 17, 2012, <http://newmilford-nj.patch.com/articles/affordable-housing-rules-challenged-in-court>.

in place by the COAH.¹⁰² The COAH adopted third-round regulations in 2004, but the Appellate Division invalidated those regulations in *In re Adoption of N.J.A.C. 5:94 and 5:95*, 390 N.J. Super. 1, 73-74 (App. Div. 2007).¹⁰³ In 2008, the COAH adopted a new set of Third Round regulations, but over twenty-two municipalities and public interest groups challenged these regulations.¹⁰⁴ In 2010, the New Jersey Appellate Division decided that the COAH must change the new third round regulations within five months.¹⁰⁵ On March 31, 2011, the New Jersey Supreme Court granted certification in the case, so any changes to the third round regulations were put on hold.¹⁰⁶ The first and second rounds of regulations were quota systems, which required towns to build a set number of low-income residences.¹⁰⁷ The first round of regulations was issued in 1987 and the second round of regulations was issued in 1993.¹⁰⁸ The third round of regulations should have been issued in 1999, but they were not created until 2004.¹⁰⁹ The third round of regulations set up a growth share system.¹¹⁰ The New Jersey Supreme Court's decision in both of these cases will be important for the future of affordable housing measures in New Jersey and all the work of the *Mt. Laurel* decisions may be undone.

¹⁰² Jennifer P. Smith, NJ Supreme Court to Hear Oral Argument on COAH Third Round Affordable Housing Regulations, GIBBONS, October 26, 2012, <http://www.rpelawalert.com/2012/10/articles/development/nj-supreme-court-to-hear-oral-argument-on-coah-third-round-affordable-housing-regulations>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Kalet, *supra* note 101.

¹⁰⁸ Kalet, *supra* note 101.

¹⁰⁹ Kalet, *supra* note 101.

¹¹⁰ Kalet, *supra* note 101.

II. Linking Associational Freedoms to Inclusionary Zoning

A. Skyboxification of America

As time goes on, America moves more and more towards a society that has a small minority of people who enjoy the greatest benefits. This minority wields the greatest power in the economic, political, and social sense. The reason that this minority has the power is money and the way that American society views the marketplace.

Michael Sandel has written about the idea of the syboxification of America, as a comparison to America's sports stadiums that now have skyboxes.¹¹¹ In a sports stadium, the wealthy people are able to afford to purchase a skybox and sit atop the stadium to view the games, often with the best sightlines and benefits. The rest of the audience at a sports stadium sits in the "regular seats" down below and may not have as good a view of the field and the action as those sitting in the skyboxes. There is also this idea that everyone who is sitting in the regular seats at the stadium hopes to one day sit in a skybox. This idea of "skyboxification" that is found in sports is a metaphor for many aspects of American life, as evident when one reviews the statistics in Sandel's book of communities and the marketplace. It is truly remarkable how many things one can purchase in the marketplace, that a decade or two ago people could never imagine being for sale.

Sandel wrote, "Of course, people disagree about the norms appropriate to many of the domains that markets have invaded -- family life, friendship, sex, procreation, health, education, nature, art, citizenship, sports, and the way we contend with the prospect of death."¹¹² Sandel

¹¹¹ MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY 172-76 (2012).

¹¹² Michael Sandel, *What Money Can't Buy: The Skyboxification of American Life*, HUFFINGTON POST, April 12, 2012, www.huffingtonpost.com/michael-sandel/what-money-cant-buy_b_1442128.html.

feels that when the character of a good or service changes, it is up to society to discuss and figure out in what areas markets belong.¹¹³

If the current market system continues to expand and put a price on more and more things and services, there is no telling where it will stop. Some can argue, however, that the idea of a free market place is what is so great about American society and that if you do have someone willing to pay a price for something, then why not take advantage of that situation or opportunity? Those who are not able to afford the price may be upset because they can't receive the benefit, but they are not really against the idea of the benefit in exchange for money. Some will call this ingenuity or innovation, but others will call it foolish and greed. Sandel writes, "When we outsource war to private military contractors, and when we have separate, shorter lines for airport security for those who can afford them, the result is that the affluent and those of modest means live increasingly separate lives, and the class-mixing institutions and public spaces that forge a sense of common experience and shared citizenship get eroded."¹¹⁴

"Unless the rich and poor encounter one another in everyday life, it is hard to think of ourselves as engaged in a common project."¹¹⁵ This common project idea is what is so important because there is interconnectedness of people in a community and of one community with another community. If we try to have a separate class of elite people that don't interact with the poorer people in society, then we are missing out on the chance to bond together, support one another, and learn from one another. When a family moves into a community that is opportunity rich from an area that did not provide as many opportunities, the family has a chance to flourish

¹¹³ *Id.*

¹¹⁴ Thomas L. Friedman, *The 'skyboxification' of American life*, May 13, 2012, <http://www.chron.com/opinion/outlook/article/Friedman-The-skyboxification-of-American-life-3555428.php>.

¹¹⁵ *Id.*

and that can have an impact on future generations.¹¹⁶ “Studies of the Gatreux Program in Chicago show that moving into areas of high opportunity increases adult employment rates, child educational attainment, and earnings of poor residents who move from inner cities to suburbs.”¹¹⁷

Healthcare is one of the areas where the wealthier are able to receive an advantage over those with less money.¹¹⁸ A concierge doctor provides those who can afford one with the opportunity to have round-the-clock access to the doctor and longer, more in-depth appointments.¹¹⁹ It seems odd that money can buy such a dramatic upgrade in healthcare. Also, this new concierge doctor system can have a ripple effect that damages healthcare as a whole.¹²⁰ This attitude that markets can dictate aspects of life such as healthcare is troubling and it shows a disregard for society as a whole. This attitude and change of marketization affects housing and it is important to take action before more negative effects set in.

B. Housing Segregation: More the Norm than the Exception

The United States does have a national housing law which is designed to afford low-income people the opportunity to live in affordable, decent housing units.¹²¹ This national program is called HOME.¹²² “Since 1990 when the HOME Program was signed into law as Title

¹¹⁶ Lisa C. Young, *Breaking the Color Line: Zoning and Opportunity in America's Metropolitan Areas*, 8 J. GENDER RACE & JUST. 667, 685-86 (2005).

¹¹⁷ *Id.*

¹¹⁸ SANDEL, *supra* note 111, at 27.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 42 USC 12721 § 202.

¹²² *Id.*

II of the Cranston-Gonzalez National Affordable Housing Act (the HOME Investment Partnerships Act), over 450,000 affordable housing units have been acquired, constructed or rehabilitated, and nearly 84,000 tenants have received direct rental assistance.”¹²³ Congress found that: to achieve the goal of national housing policy, there is a need to strengthen nationwide a cost-effective community-based housing partnership designed to-- expand the supply of rental housing that is affordable to very low-income and low-income families, improve homeownership opportunities for low-income families, carry out comprehensive housing strategies tailored to local housing market conditions, and protect the Federal, State, and local investment in low-income housing to ensure affordability of the housing for the remaining useful life of the property.¹²⁴

While there is this national program designed to provide affordable housing to those who need it, it is evident that there is still too many individuals and families who need affordable housing. The suburban towns have the opportunity to welcome low-income people into their borders and provide housing for people who need it. Also, it is more cost efficient to have inclusionary zoning policies instead of the traditional affordable housing programs, so legislatures and communities should look to inclusionary zoning.

Another important consideration is the problem of homelessness. Besides just low-income people who cannot afford housing in one neighborhood or community, there are people who are not able to afford any housing at all. It has been suggested that the problem of homelessness is best treated on a local basis, instead of a national, uniform plan. One possible remedy is to have a two-part system, with one part designed for areas that have an extra housing

¹²³ *Affordable Housing*, March 13, 2013, <http://www.hud.gov/offices/cpd/affordablehousing/index.cfm>.

¹²⁴ 42 USC 12721 § 202(7).

supply, and the other area where there is a deficiency in housing supply. “In areas where housing units exist but are not affordable to low-income people, subsidies such as housing vouchers should be provided to make those units affordable. In areas of the country where there is a shortage of decent housing, new units should be developed through a combination of federal incentives such as tax credits and direct federal funding. Federal subsidies should be coupled with measures to control costs, such as limiting rents to actual landlord expenses plus a reasonable rate of profit. New units created through direct federal aid should be held by public or private nonprofit entities.”

In New Jersey,

“Suburban communities that benefit financially from exclusionary controls do so at the expense of their neighbor suburbs and the region as a whole. For example, Franklin Lakes, New Jersey, a community which has refused to permit building of multi-family housing to accommodate employees of a new IBM facility, has three times the taxable resources of Garfield, a neighboring community, which has provided a significant amount of publicly assisted housing. Even those communities that do not benefit from exclusionary pattern are, so far, turning a deaf ear to this fact as evidenced by the increase in large-lot zoning.¹²⁵

Towns prefer businesses to residences, especially low-income residences.¹²⁶ The fewer residents in a town, the fewer services that the town must provide and therefore the less money the town needs to provide services.¹²⁷

Many low-income people in need of housing have been helped by the Mt. Laurel decisions, with approximately 60,000 families, seniors, and people with special needs living in

¹²⁵ Frank Alois and Arthur Abba Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 Urb. L. Ann. 9, 13 (1971) Available at: <http://digitalcommons.law.wustl.edu/urbanlaw/vol1971/iss1/3>.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.*

homes that resulted from Mount Laurel and another 40,000 homes in the pipeline.”¹²⁸ “In 2002, the state government’s Council on Affordable Housing determined that after nearly 30 years and 45,000 units of affordable housing built under mandate, municipalities still needed to build an additional 73,000 homes to satisfy the high court.”¹²⁹ The cities in New Jersey, such as Camden, Newark, Trenton, and Paterson, have a high number of low-income people compared to suburban towns and it is unfair that low-income people are relegated to these urban areas.¹³⁰ A suburban town often does not want to allow additional low-income people into its borders because of the lower tax intake that low income people will provide to the town.¹³¹ It is unfair for urban cities to have a large concentration of people who cannot afford to contribute as much to the tax pool in a town.¹³² There is still a great divide in the areas that housing is available for high income and low income people. This segregation of housing needs to end and if the towns and legislatures do not do anything, it is up to the courts to make the change.

III. Prescription for Reform. Judicial Sensitivity to Unintended Consequences of Exclusionary Zoning

The right to freedom of association is an important and integral right to all people, regardless of their race, ethnicity, religion, or income level. The right to associate with others means that people should not be kept out of communities for any reason, especially not because of low-income level, which is often connected to race, ethnicity, religion.

¹²⁸ Gordon, *supra* note 100.

¹²⁹ Timothy Lee, *Property Rights Apply to Poor People Too*, FORBES, February 28, 2012, <http://www.forbes.com/sites/timothylee/2012/02/28/property-rights-apply-to-poor-people-too/>

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

The courts have taken a step back from the fight over exclusionary zoning and left it in the hands of the legislative branch. State courts should once again take on a larger role in combating the problem of exclusionary zoning and the consequences. Any judiciaries that still take an active role in the exclusionary zoning fight do so usually on the basis of “substantive due process or statutory construction of state ZEAs to place limits on local zoning autonomy”.¹³³ There still is much to do in terms of providing enough low-income housing in municipalities. Municipalities should be diverse and should celebrate that diversity, not be ashamed or upset about it. Municipalities should not view low income people as a burden that they want to get rid of, but as an important segment of the community. Every municipality should practice inclusionary zoning by encouraging low income housing projects and an increase in the availability of low income housing in their community.

The right to association is thought of in an intrinsic or expressive way, and both kinds of associational rights are implicated by exclusionary zoning ordinances. The intrinsic right to association has traditionally only been thought of as protecting familial relationships, but the court should extend it to protecting a community relationship.

On the other hand, the right to association has also brought about the right to exclude others from an association. The Supreme Court has said that groups can exclude members on the basis of a characteristic because the characteristic goes against the group’s goals and mission. This can lead to the conclusion that a municipality should be able to exclude people from its borders, especially if it has a justification of protecting the people of its community from heavy economic burdens. A town council can say that it wants to protect the people in the community from higher taxes and keep the quality of education at the same level it presently is at as

¹³³ Jeffrey M. Lehmann, Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Winter 2003, at 229, 257.

justifications for exclusionary zoning measures. The town council can also argue that the people of the community want to have the community comprised of like individuals because that is the wish of the group and that if the members of the community share common characteristics, then everyone will be happier and will feel more connected because of how alike everyone is.

A general social good should trump any one municipalities desire to exclude low income people. For a town to consider itself a community it must embrace the ideals of a community and foster relationships between the people of its town. A town should want to include people of different races and lower income levels, because these people have different experiences that can make a community better. A community can only thrive when it embraces basic human values and ideals, like inclusiveness, honor, respect, love, and compassion. These values are thrown to the side when a community seeks to exclude people on the basis of income. Therefore, the courts should not allow towns to exclude people of lower income levels, because the right to association would be compromised.

Conclusion

The supply of affordable housing in suburban areas is a problem, but there are no clear-cut, easy solutions. There are valid arguments for those who argue for inclusionary zoning and those who argue against it. Inclusionary zoning helps to diversify communities and foster relationships between people who otherwise may not have had any contact. The courts have forced groups and organizations to be inclusive and now the courts can use that same logic to force communities to be inclusive to people of all income levels. Inclusiveness results in many benefits to both the specific community and to society as a whole. Therefore, communities should be inclusive by enacting inclusionary zoning ordinances.