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EXCLUSIONARY ZONING: A CONSIDERATION OF REMEDIES*

Rosalind M. Mytelka† *and Arnold K. Mytelka*‡

INTRODUCTION

A rising tide of public pressure,[1] lawsuits,[2] academic criticism,[3] and judicial disaffection with exclusionary zoning practices,[4] raises the crucial issue of remedy with which this article deals. What can/should legislatures, municipalities, and courts do? Can the good in zoning and planning be saved and strengthened while the evil of exclusion of low, moderate, and even middle income families is excised?

Exclusionary zoning can be successfully attacked in the courts, but the excluded can win too well. If land use regulations are torn down without regard to the efficacy of substitute ordinances, the desirable residential community which originally attracted the plaintiffs can rapidly deteriorate into a place of soaring taxes, disappearing

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† A.B., Smith College; M.U.P., New York University.

‡ A.B., Princeton University; LL.B., Harvard University.

[1] Exclusionary zoning affects not only the urban poor inhabiting the slums of cities and older suburbs but also blue collar and clerical workers who must follow their jobs to the suburbs, retired senior citizens who cannot afford high-priced housing, families needing decent rental quarters with room for young children, and many others who seek suburban amenities but cannot pay the present price. *See* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 159, 336 A.2d 713, 717, *appeal dismissed*, 96 S. Ct. 18 (1975).

[2] Such suits have been brought by organizations, *e.g.*, the Suburban Action Institute, the N.A.A.C.P., and the U.A.W., as well as by developers, landowners, and individuals seeking homes.

[3] *See, e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971). *See generally* D. LISTOKIN, L. GERLACH, & B. CYVINER, ZONING—EXCLUSIONARY ZONING: A SELECTED BIBLIOGRAPHY (1974).

[4] *See, e.g.*, Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 169–73, 336 A.2d 713, 722–24, *appeal dismissed*, 96 S. Ct. 18 (1975).

amenities, and inadequate schools, utilities, and public services—in short, a scene of chaotic, ugly growth.

PERSPECTIVE

Although modern zoning was constitutionally sanctioned by the Supreme Court in 1926,[5] early ordinances received close judicial scrutiny and were often invalidated.[6] During this period, exclusionary regulations were dealt with severely. For example, an ordinance requiring minimum lots of 150 by 250 feet and construction of no less than a 2-1/2 story house, costing at least $15,000, was found to be "clearly unreasonable, and, therefore, unconstitutional."[7] As late as 1947, a zoning amendment that excluded garden apartments was voided, the court bluntly stating: "Certainly, it is no part of zoning to prevent growth."[8]

Then the wind shifted and, as Professor Williams put it,

> the courts swung to the extreme of approving practically any local regulations, as long as somebody had tacked the word "planning" on the back of the donkey.[9]

Exclusionary zoning was rationalized and upheld: large lot requirements,[10] minimum floor area requirements without reference to occupancy levels,[11] exclusion of multi-family dwellings,[12] exclusion

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[5] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–89 (1926).

[6] Williams, *The Three Systems of Land Use Control (Or, Exclusionary Zoning and Revision of the Enabling Legislation)*, 25 RUTGERS L. REV. 80, 92 (1970).

[7] Stein v. City of Long Branch, 2 N.J. Misc. 121, 122, 123 (Sup. Ct.), *appeal dismissed*, 100 N.J.L. 413, 126 A. 924 (Ct. Err. & App. 1924).

[8] Ridgefield Terrace Realty Co. v. Borough of Ridgefield, 136 N.J.L. 311, 313, 55 A.2d 812, 813 (Sup. Ct. 1947); *cf.* Dowsey v. Village of Kensington, 257 N.Y. 221, 177 N.E. 427 (1931) (invalidating exclusion of apartment building on land reasonably suited only for apartment or business use).

[9] Williams, *supra* note 6, at 92.

[10] *See, e.g.*, County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (five-acre minimum upheld); Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952) (five-acre minimum upheld). In *Fischer*, the New Jersey supreme court indicated that even a ten-acre minimum lot size would not be unreasonable. *Id.* at 205, 93 A.2d at 383–84.

[11] *See, e.g.*, Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *rev'g* 13 N.J. Super. 490, 80 A.2d 650 (L. Div. 1951), *appeal dismissed*, 344 U.S. 919 (1953).

[12] *See, e.g.*, Trendel v. County of Cook, 27 Ill. 2d 155, 188 N.E.2d 668 (1963); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958). *See also* Connor v. Township of Chanhassen, 249 Minn. 205, 211, 81 N.W.2d 789, 795 (1957), wherein the court stated: "A municipality on the periphery of a large metropolitan center may constitutionally pass a one-use ordinance in order to retain its residential character."

of mobile homes,[13] and the like.[14] There were vigorous dissents[15] and critical academic comments.[16] But case by case, a wall took shape around the cities, and only the well-to-do could escape through its golden gate.[17]

In recent years, judicial laissez-faire in zoning has gradually given way to active intervention again.[18] Perhaps in response to the social revolution through which America has passed or to the increasing population pressure at the fringes of metropolitan areas, courts have shown less reluctance to strike down exclusionary zoning and open new acreage to urban settlement.

The greatest leap forward was that of the Supreme Court of New Jersey in the landmark case of *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,[19] decided in 1975. While two concurring opinions evidenced some variation in approach, the court was unanimous on the fundamental holding: to override *all* exclusionary zoning devices by requiring that each and every develop-

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[13] *See, e.g.*, Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963).

[14] *See, e.g.*, Malmar Associates v. Board of County Comm'rs, 260 Md. 292, 272 A.2d 6 (1971) (limitation on the number of bedrooms upheld). For a discussion of various onerous subdivision exactions see Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111, 1124–26 (1972).

[15] *See, e.g.*, Vickers v. Township Comm., 37 N.J. 232, 252–70, 181 A.2d 129, 140–50 (1962) (Hall, J., dissenting), *appeal dismissed*, 371 U.S. 233 (1963).

[16] *See, e.g.*, Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953).

[17] As one noted author in the field observed,

> [i]n 1960, 80 per cent of the vacant land zoned for residential use within fifty miles of Manhattan was subject to minimum lot requirements of one-half acre or more; over half was zoned for single-family dwellings on lots of at least one acre. . . . Widespread and substantial increases in acreage requirements have been reported since 1960.

C. HAAR, LAND-USE PLANNING 244–45 (2d ed. 1971) (citations omitted). For additional statistics on zoning in the New York metropolitan area see Bigham & Bostick, *supra* note 14, at 1123. *See also* Haar, *supra* note 16, at 1062–63; Williams, *supra* note 6, at 93–94; Comment, *The Equal Protection Clause: A Single-edged Sword for the Gordian Knot of Exclusionary Zoning*, 40 UMKC L. REV. 24, 28–29 (1971); Comment, 47 TULANE L. REV. 1056, 1056–57 (1973).

[18] A microcosmic example: Judge Furman, who pioneered the attack on exclusionary zoning in New Jersey with his decision in Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1972), *on remand*, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974), had sustained an exclusionary scheme only five years before, during the laissez-faire period, in Meridian Dev. Co. v. Edison Twp., 91 N.J. Super. 310, 316, 220 A.2d 121, 125 (L. Div. 1966).

[19] 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 44 U.S.L.W. 3198 (U.S. Oct. 7, 1975) (No. 75–38).

ing community provide its "fair share" of the regional need for low- and moderate-income housing.[20]

The Pennsylvania supreme court has invalidated specific exclusionary devices, *e.g.*, large lot zoning[21] and the *de facto* prohibition of multi-family dwellings.[22] But *Mount Laurel* alone sweeps aside all such devices, whether on the books or yet unconceived. It seems likely that other jurisdictions, confronted with exclusionary zoning and population pressures, will follow the lead of New Jersey.[23] The issue of remedy is ripe for consideration.

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[20] *Compare* 67 N.J. at 174, 188–91, 336 A.2d at 724–25, 732–34 (majority opinion) *with id.* at 193, 336 A.2d at 735 (Mountain, J., concurring) *and id.* at 194–95, 208–09, 336 A.2d at 736, 743 (Pashman, J., concurring). For analysis of the Mount Laurel decision see N. WILLIAMS, AMERICAN PLANNING LAW §§ 66.13a–.13g (Addendum 1975); Mytelka, *The* Mount Laurel *Case: Where To Now?*, 98 N.J.L.J. 513 (1975); Rose, *The* Mount Laurel *Decision: Is It Based on Wishful Thinking?*, 4 REAL ESTATE L.J. 61 (1975).

[21] *See* Concord Twp. Appeal (Appeal of Kit-Mar Builders, Inc.), 439 Pa. 466, 470–71, 268 A.2d 765, 766–67 (1970) (two- and three-acre minima); National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 533, 215 A.2d 597, 613 (1965) (four-acre minimum).

[22] *See* Girsh Appeal, 437 Pa. 237, 240–42, 263 A.2d 395, 396–97 (1970).

[23] Jurisdictions other than New Jersey which have ruled against exclusionary zoning practices include Connecticut, Illinois, Michigan, New York, Rhode Island, and Virginia. *See, e.g.*, Kavanewsky v. Zoning Bd. of Appeals, 160 Conn. 397, 403–04, 279 A.2d 567, 571 (1971) (non-compliance with state statute); Lakeland Bluff, Inc. v. County of Will, 114 Ill. App. 2d 267, 274–75, 282, 252 N.E.2d 765, 768–69, 772 (1969); Kropf v. City of Sterling Heights, 391 Mich. 139, 155–56, 215 N.W.2d 179, 185 (1974) (dictum); Tocco v. Atlas Twp., 55 Mich. App. 160, 166–67, 222 N.W.2d 264, 267–68 (1974); Westwood Forest Estates, Inc. v. Village of S. Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); Town of Glocester v. Olivo's Mobile Home Court, Inc., 111 R.I. 120, 126–28, 300 A.2d 465, 469–70 (1973); Board of Supervisors v. Allman, 215 Va. 434, 446, 211 S.E.2d 48, 54–55 (1975); Board of County Supervisors v. Carper, 200 Va. 653, 662, 107 S.E.2d 390, 396–97 (1959).

Given the fact that a large percentage of black and other minority groups are in the low- and moderate-income categories, the subspecies of racially exclusionary zoning —and the strong federal judicial trend against it—should be noted. Companion cases involving the city of Black Jack, Missouri, illustrate the trend, articulate the controlling principles, and collect the decisions from other circuits: Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972), and United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975). The latter case emphasized that racial motivation need not be proved; the plaintiff may succeed simply by showing a racially discriminatory effect. 508 F.2d at 1184–85. *See also, e.g.*, Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 294–96 (9th Cir.), *on remand*, 357 F. Supp. 1188, 1196–99 (N.D. Cal. 1970); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 693–98 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

The recent 5–4 United States Supreme Court decision in Warth v. Seldin, 95 S. Ct. 2197 (1975), which dismissed a complaint alleging racially exclusionary zoning by a suburb of Rochester, New York, on lack-of-standing grounds, does not significantly impede the federal trend. The majority held no more than that plaintiffs may not pose abstract arguments but must allege concrete facts and seek relief which would confer tangible benefits on them. *Id.* at 2210. In a footnote, the majority stated that "usually the

LEGISLATIVE REMEDIES

There has been much talk of legislative remedies for exclusionary zoning, but little action. Law review proposals abound; statutory change has been infrequent. Nevertheless, legislative reform is worth considering: It can achieve far more than judicial remedies ever will, and the political winds may ultimately shift here as they did in the civil rights area after the courts had pioneered the way.[24]

Legislative remedial action possesses several distinct advantages. First, the impact of legislation is much broader than that of court-ordered change. Rather than the case-by-case approach, legislation can act comprehensively and immediately, transcending boundaries of ownership, municipality, county, and state.

Second, the input into legislation can substantially exceed that which goes into judicial determination, both in quantity and quality. In part, this legislative advantage derives from its wide-angled focus. The court confronts a zoning ordinance, a particular project, a specific set of facts, and often only one phase of land-use planning, *e.g.*, housing needs. By contrast, the legislature can consider an entire state or nation, including the interdependence of communities and regions. Emphasis may be given to as many fact situations as legislators and their staffs can conceive and to all phases of a complex subject, including housing, employment, transportation, public facilities, aesthetics, open space needs, the environment, and the like.

In addition, the expertise, funds for research, and even time available to the legislature greatly exceed what the court may have. The legislature draws on its own staff, as well as the professional planners, economists, demographers, engineers, scientists, sociologists, educators, and others who work for departments of community affairs, environmental protection, public utilities, labor, commerce, and the like. These experts bring to bear their own knowledge and ability, along with the institutional experience of the departments for which they work. If additional research, mapping, interviewing, or testing is needed, it can be done. By contrast, the court usually has limited expertise and virtually no professional staff (except in the legal area). The court depends on outside experts hired for the particular case who

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initial focus [of a racially exclusionary zoning challenge] should be on a particular project" and cited, with apparent approval, *Black Jack*, *Lackawanna*, and similar federal decisions. *Id.* at 2210 n.18.

[24] The reference is to the substantial congressional reform which followed cases like Brown v. Board of Educ., 347 U.S. 483 (1954). *See, e.g.*, Civil Rights Act of 1957, 42 U.S.C. § 1975 *et seq.* (1970) (establishing Civil Rights Commission); Civil Rights Act of 1964, *id.* § 2000a *et seq.* (prohibiting discrimination in public accommodation, education, employment, and federally financed activities).

usually testify in an adversary context where one party can do no right and the other can do no wrong. On the rare occasion where independent experts are appointed by the court,[25] funds are limited (usually, an assessment against the parties is utilized), and the scope of the assignment is concomitantly restricted. Even time pressures differ. The legislature can take its time; while the court is obliged to act with dispatch so that the parties before it are not left with Pyrrhic victories.

Third, in complex fields such as land-use planning there is also the advantage that legislation can be monitored by administrative agencies and revised if found deficient. Courts rarely retain jurisdiction and are ill equipped to monitor complex issues. Revision of deficient judicial remedies usually depends upon the existence of a party who (a) has standing, (b) can afford further litigation, and (c) is sufficiently hurt to make it worth proceeding. This haphazard approach to revision may be ameliorated where institutional litigants (*e.g.*, the N.A.A.C.P., Suburban Action Institute, or associations of developers) step into the picture.

Fourth, exclusionary zoning is a highly sensitive issue. It touches the lives of most citizens. Legislators can compromise without eviscerating principles; courts must decide cases, usually on an all-or-nothing basis. Moreover, legislators often try to explain legislation and to persuade the public of its benefits; judicial opinions are rarely written for the man in the street. Thus, statutes frequently encounter less resistance than court orders.

Finally, it is not in the long-run interest of any democracy to commit its major decisions to the one branch of government that is not elected. Legislative inaction in the face of grave evils has forced the courts to act on subjects which not long ago would have been regarded as strictly legislative matters, from apportionment to zoning. The balance should be restored.

Whether the pace-setting trend in the courts will prod legislators to act, or whether judicial decisions will be silently approved by legislators who are thereby freed from controversy and allowed to concentrate on pork-barrel issues; it is at least clear that the best method of reform is through statutory change, not court order.[26] A summary of the more significant legislative remedies for exclusionary zoning follows.

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[25] *See, e.g.*, Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 201, 329 A.2d 89, 93 (L. Div. 1974), *rev'd on other grounds*, Nos. A-3790-72, A-1841-73 (N.J. Super. Ct., App. Div., June 25, 1975), *cert. granted*, No. 11754 (N.J., Oct. 14, 1975).

[26] Of course, legislation can paper over problems, leaving things worse than before. But public interest groups are alive and well; and the doors to the courts are always open.

The preferred legislative remedy would expand the constituency which, directly or indirectly, elects those responsible for zoning and planning decisions.[27] In England, ultimate land-use planning decisions are made at the highest levels of the national government.[28] In the United States, such decisions are almost invariably made at the lowest level: the city, town, and village. As a result, suburban communities can and do exclude low, moderate, and even middle income housing. Their elected officials have no incentive to act otherwise. Narrow, parochial perspectives control; urban realities are disregarded.

Expansion of the constituency would mandate a balanced approach. While national land-use planning may be impractical in the continental, complex American society; state, regional, or county agencies, vested with plenary zoning and planning authority, could be effective, yet flexible. The responsible officials would not ignore the needs of a substantial segment of the electorate—those earning less than upper-level incomes. There has been some movement in this direction.

Vermont, for example, has statewide land-use controls for major projects. Administered by a state "environmental board" and "district commissions," the system involves a statewide land-use plan, permit requirements for development, and penalty provisions.[29] There is the following statement of legislative intent concerning housing:

> (A) Opportunity for decent housing is a basic need of all Vermont's citizens. . . . The housing requirement for Vermont's expanding resident population, *particularly for those citizens of low or moderate income*, must be met by the construction of new housing units and the rehabilitation of existing substandard dwellings. . . . [Such] housing should be: safe and sanitary; *available in adequate supply to meet the requirements of all Vermont's residents* . . . .
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> (B) *Sites for multi-family and manufactured housing should*

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[27] *See* Williams, *supra* note 6, at 98. *See generally* Note, *State Land Use Regulation —A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869 (1972).

[28] *See generally* Town & Country Planning Act 1968, c. 72; Town & Country Planning Act 1962, 10 & 11 Eliz. 2, c. 38; Garner, *An Introduction to English Planning Law*, 24 OKLA. L. REV. 457 (1971).

[29] VT. STAT. ANN. tit. 10, § 6001 *et seq.* (1973), *as amended*, (Supp. 1975); *cf. In re* Application of Great Eastern Bldg. Co., 132 Vt. 610, 326 A.2d 152 (1974) (homeowners lack standing before Environmental Board to challenge condominium development). Under the Vermont scheme, some residual local powers remain; *e.g.*, local permits may be required. *See* VT. STAT. ANN. tit. 10, § 6082 (1973). (Query: What happens in the event of a conflict?)

The Maine enactment is comparable. *See* ME. REV. STAT. ANN. tit. 38, §§ 481–88 (Supp. 1973), *construed in In re* Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973).

be readily available in locations not inferior to those generally used for single-family conventional dwellings.

(C) There should be a *reasonable diversity of housing types and choice between rental and ownership* for all citizens in a *variety of locations* suitable for residential development and *convenient to employment and commercial centers.*[30]

Hawaii also has statewide land-use controls. A state "land use commission" divides all land into urban, rural, agricultural, and conservation districts, and may revise the district lines from time to time.[31] The enabling statute mandates that, whenever boundaries are established, "those lands that are now in urban use and *a sufficient reserve area for foreseeable urban growth shall be included.*"[32] Counties maintain substantial zoning and subdivision powers.[33]

Massachusetts has established a statewide appeals board in its Department of Community Affairs. A statutory formula sets quotas of low- and moderate-income housing for each municipality. If the municipality has not reached its quota, and if its zoning agency denies a permit for low- or moderate-income housing development or imposes onerous conditions, the statewide appeals board is empowered to override the local decision.[34] The statute has been sustained against constitutional challenge.[35]

New York has created a public corporation, *inter alia*, to build low- and moderate-income housing.[36] While the corporation ("Urban Development Corporation" or "UDC") was required to "cooperate with local elected officials," it was permitted to override municipal land-use ordinances where "compliance [was] not feasible or practicable."[37] This provision was held constitutional by New York's highest court.[38] Unfortunately, however, "[s]tate-wide consternation"[39] resulted in a 1973 amendment which gave towns and villages

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[30] Law of April 23, 1973, No. 85, § 7(a)(8), [1973] Vt. Laws 251 (emphasis added).

[31] HAWAII REV. STAT. § 205–1 *et seq.* (1968), *as amended*, (Supp. 1973).

[32] *Id.* § 205–2 (emphasis added).

[33] *See id.* §§ 205–5, –6.

[34] Low and Moderate Income Housing Act, MASS. ANN. LAWS ch. 40B, §§ 20–23 (1973).

[35] Board of Appeals v. Housing Appeals Comm. in the Dep't of Community Affairs, 294 N.E.2d 393, 414, 416 (Mass. 1973).

[36] *See* New York State Urban Development Corporation Act, N.Y. UNCONSOL. LAWS § 6251 *et seq.* (McKinney Supp. 1974–75).

[37] *Id.* § 6266(1), (3).

[38] Floyd v. New York State Urban Dev. Corp. 33 N.Y.2d 1, 300 N.E.2d 704, 347 N.Y.S.2d 161 (1973).

[39] Town of Greece v. Urban Dev. Corp.—Greater Rochester, Inc., 79 Misc. 2d 375, 378, 360 N.Y.S.2d 171, 174 (Sup. Ct. 1974).

(but not cities) veto power over UDC residential projects.[40] The suburbs won and the experiment failed.

Multipurpose regional authorities have been established in some jurisdictions. New Jersey enacted the Hackensack Meadowlands Reclamation and Development Act[41] to comprehensively develop 21,000 acres of swampland in the heart of the New York metropolitan area. The acreage covers parts of 14 municipalities in two counties. A commission, composed of gubernatorial appointees, is granted plenary zoning and planning powers in the region.[42] There is a sop to home rule: The mayors of each municipality in the region form a committee which can review and vote to reject land-use decisions by the commission.[43] But the commission of state appointees can override the local-based committee by a 5/7 vote of the commission's full membership.[44] The constitutionality of this statute, including the grant of zoning power, has been upheld.[45]

It is one thing to regionalize land-use controls in the Hackensack River swamps; quite another to grant zoning and planning powers to metropolitan government in built-up areas. While there is widespread recognition of the need to solve municipal-services problems (*e.g.*, sewerage disposal) on a multi-governmental basis, the remedy has usually been to create special purpose districts rather than multipurpose metropolitan government.[46] For example, in Los Angeles County, suburban communities retain land-use powers, while contracting with the county (on an optional basis) for necessary services.[47]

But the beginnings of metropolitan government may be found. Indianapolis and surrounding Marion County were consolidated into one governmental unit,[48] a "metropolitan plan commission" was

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[40] Law of June 5, 1973, ch. 446, § 3, [1973] N.Y. Laws 894 (codified at N.Y. UNCONSOL. LAWS § 6265(5) (McKinney Supp. 1974–75)); *see* Message of the Governor of the State of New York on approving Law of June 5, 1973, ch. 446, [1973] N.Y. Laws 2346.

[41] Law of Jan. 13, 1969, ch. 404, [1968] N.J. Laws 1313 (codified at N.J. STAT. ANN. § 13:17–1 *et seq.* (Supp. 1974–75)).

[42] *See* N.J. STAT. ANN. §§ 13:17–5 to –6, –9 to –19 (Supp. 1974–75).

[43] *See id.* §§ 13:17–7 to –8.

[44] *See id.* § 13:17–8(c).

[45] Meadowlands Regional Redevelopment Agency v. State, 63 N.J. 35, 46, 304 A.2d 545, 550 (1973).

[46] *See* 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 1.52–.53 (3d ed. 1971) [hereinafter cited as MCQUILLIN].

[47] Note, *The Urban County: A Study of New Approaches to Local Government in Metropolitan Areas*, 73 HARV. L. REV. 526, 545–58 (1960).

[48] Consolidated First-Class Cities and Counties Act, IND. STAT. ANN. § 18–4–1–1 *et seq.* (code ed. 1974), *construed in* Chavis v. Whitcomb, 305 F. Supp. 1359, 1361 (S.D. Ind. 1969).

established,[49] and plenary land-use controls were vested at the metropolitan level.[50] The Indiana legislation was held constitutional.[51] Nashville and Davidson County, Tennessee, merged into a metropolitan government[52] which was judicially sustained.[53] Dade County, Florida, another example of metropolitan government, permits constituent municipalities to exercise zoning powers and to use them to impose "higher [more onerous] standards" than those adopted by the county.[54] There are also various statutes authorizing county and regional agencies to engage in planning functions, sometimes with limited regulatory teeth.[55]

It seems reasonably probable that, in the near future, significant land-use powers will be granted to agencies which are not tied to the lowest level of government. Pointing to statutes which establish regional planning authorities, the New Jersey supreme court recently commented:

> Authorization for regional *zoning*—the implementation of planning—, or at least regulation of land uses having a substantial external impact by some agency beyond the local municipality, would seem to be logical and desirable as the next legislative step.[56]

As the American Law Institute put it: "The long period of unquestioned acceptance of the local prerogative to control land development is clearly over."[57]

Legislative reform could alternatively attack exclusionary zoning by revising the enabling legislation. This type of remedy is more rigid than the delegation of land-use powers to an agency with an expanded constituency. The revised enabling legislation would normally treat all municipalities alike; the higher-level delegation permits the flexibility that a consideration of regional and local factors may require. Moreover, specific changes in the enabling act may present

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[49] Metropolitan Planning Departments Act, IND. STAT. ANN. § 18–7–2–1 *et seq.* (code ed. 1974).

[50] *Id.* §§ 18–7–2–1, -2.

[51] Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971) (Consolidated First-Class Cities and Counties Act); Mogilner v. Metropolitan Plan Comm'n, 236 Ind. 298, 140 N.E.2d 220 (1957) (Metropolitan Planning Departments Act).

[52] This was done pursuant to TENN. CODE ANN. § 6–3701 *et seq.* (1971).

[53] Frazer v. Carr, 210 Tenn. 565, 360 S.W.2d 449 (1962).

[54] Note, *supra* note 47, at 539; *see id.* at 536 n.83.

[55] *See, e.g.*, Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 189 n.22, 336 A.2d 713, 732–33 (1975).

[56] *Id.* at 189 n.22, 336 A.2d at 733 (emphasis in original).

[57] MODEL LAND DEVELOPMENT CODE, art. 7, Comment, at 288 (P.O.D., 1975).

more of a target for opposition than would enlarging the constituency of the planning and zoning agency, except where local "home rule" is next to God and Country in the hierarchy of values. Illustrations of enabling-act revisions, beginning with the mildest, include:

1. The relatively standard "purposes" section[58] could add the phrase "provision of low- and moderate-income housing"[59] and/or delete the usual "conserving the value of property" aim. The practical impact of this suggestion is obviously limited.

2. The traditional presumption of validity of zoning ordinances[60] could be expressly neutralized or—a step further—reversed[61] on a showing of exclusionary intent or effect. While helpful, this remedy would still commit the problem of exclusionary zoning to the courts.

3. Low- and moderate-income housing might be declared a "special exception" use[62] in all municipalities. This technique would permit local agencies to set standards regulating siting, height, and design. The potential for administrative abuse (*e.g.*, onerous conditions) is substantial.[63]

4. Specific land-use control devices which have been abused in the past could be barred or weakened: The maximum extent of minimum lot requirements could be set;[64] minimum floor space standards, allegedly set for health reasons,[65] could be limited to a per-occupant formula approved by state health officials;[66] prohibitions of multi-family housing and mobile homes could be restricted; and limitations on the number of bedrooms could be

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[58] *See, e.g.*, N.J. STAT. ANN. § 40:55–32 (1967), which provides that

> [local zoning] regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to lessen congestion in the streets; . . . promote health, morals or the general welfare; . . . avoid undue concentration of population. Such regulations shall be made . . . with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

[59] *Cf.* CAL. GOV'T CODE § 65302(c) (West Supp. 1975).

[60] *See, e.g.*, Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 350, 307 A.2d 563, 571 (1973); 8A MCQUILLIN, *supra* note 46, § 25.295 (1965).

[61] *Cf.* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 180–81, 336 A.2d 713, 728 (1975).

[62] *See, e.g.*, *id.* at 181–82 n.12, 336 A.2d at 729; N.J. STAT. ANN. § 40:55–39b (1967).

[63] *See generally* Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668 (1969).

[64] Note, *Large Lot Zoning*, 78 YALE L.J. 1418, 1437–38 (1969).

[65] *See, e.g.*, Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 173–74, 89 A.2d 693, 697 (1952). *But see* Haar, *supra* note 16, at 1061–62.

[66] Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509, 529 (1971).

ameliorated. The problem with this legislative remedy is that, unless all zoning powers are severely weakened, a municipality bent on excluding certain potential residents could conceive of new ways to achieve its end, stepping carefully to avoid conflict with the express limitations in the revised enabling legislation.

5. At the extreme end of the spectrum, *any* type or density of housing could be permitted in *all* residential districts, subject to statewide health regulations.[67] Municipalities could draw residential boundary lines—no more. Beyond the obvious political impracticality of enacting this remedy, there is also the undesirable economic and aesthetic effect of precluding high class residential districts.[68]

Another approach would be "inclusionary zoning" legislation. Developers of conventional multi-family housing would be required to include in their projects some percentage of low- and/or moderate-income housing.[69] The virtue of this remedy is that it does not merely open the door to such previously excluded housing—as would the remedies set forth above—but would push developers through the door. The difficulty with this remedy lies in the constitutional sphere: whether the requirement constitutes a taking of the developer's property without compensation. Virginia's supreme court has so held.[70] New Jersey permits exactions from subdividers (*e.g.*, provision of roads), but only where the exaction "bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision."[71] *Per contra*, it may well be argued that assuming local zoning ordinances are superseded by the inclusionary zoning statute, the developer can still build his low- and moderate-income housing quota at a sufficient density and with enough cost-saving devices to make a profit;[72] and settled zoning principles hold that the mere fact that a greater profit could have been earned (here, by concentrating on luxury dwellings) does not give rise to an unconstitutional tak-

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[67] *See* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING 113, 123 (1973); Davidoff & Davidoff, *supra* note 66, at 529.

[68] *Cf.* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 190–91, 336 A.2d 713, 733–34 (1975); Collins v. Board of Adjustment, 3 N.J. 200, 209, 69 A.2d 708, 712 (1949).

[69] *See generally* Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A.L. REV. 1432 (1974).

[70] Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973).

[71] Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 350, 245 A.2d 336, 337 (1968); *see* Divan Builders, Inc. v. Planning Bd., 66 N.J. 582, 595, 598, 600–01, 334 A.2d 30, 36–37, 38–39, 39–40 (1975).

[72] *See* Kleven, *supra* note 69, at 1524–28.

ing.[73] Moreover, if property may be devalued by 88 per cent because of flood-plain conditions,[74] can it not be said that a similar result is required by the present housing emergency?

Finally, federal and state aid could be used to encourage municipalities to provide suitable space for low- and moderate-income housing. While this remedy may seem chimerical in the present period of recession and curtailment of federal and state aid programs, times will change, and the intelligent use of grants and loans can be an effective antidote for exclusionary zoning. There are two facets to utilization of aid: the "carrot alone" and the "carrot with stick attached."[75]

The "carrot alone" device involves the simple recognition that a major reason for exclusionary zoning is municipal fear of the fiscal impact of low-cost housing: ratables which consume more in services than they turn back in taxes.[76] The answer is amelioration of the heavy local tax burden either by tax reform or by subsidies (*e.g.*, for new schools) tied directly to municipal provision of low- and moderate-income housing.[77]

The "carrot with stick attached" approach consists of conditioning all grants and loans—even for purposes unrelated to housing —as well as the construction of public facilities, on the provision of low- and moderate-income housing.[78] This approach has proved successful[79] but must be grounded in statutory language or it will be held *ultra vires*.[80]

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[73] *See, e.g.*, Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 350, 307 A.2d 563, 571 (1973), where the court stated the general principle: "An owner is not entitled to have his property zoned for its most profitable use." *See generally* 8 MCQUILLIN, *supra* note 46, § 25.44 (1965).

[74] Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891, 900 (Mass. 1972); *cf.* AMG Associates v. Township of Springfield, 65 N.J. 101, 112 n.4, 319 A.2d 705, 711 (1974).

[75] *See generally* L. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES, chs. 8, 12, 14 (1974) [hereinafter cited as RUBINOWITZ].

[76] *See* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 185, 336 A.2d 713, 730–31 (1975).

[77] *See id.* at 188 n.21, 336 A.2d at 732; Davidoff & Davidoff, *supra* note 66, at 531; Williams, *supra* note 6, at 96–97.

[78] *See* Downs, *Suburban Housing: A Program for Expanded Opportunities*, in HOUSING 1970–1971, at 34 (G. Sternlieb & L. Sagalyn eds. 1972); Lauber, *Recent Cases in Exclusionary Zoning*, A.S.P.O. Planning Advisory Serv. (Report No. 292), at 25 (1973).

[79] *See* Myhra, *A-95 Review and the Urban Planning Process*, 50 J. URB. L. 449, 457–59 (1973).

[80] *See, e.g.*, Upper St. Clair Twp. v. Commonwealth, 13 Pa. Commw. 71, 317 A.2d 906 (1974) (conditioning funds for municipal park invalidated because without basis in constitutional or statutory law).

MUNICIPAL REMEDIES

Developing municipalities are obviously reluctant to ameliorate the impact of exclusionary zoning. Their governing bodies are elected by a constituency that by and large prefers to wall out urban ills. There is no incentive to open the door—even slightly—to admit low- and moderate-income housing where such housing will cost more in services than it produces in revenues.

Nevertheless, there has been community action on a voluntary basis (that is, without the coercion of legislative and/or judicial action).[81] There is recognition that the products of exclusionary zoning, such as a class-segregated society, do not conform to American ideals[82] and that urban ghettos without exits are breeding grounds for violence and even revolution.

Moreover, as decisions like *Mount Laurel* are handed down, pragmatic incentives to municipal action begin to appear. There is the danger that litigation will result in low- and moderate-income housing in spurts, rather than evenly spread over a reasonable time frame; that developer-plaintiffs will choose the sites for such housing, and that such sites may not coincide with community needs; that certain municipalities, by chance or because of location, may bear the brunt of low-cost housing, while others escape entirely; and that, in a litigation context, aesthetic and environmental considerations may seem to be makeweights argued by an exclusionary community and may thus get short shrift from courts.

It is submitted, therefore, that a consideration of municipal remedies is not an academic exercise. As Justice Hall said in *Mount Laurel*:

> Proper planning and governmental cooperation can prevent over-intensive and too sudden development, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty. We do not intend that developing municipalities shall be overwhelmed by voracious land speculators and developers if they use the powers which they have intelligently and in the broad public interest.[83]

Some suggestions follow.

The objectives of a housing program, concerned with providing a mix of housing, may be stated as:

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[81] *See* RUBINOWITZ, *supra* note 75, at 53–84.

[82] *See* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 220–21, 336 A.2d 713, 749–50 (1975) (Pashman, J., concurring).

[83] *Id.* at 191, 336 A.2d at 733–34 (majority opinion).

1. To preserve the natural beauty of an area. To create and/or maintain attractive neighborhoods.

2. To provide for uses as rationally as possible. To minimize costs of services by proper planning. To site uses with proper regard for their needs and impact.

3. To provide a full range of decent housing, including low- and moderate-cost housing.

Well-drawn regulations will permit the introduction of low- and moderate-cost housing, with safeguards for aesthetics and the amenities. This approach presents a dilemma, however: Every condition placed upon new construction raises its cost, making the provision of low-cost housing more difficult. Conditions will have to be drawn with care.

In the absence of regional planning, a "Fair Share" program for municipalities in each region should be established voluntarily. As noted, these programs have been adopted in various parts of the country.[84] The program may be administered by a county or regional planning body, which would determine the overall housing needs of the planning area. This housing-need figure may then be allocated among the constituent members, based upon local needs, fiscal capabilities, employment sites, transportation facilities, and so forth.[85] The advantages of a "Fair Share" program are:

1. All municipalities are in a similar position. None will be flooded with low-cost housing. None will escape. Prospective buyers and developers will find the same situation throughout the region.

2. Planning can be more rational. Low-cost housing can be located where conditions are most suitable.

3. Social aims of dispersal of the poor are facilitated.

If a "Fair Share" program proves impractical (*e.g.*, politically), the municipality should develop its own plan. A thorough inventory of physical conditions (soil, geology, hydrology, current land use), as well as a study of population and employment projections, economic factors, job locations, travel patterns, and housing needs, are vital as

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[84] Such plans have been adopted by the Metropolitan Washington Council of Government, the Ohio Valley Regional Planning Commission, San Bernardino County, California, and the Metropolitan Council of Minneapolis-St. Paul. *See* Brooks, *Lower Income Housing: The Planner's Response*, A.S.P.O. Planning Advisory Serv. (Report No. 282).

[85] Formulae for allocation differ. *See id. See also* Karmin, *How Dayton's Elite Opened its Suburbs*, Wall Street J., May 11, 1972, at 16, col. 3.

a starting point. The municipality should define its region and describe its role within the region. Goals should be set for various types of housing. Sites which are undesirable for environmental reasons should be eliminated from the pool. Districting should be done with consideration for the nature of the land, capital plant (including public transportation), existing neighborhoods, and location of services. Sites considered most desirable for low-income housing should be made available to developers. Facts and figures are important. A well thought out and documented plan is critical to the development of the community and will be of substantial assistance should litigation develop. Communities may employ a variety of planning techniques.

Phased zoning is a technique that permits control over the pace and location of new development. Ramapo, New York, pioneered a plan that tied development to a capital improvement budget and made the issuance of permits for residential construction contingent upon the amassing of a certain number of points. These points were scored on the basis of existing improvements in the area. Thus, development could be directed to areas that are already sewered, have city water, and so forth. New York's highest court upheld the Ramapo plan.[86] Judicial approval of this form of planning is important; municipalities should not be required to accept unplanned, spurt development, whatever the cost. Provided there is professional planning input, the phasing of development is not too drawn out, and early provision is made for low- and moderate-income housing, the courts will probably permit a community to pause and digest development.[87]

Low- and moderate-income housing districts should be intelligently drawn, encouraging, among other things, proximity of residential areas to public parks, shopping facilities, and public transportation. Furthermore, landscaping requirements should be strict, *inter alia*, prohibiting the removal of mature trees without a permit. Important, also, is keeping lot requirements modest, thereby making the use of row housing a valuable option. While a single-family detached home requires a minimum of 7500 square feet, row housing can be built on lots of 2000 square feet.[88] Moreover, row housing is not only comparatively inexpensive to build because of its low land require-

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[86] Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). Phased zoning was also upheld in Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *rev'g* 375 F. Supp. 574 (N.D. Cal. 1974).

[87] The *Mount Laurel* court so suggested. *See* 67 N.J. at 188 n.20, 336 A.2d at 732. *See also* cases cited note 86 *supra*.

[88] THE COMMUNITY BUILDERS HANDBOOK 108 (J. McKeever ed. 1968).

ments, but also has the "feel" of independent housing units so long as common walls are acoustically treated.[89]

Multi-family housing could be made a special exception in most residential districts. Restrictions on height (*e.g.*, four stories) and number of units should be set so that the housing more closely resembles its neighbors and so as to avoid social problems found to exist when low-income families are concentrated in high-rise buildings. Conditions for granting the special exception may include:

1. All multi-family buildings should be at least one-half mile apart.

2. The buildings, taking into consideration their higher density, should be designed to fit in with neighboring homes. Perimeter plantings may be required.

3. Adequate provision should be made for parking and for open space.

4. Aesthetic aspects should be detailed. For example, in order to avoid unsightly laundry lines, provision should be made for drying clothes.[90]

A Planned Unit Development ordinance (PUD)[91] could be adopted. This would avoid the boring grid system of modern subdivisions and would permit the development of low- and moderate-cost housing—as well as higher levels of residential and other uses—in an integrated, planned community. Under this type of ordinance, usual zoning requirements as to use and area are suspended and an overall density is substituted. The PUD offers the advantages of relatively large-scale planning and flexibility in terms of design and economic mix.

"Inclusionary zoning," previously mentioned, can be effected by ordinance if put on an incentive rather than a mandatory basis. A developer would receive density bonuses if he chooses to build some low- or moderate-income housing.[92] These units might be built as

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[89] *See id.* at 115.

[90] *Id.* at 128–29.

[91] This approach was described by the *Mount Laurel* court:

> [T]he type, density and placement of land uses and buildings, instead of being detailed . . . by local legislation in advance, is determined by contract . . . as to each development between the developer and the municipal administrative authority, under broad guidelines laid down by . . . local ordinance.

67 N.J. at 166, 336 A.2d at 720; *see id.* at 166–68 & n.5, 336 A.2d at 720–22. *See also* Rudderow v. Township Comm., 121 N.J. Super. 409, 297 A.2d 583 (App. Div. 1972), *rev'g* 114 N.J. Super. 104, 274 A.2d 854 (L. Div. 1971), *construing* Municipal Planned Unit Development Act (1967), N.J. STAT. ANN. § 40:55–54 *et seq.* (1967), *as amended*, (Supp. 1975–76); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968).

[92] *See generally* Kleven, *supra* note 69.

part of a single project or on scattered locations, subject to site approval by the municipality.

In established towns, it may be desirable for the municipality to build the housing. In this way it may control siting, design, maintenance, and management. Grants and loans from higher levels of government may be available, and attractive results are possible.

These suggestions are necessarily general. Zoning and other land-use regulations must be tailored to the particular needs of the municipality. In all cases, a public education program should be mounted by the municipality.[93]

JUDICIAL REMEDIES

As suggested earlier, legislative action is preferable to litigation. For similar reasons, voluntary efforts at the local level (particularly "Fair Share" programs) can achieve more with less disruption than can judicial remedies.

Thus, in *Mount Laurel* itself, the New Jersey supreme court withheld specific relief and invited the township to act.[94] And in the same opinion, Justice Hall encouraged the legislature to require regional zoning.[95] As the United States Supreme Court recently observed, "citizens dissatisfied with provisions of [zoning] laws need not overlook the availability of the normal democratic process."[96] When this process fails, however, and social problems persist, the courts will act.[97] The question is how: with what remedies?

The answer depends upon what objectives are assumed. Insofar as exclusionary zoning is concerned, two objectives seem crucial. First, housing for low- and moderate-income families must be built, not just talked about. Second, attractive suburban communities must be preserved; it is no advance to "recreate slums in new locations."[98]

Establishing First Principles

For the most part, anti-exclusionary decisions have adopted the traditional case-by-case approach, adjudicating no more than is neces-

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[93] Brooks, *supra* note 84, at 12.

[94] 67 N.J. at 191–92, 336 A.2d at 734.

[95] *Id.* at 189 n.22, 336 A.2d at 732–33.

[96] Warth v. Seldin, 95 S. Ct. 2197, 2210 n.18 (1975).

[97] Among the many areas in which the courts have taken the lead are racial segregation, *see* Brown v. Board of Educ., 347 U.S. 483 (1954), legislative apportionment, *see* Baker v. Carr, 369 U.S. 186 (1962), educational funding, *see* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), and exclusionary zoning, *see* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975).

[98] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 212, 336 A.2d 713, 744 (1975) (Pashman, J., concurring).

sary to resolve the dispute before the court. The focus has been on zoning, not housing.

Thus, in one jurisdiction, four-acre minimum lot restrictions were invalidated in 1966, two-acre restrictions in 1970.[99] In another jurisdiction, a two-acre limitation was ruled unconstitutional because its effect was "to prevent people in the low income bracket from living in the . . . area."[100] But the court did not deal with other exclusionary devices which can produce the same effect. Each variation on the exclusionary theme, *e.g.*, a ban on apartments,[101] on townhouses,[102] on mobile homes,[103] is treated separately, case by case.

This traditional approach, desirable in common law fields, is somewhat less than satisfactory when applied to zoning. One reason is that while municipalities soon fathom that courts are seeking to prevent the exclusion of low- and moderate-income groups from the suburbs, they are not sure how far the courts will go.[104] It is difficult to plan, and the impetus to do so is weak.

A second reason, akin to the first, is that the piecemeal approach leaves room for substantial maneuvering. Imaginative draftsmen can usually create fresh devices, untrammeled by precedent. For example, instead of banning apartments, a municipality may restrict the number of bedrooms and require luxury features, such as swimming pools and air-conditioning, so as to deter construction or at least screen out prospective low- and moderate-income tenants.[105] Such maneuvering abets other available delaying tactics (*e.g.*, the abuse of

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[99] *Compare* National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) *with* Concord Twp. Appeal (Appeal of Kit-Mar Builders, Inc.), 439 Pa. 466, 268 A.2d 765 (1970).

[100] Board of County Supervisors v. Carper, 200 Va. 653, 661, 107 S.E.2d 390, 396 (1959).

[101] Girsh Appeal, 437 Pa. 237, 240, 263 A.2d 395, 396 (1970).

[102] Camp Hill Dev. Co. v. Zoning Bd. of Adjustment, 13 Pa. Commw. 519, 524, 319 A.2d 197, 200 (1974).

[103] East Pikeland Twp. v. Bush Bros., 13 Pa. Commw. 578, 584, 319 A.2d 701, 704 (1974).

[104] For example, the Rhode Island supreme court invalidated a patently unreasonable restriction on mobile homes, suggested it "might be considered as one type of exclusionary zoning," and quoted from two Pennsylvania anti-exclusionary precedents (National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965), and Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970)) with apparent approval. Town of Glocester v. Olivo's Mobile Home Court, Inc., 111 R.I. 120, 126–28, 300 A.2d 465, 469–70 (1973). But the court did not detail where this reasoning might carry it.

[105] *See* Molino v. Mayor & Council, 116 N.J. Super. 195, 201–05, 281 A.2d 401, 404–06 (L. Div. 1971) (held invalid); *cf.* Shomo v. Derry Borough, 5 Pa. Commw. 216, 219–20, 227, 289 A.2d 513, 515, 518 (1972) (otherwise innocuous minimum size requirements held invalid where effect was to exclude mobile homes).

site-plan and subdivision controls); and here, as elsewhere, to delay is often to deny.

Third, on a case-by-case basis, lightning may strike one town and not another. Instead of an equitable allocation of regional housing needs, there may be a heavy infusion of ex-urban poor in one place and virtually none in another. "Tipping points" may be passed, and racial or at least socio-economic ghettos may be transferred to the suburbs.

It is submitted, therefore, that a more sweeping approach is required at the outset,[106] with emphasis on meeting housing needs rather than invalidating specific exclusionary devices, and with a clear mandate that remedial action be regional in scope. Although elements of this approach may be found elsewhere,[107] it is developed in full only in *Mount Laurel*. There, the court held (a) that each developing municipality must utilize its land use powers to afford realistic opportunities for meeting its fair share of regional housing needs; (b) that it is the municipality which must "sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do"; and (c) that improper intent need not be proved; a showing of exclusionary effect is enough.[108]

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[106] This is not to say that the litigation giving rise to this initial approach need be a multiparty extravaganza. *See* Commonwealth v. County of Bucks, 8 Pa. Commw. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974), where the court dismissed (as nonjusticiable) a suit against all 54 Bucks County municipalities and assorted other defendants, alleging exclusionary zoning. Indeed, a concrete and manageable factual matrix will aid the formulation of first principles. *See* Warth v. Seldin, 95 S. Ct. 2197, 2209–10 (1975).

[107] For example, in Michigan, the total exclusion of a legitimate use from a municipality gives rise to a prima facie inference of unconstitutionality " 'placing a heavy burden on the municipality to justify the local legislation.' " Kropf v. City of Sterling Heights, 391 Mich. 139, 155, 215 N.W.2d 179, 185 (1974) (quoting from the unreported opinion of the trial court); *accord*, Tocco v. Atlas Twp., 55 Mich. App. 160, 222 N.W.2d 264 (1974) (invalidating total ban on mobile homes). *See also* Beaver Gasoline Co. v. Osborne Borough, 445 Pa. 571, 576–77, 285 A.2d 501, 504–05 (1971).

While this across-the-board approach, as well as the shifting of the burden of proof to the municipality, resemble the thinking of *Mount Laurel*, the Michigan and Pennsylvania cases do not provide for regional needs and do not necessarily prevent lip-service compliance (slightly less than total prohibition), as opposed to fair share. *But cf.* Casey v. Zoning Hearing Bd., 328 A.2d 464, 468 (Pa. 1974) (court would prevent municipality's attempts to "zone around" those who successfully challenge exclusionary ordinances).

The emphasis on meeting low-income housing needs is more pronounced in some of the federal cases, but only local—not regional—needs are considered. *See, e.g.*, Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291, 295–96 (9th Cir.), *on remand*, 357 F. Supp. 1188, 1199 (N.D. Cal. 1970).

[108] 67 N.J. at 174 & n.10, 336 A.2d at 724–25. For the question of effect versus intent see United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 697 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

Initial Implementation

It is no easy matter to delineate proper regions and to fairly allocate housing needs. Professional planning expertise will be necessary. Only an overall approach will avoid overlap (the same municipality placed in two regions) and omission (carving out two regions and omitting a municipality between them). Moreover, the task will require periodic revision as circumstances change.[109]

Quite obviously, the job should be done by a statewide administrative agency with a professional staff, deriving its powers from the legislature.[110] The fact that an absence of effective legislation caused a court to act in the first place does not necessarily suggest that the legislature will sit on its hands once a *Mount Laurel*-type decision is handed down. Even home-rule-conscious towns may ask for help to avoid the possible chaos of discordant judicial results.

Another alternative is voluntary local action, perhaps utilizing professional services available from state and county agencies. It is in the best interests of communities to cooperate to produce a rational and attractive result in advance of litigation.[111] *Mount Laurel* leaves the door open:

> Frequently it might be sounder to have more of such housing, like some specialized land uses, in one municipality in a region than in another, because of greater availability of suitable land, location of employment, accessibility of public transportation or some other significant reason. But, under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally. So long as that situation persists under the present tax structure, *or in the absence of some kind of binding agreement among all the municipalities of a region*, we feel that every municipality therein must bear its fair share of the regional burden.[112]

Of course, if all else fails, it would be necessary for the courts to map regions and allocate housing needs. Various tests and factors have been suggested,[113] although the majority opinion in *Mount*

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[109] *Compare* Board of County Supervisors v. Carper, 200 Va. 653, 655–60, 107 S.E.2d 390, 392–95 (1959) (planning needs of Fairfax County, Virginia, prior to 1959) *with* Board of Supervisors v. Allman, 215 Va. 434, 436–43, 211 S.E.2d 48, 49–54 (1975) (present needs in Fairfax County).

[110] *See* Rose, *supra* note 20, at 70; *cf.* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 190, 336 A.2d 713, 733 (1975).

[111] Mytelka, *supra* note 20, 98 N.J.L.J. at 522, col. 4.

[112] 67 N.J. at 189, 336 A.2d at 732–33 (footnote omitted) (emphasis added).

[113] *See id.* at 215–16, 336 A.2d at 746–47 (Pashman, J., concurring); Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 441–47, 320 A.2d 223, 224–28 (L. Div. 1974); RUBINOWITZ, *supra* note 75, at 219–20; Lindbloom, *Defining 'Fair Share' of 'Regional Need': A Planner's Application of* Mount Laurel, 98 N.J.L.J. 633, col. 4 (1975).

Laurel gives few details to guide a trial court.[114] If the litigants themselves do not adduce expert evidence of satisfactory quality, the court could appoint its own expert or ask a statewide planning agency to participate as *amicus*.[115] In this phase of the litigation, the necessity of joining all municipalities in the region probably outweighs the problem of managing so large a multi-party litigation.[116]

At this point, either by litigation combined with state administrative or voluntary local action, or by litigation alone, each municipality would be assigned a set amount of low- and moderate-income housing.[117] The next step is rezoning, a task the municipality should perform, subject, of course, to time limitations and judicial supervision.[118] In this connection, the municipality should be given guidelines and the modern tools with which to work.

As for guidelines, it is imperative that overcorrections and unplanned results be avoided. Municipalities should be told that they may and should maintain attractive, balanced communities—including large-lot luxury areas and commercial districts, as well as places for low- and moderate-income housing—and that fiscal and aesthetic considerations should not be tossed aside.[119] Municipalities should also be told that ecological and environmental factors must be taken into account in siting new development, although these factors will rarely preclude allocation of regional housing quotas to a particular community.[120]

Modern planning tools will help and should be cited, particularly in jurisdictions which have not previously passed upon their validity. Phased zoning[121] can avert "too sudden develop-

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[114] *See* 67 N.J. at 188–90, 336 A.2d at 732–33.

[115] *Id.* at 216, 336 A.2d at 747 (Pashman, J., concurring); *see* Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 201, 329 A.2d 89, 93 (L. Div. 1974), *rev'd on other grounds*, Nos. A-3790-72, A-1841-73 (N.J. Super. Ct., App. Div., June 25, 1975), *cert. granted*, No. 11754 (N.J., Oct. 14, 1975); *cf.* Township of Wayne v. Kosoff, 136 N.J. Super. 53, 344 A.2d 328 (App. Div. 1975), *cert. granted*, No. 11783 (N.J. Oct. 14, 1975), where, in a condemnation case, the court required court-appointed experts to avoid the pitfalls of partisan testimony, citing McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109, 131 (1945). *See also* FED. R. EVID. 706.

[116] *See* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 216, 336 A.2d 713, 747 (1975) (Pashman, J., concurring).

[117] *See* Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 446–47, 320 A.2d 223, 227 (L. Div. 1974).

[118] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 191, 336 A.2d 713, 734 (1975).

[119] *Id.* at 185, 190–91, 212–13, 336 A.2d at 731, 733, 745.

[120] *Id.* at 186–87, 212–13, 336 A.2d at 731, 745; *see* Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 447, 320 A.2d 223, 227–28 (L. Div. 1974) (environmental and ecological considerations).

[121] *See* notes 86–87 *supra* and accompanying text. *See also* National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965) (munici-

ment."[122] Cluster zoning[123] and planned unit developments[124] can avoid "suburban sprawl" and conserve "open space and local beauty."[125] As observed by Justice Pashman in *Mount Laurel*:

> A municipality has a legitimate interest in insuring that residential development proceeds in an orderly and planned fashion, that the burdens upon municipal services do not increase faster than the practical ability of the municipality to expand the capacity of those services, and that exceptional environmental and historical features are not simply concreted over.[126]

Assuming a municipality complies in good faith, it should be safeguarded from "voracious land speculators and developers."[127] So long as there is sufficient available land zoned for low- and moderate-income housing, and so long as that land is practicably usable for such housing, a developer should be precluded from asserting that *other* land subject to his contract must be rezoned to suit his bank account.[128]

An exception should be carved from the last paragraph. If a developer seeking approval of a specific project brings suit and establishes a seminal anti-exclusionary precedent (*Mount Laurel* did not involve such a plaintiff)—or if, after such precedent is established, a developer is required to litigate against a recalcitrant municipality —the developer should not be told at the end of a long, expensive suit that his tract is not appropriate for his project, absent overwhelming countervailing considerations. To hold otherwise would discourage potential plaintiffs and work against the significant public policies underlying the anti-exclusionary decisions.[129]

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pality may zone to insure that municipal services are provided in an orderly and rational manner).

[122] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 191, 336 A.2d 713, 733 (1975). *See also id.* at 212–13, 336 A.2d at 745–46 (Pashman, J., concurring).

[123] *See* Chrinko v. South Brunswick Twp. Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (L. Div. 1963).

[124] *See* note 91 *supra* and accompanying text.

The fact that a municipality may improperly condition PUD approvals, *see* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 166–68 & nn.5, 6, 336 A.2d 713, 720–22 (1975), does not mean that the *concept* is bad. *See also* Bucholz v. City of Omaha, 174 Neb. 862, 870–75, 120 N.W.2d 270, 276–78 (1963); Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960); Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A.L. REV. 897 (1965).

[125] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 191, 336 A.2d 713, 733 (1975).

[126] *Id.* at 212–13, 336 A.2d at 745 (Pashman, J., concurring).

[127] *Id.* at 191, 336 A.2d at 733–34 (majority opinion).

[128] *Id.* at 213–14, 336 A.2d at 746 (Pashman, J., concurring).

[129] *See, e.g.*, Casey v. Zoning Hearing Bd., 328 A.2d 464, 468 (Pa. 1974). By analogy,

Ultimate Applications

It is important not to lose sight of objectives. As stated earlier, these are: to build housing, while preserving the amenities.

Even with a broad-gauged *Mount Laurel*-type approach, there is room for maneuvering. A bad-faith municipality can play games until a developer gives up and goes elsewhere.[130] The possibilities for delay are greater where courts are content to gradually chip away at exclusionary policies.

On the other hand, the simple expedient for cutting through delay—mandating the issuance of a building permit—

> affords no protection to other property owners in the community who might be adversely affected by what in essence would be the unregulated development by the plaintiffs of their property.[131]

Some safeguards are necessary to ensure that developing municipalities on the urban fringe "become and remain attractive, viable communities providing good living and adequate services for all their residents."[132] Once decay sets in, it is difficult to call a halt.[133] "An ugly city is not like a bad painting, which can be shut up in a museum out of the sight of anyone who does not wish to see it."[134]

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those courts which have applied the prospective overruling doctrine have usually excepted from its scope the party who obtained the change in law, because

> unless the immediate litigant can hope to gain, there would be no incentive to challenge existing practices or prior holdings which, in the public interest, ought to be reviewed.

Goldberg v. Traver, 52 N.J. 344, 347, 245 A.2d 334, 336 (1968).

[130] For example, delaying tactics stymied construction of housing in the three leading Pennsylvania anti-exclusionary cases. RUBINOWITZ, *supra* note 75, at 210–11. For another, note the history of the *Oakwood at Madison* case: After the trial court invalidated the Madison township zoning ordinance in 1971, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 22, 283 A.2d 353, 359 (L. Div. 1971), an appeal was taken and the New Jersey supreme court granted certification, 62 N.J. 185, 299 A.2d 720 (1972), thus expediting the case by bypassing the appellate division. On the eve of oral argument, Madison Township amended its ordinance, and the supreme court remanded the case for reconsideration at the trial level. No. A9/10 (N.J., filed Jan. 14, 1974). In 1974, the amended ordinance was likewise invalidated. 128 N.J. Super. 438, 447, 320 A.2d 223, 227 (L. Div. 1974). As of this writing, the case is presently awaiting decision in the supreme court.

For a further discussion of delaying tactics see Rose, *supra* note 20, at 67–70.

[131] Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 207, 329 A.2d 89, 96 (L. Div. 1974), *rev'd on other grounds*, Nos. A-3790-72, A-1841-73 (N.J. Super. Ct., App. Div., June 25, 1975), *cert. granted*, No. 11754 (N.J., Oct. 14, 1975).

[132] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 190, 336 A.2d 713, 733 (1975).

[133] *See, e.g.*, Wilson v. Borough of Mountainside, 42 N.J. 426, 433–37, 450, 201 A.2d 540, 543–45, 552–53 (1964) (deterioration of "residential" district fronting on highway).

[134] Speech by Senator Fulbright, University of North Carolina, Apr. 5, 1964.

The potential conflict between these objectives—building homes and preserving amenities—can be resolved by careful application of flexible remedies with recognition that the public interest may not be fully represented by either plaintiffs or defendants. The point was well stated in a 1969 New Jersey chancery opinion:

> Substantial justice can often be accomplished by the granting of conditional, experimental or substitutional relief or any equitable combination thereof. . . .
>
> . . . .
>
> . . . *Within very broad limits, the court is free to adjust the interests of the plaintiffs, the defendants and the public by devising an individually tailored remedy to fit the particular case.* . . .
>
> . . . .
>
> A court may reject entirely the specific relief requested by the plaintiffs and substitute relief which in its judgment better reflects the parties' equities. . . .[135]

A discussion of remedies follows. In each case, the assumption is that either (a) a *Mount Laurel*-type precedent has been established and the municipality has not provided usable land sufficient to meet its fair share of regional housing needs, or (b) a case-by-case approach is in process and the court has found a particular zoning ordinance improperly exclusionary.

1. Simple invalidation.

The traditional equitable remedy is a declaration that the offending ordinance is invalid, usually coupled with an injunction against its enforcement.[136] Out of deference to the municipality, and to avoid the evil of unzoned lands, courts will often stay their declaration of invalidity for a specified time period. If the period passes without rezoning, the developer may proceed with his project, disregarding the illegal ordinance, yet "subject to all other applicable provisions of the zoning and other pertinent regulations of the municipality."[137]

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[135] Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 486–90, 261 A.2d 692, 705–07 (Ch. 1969) (emphasis added). *See* Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639 (1962); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1063–64 (1965).

[136] Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1216 (8th Cir. 1972); *see, e.g.*, United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975); Herzog v. City of Pocatello, 83 Idaho 365, 373–74, 363 P.2d 188, 193 (1961); Board of County Supervisors v. Carper, 200 Va. 653, 655, 107 S.E.2d 390, 391–92 (1959).

[137] Schere v. Township of Freehold, 119 N.J. Super. 433, 437, 292 A.2d 35, 37 (App. Div.) (per curiam), *cert. denied*, 62 N.J. 69, 299 A.2d 67 (1972), *cert. denied*, 410 U.S. 931 (1973).

This remedy is most desirable in actions which generally challenge a municipality's zoning but do not involve a specific project. *Mount Laurel* itself was in this category, and the remedy was applied by the New Jersey supreme court.[138]

The remedy is less than satisfactory, however, where plaintiffs seek approval for a particular project. In that context, time is often of the essence: A plaintiff's option to purchase the project property will usually have a time limitation; and even if he owns the property, delay ties up his investment and may increase his costs. Moreover, where a bad-faith municipality aims to delay, it receives a substantial assist from a court which, while invalidating a 21,780 foot minimum lot restriction, refuses to approve the 8,500 foot minimum sought by plaintiff, stating: "It will be time enough for the court to review this matter if and when the municipal legislative body has rezoned plaintiffs' property."[139]

2. Rezoning plaintiff's property.

Where a municipality has engaged in exclusionary practices, particularly where it has done so in the face of precedents like *Mount Laurel*, the overriding judicial consideration should be to get housing built without delay.[140] The most direct remedy, therefore, is to rezone plaintiff's tract for the use he seeks to build, assuming the court has found the project to be reasonable.[141] In this way, the developer and the municipality know exactly where they stand, litigation is shortened or terminated, and the project can move forward. As Professor Krasnowiecki put it in a recent article which marshals the arguments:

> Obviously, if judicial review of local zoning actions is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief.[142]

The leading case is *Sinclair Pipe Line Co. v. Village of Richton Park*,[143] where Justice Schaefer of the Illinois supreme court pointed

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[138] 67 N.J. at 191, 336 A.2d at 734.

[139] Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 519, 116 N.W.2d 816, 821 (1962).

[140] As one commentator has noted: "In exclusionary zoning cases the measure of whether the remedy is working should be actual production of low- and moderate-income housing." RUBINOWITZ, *supra* note 75, at 211.

[141] Such rezoning may be subjected to conditions, *e.g.*, compliance with other land-use regulations. *See* notes 175–79 *infra* and accompanying text.

[142] Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1082 (1972). For further discussion see *id.* at 1060–65, 1079–83.

[143] 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

out "two equally undesirable consequences" of a simple declaration of invalidity:

> The municipality may rezone the property to another use classification that still excludes the one proposed, thus making further litigation necessary as to the validity of the new classification. . . . [On the other hand,] a decree which was induced by evidence which depicted a proposed use in a highly favorable light would not restrict the property owner to that use, and he might thereafter use the property for an entirely different purpose.[144]

Since in most cases the trial will center upon a particular project proposed by plaintiff, the cure is for the trial court to grant a remedy "with reference to the record before it."[145] Thus,

> the relief awarded may guarantee that the owner will be allowed to proceed with that use without further litigation and that he will not proceed with a different use.[146]

While *Sinclair* did not involve housing, later Illinois cases gave definitive relief for such uses as apartments[147] and mobile homes.[148] To the same effect are decisions in Connecticut,[149] New Jersey,[150] and federal courts.[151] Pennsylvania adopted definitive relief by statute,[152] and its case law follows the statute.[153]

The major argument against definitive relief is theoretical: that the court is zoning and that this interferes with the doctrine of separation of powers. *Sinclair* brushed this argument aside, observing that courts already grant definitive relief in variance and mandamus cases.[154] Another answer might be that if the judiciary is empowered

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[144] *Id.* at 378, 167 N.E.2d at 411 (citations omitted).

[145] *Id.* at 379, 167 N.E.2d at 411.

[146] *Id.*

[147] *See* Fiore v. City of Highland Park, 76 Ill. App. 2d 62, 221 N.E.2d 323 (1966).

[148] *See* Duggan v. County of Cook, 60 Ill. 2d 107, 324 N.E.2d 406 (1975), *modifying on other grounds* 17 Ill. App. 3d 253, 307 N.E.2d 782 (1974).

[149] *See* Kavanewsky v. Zoning Bd. of Appeals, 160 Conn. 397, 403–04, 279 A.2d 567, 571 (1971).

[150] Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 207–08, 329 A.2d 89, 97 (L. Div. 1974), *rev'd on other grounds*, Nos. A-3790-72, A-1841-73 (N.J. Super. Ct., App. Div., June 25, 1975), *cert. granted*, No. 11754 (N.J., Oct. 14, 1975).

[151] Crow v. Brown, 332 F. Supp. 382, 395 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Dailey v. City of Lawton, 296 F. Supp. 266, 269 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

[152] Krasnowiecki, *supra* note 142, at 1109.

[153] *E.g.*, Casey v. Zoning Hearing Bd., 328 A.2d 464, 469 (Pa. 1974).

[154] 19 Ill. 2d at 379, 167 N.E.2d at 411. In a recent New Jersey case brought against officials of Madison Township and decided while previous invalidations of Madison's zoning ordinance were stayed pending appeal, *see* note 130 *supra*, specific relief (the

to set aside an ordinance in its entirety, surely it can give a lesser remedy, namely, invalidation subject to the condition that the land be developed for a particular use only.

In any event, *Sinclair* is so compelling from a practical standpoint that even courts which reject it and pay lip service to separation of powers, nevertheless arrive at the same result. For example, the Virginia supreme court, in a case decided in 1975, *Board of Supervisors v. Allman*,[155] sustained a trial court's finding of invalidity but reversed as to the definitive relief granted by the trial judge.[156] Plaintiff had applied for rezoning of 302.96 acres from the existing one dwelling unit per acre to three.[157] A "critical housing need for low and moderate income families" was conceded, but the application was denied because of an inadequacy of public facilities.[158] The trial court ruled for plaintiff and gave the governing body seven weeks to rezone.[159] When it failed to do so, the trial judge held:

> "[T]he subject property be and it hereby is, rezoned to the *PDH–3* District, and Defendant Board is directed to cause its agents to make appropriate notations upon the zoning records of Fairfax County in accord with this Order."[160]

The Virginia supreme court bristled:

> The ultimate classification of lands under zoning ordinances involves the exercise of the legislative power and under the doctrine of separation of powers this field shall not be invaded by the courts.[161]

But it turned around and directed that the trial court order the county board of supervisors to "reconsider its action refusing to rezone the Allman property" within a time limit to be set by the lower court, and that

> [d]uring this period of time the court will suspend its adjudication of the invalidity of the classification RE–1 [one acre]. It having been established by the evidence that the uses of the property proposed by Allman are reasonable uses and that either zoning classification PDH–3 or zoning classification R–12.5 would permit

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granting of a variance) was ordered for the plaintiff. Brunetti v. Mayor & Council, 130 N.J. Super. 164, 325 A.2d 851 (L. Div. 1974).

[155] 215 Va. 434, 211 S.E.2d 48 (1975).

[156] *Id.* at 446, 211 S.E.2d at 55–56.

[157] *Id.* at 434–35, 211 S.E.2d at 48–49.

[158] *Id.* at 437, 211 S.E.2d at 50; *see id.* at 436–41, 211 S.E.2d at 49–52.

[159] *Id.* at 435, 211 S.E.2d at 49.

[160] *Id.* at 436, 211 S.E.2d at 49 (quoting from the unreported order of the trial court).

[161] *Id.* at 445, 211 S.E.2d at 55.

> such uses, the trial court will also enjoin the Board during the prescribed period from taking any action which would disallow these uses by Allman . . . . [S]hould the Board fail to comply within the time specified, the adjudication of invalidity of zoning classification RE–1 for the property will become operative and the injunction will become permanent, provided that appellee landowners shall not put their property to any use other than those shown by the record to be reasonable.[162]

In another case, involving the same issue and result, the Virginia court explained its rationale underlying this remand order in language which substantially paraphrased *Sinclair*.[163] But in a footnote, the court rejected the Illinois precedents, stating:

> We believe these holdings, which compel affirmative action by legislative bodies, go too far. The injunction is a more traditional remedy and one less offensive to the concept of separation of powers.[164]

The Florida supreme court held to the same effect, while ruefully confessing: "On the surface it may appear that we are here dealing with inconsequential semantics."[165]

In summary, there is substantial authority and good reason for granting definitive relief, to wit, rezoning a litigant's property so that he may proceed to build his project.

3. The zoning amendment shuffle.

A sub-category of the definitive relief question is the not infrequent tactic of rezoning during litigation. The purpose is usually delay. Thus, as noted earlier,[166] Madison Township (New Jersey) amended its ordinance just before argument of its appeal from the trial court's invalidation of the prior ordinance. Under New Jersey law,[167] the supreme court remanded the case without opinion,[168] and

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[162] *Id.* at 446, 211 S.E.2d at 55–56.

[163] City of Richmond v. Randall, 215 Va. 506, 513, 211 S.E.2d 56, 61 (1975). *Cf.* Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 378–79, 167 N.E.2d 406, 411 (1960).

[164] 215 Va. at 513 n.3, 211 S.E.2d at 61.

[165] City of Miami Beach v. Weiss, 217 So. 2d 836, 837 (Fla. 1969); *see* Orange County v. Butler Estates Corp., 303 So. 2d 66 (Fla. Dist. Ct. App. 1974); *cf.* Hamer v. Town of Ross, 59 Cal. 2d 776, 790–91, 382 P.2d 375, 384–85, 31 Cal. Rptr. 335, 344–45 (1963) (decree on remand should allow minimum lot size rezoning by town no larger than 10,000 square feet).

[166] *See* note 130 *supra*.

[167] *See* Tidewater Oil Co. v. Mayor & Council, 84 N.J. Super. 525, 530, 202 A.2d 865, 868 (App. Div. 1964), *aff'd*, 44 N.J. 338, 209 A.2d 105 (1965).

[168] Oakwood at Madison v. Township of Madison, No. A9/10 (N.J., filed Jan. 14,

the law division went through its routine again, rendering a decision invalidating the amended ordinance some two and a half years after it had handed down its original decision.[169] The case is again back in the supreme court.

Theoretically, it makes good sense to shun moot issues on appeal and determine only "the legal validity of the zoning ordinance in effect at that time [when the appeal is decided]."[170] Practically, however, a bad-faith municipality can spin its wheels until the plaintiff quits. For this reason, at least two jurisdictions have ruled that amendatory afterthoughts will not be considered, at least as between the municipality and the particular litigant who has won below.[171] To hold otherwise

> would effectively grant the municipality a power to prevent any challenger from obtaining meaningful relief after a successful attack on a zoning ordinance. The municipality could penalize the successful challenger by enacting an amendatory ordinance designed to cure the constitutional infirmity, but also designed to zone around the challenger. Faced with such an obstacle to relief, few would undertake the time and expense necessary to have a zoning ordinance declared unconstitutional.[172]

Any theoretical problems may be resolved either by viewing the trial decision as the law of the case as between the litigants[173] or by automatically including in trial judgments language enjoining the municipality

> "from rezoning . . . the property of the plaintiffs . . . , the effect of which would be to thwart or prevent the Plaintiffs from using their property for multiple dwelling apartment uses."[174]

1974). In fairness, it may be noted that this occurred while the New Jersey supreme court was pondering the *Mount Laurel* case, and it may have wanted a more substantial record for policy-making purposes. *See* 67 N.J. at 190 n.23, 336 A.2d at 733.

[169] Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 447, 320 A.2d 223, 227 (L. Div. 1974).

[170] *Id.* at 439–40, 320 A.2d at 223.

[171] *See* Fiore v. City of Highland Park, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968), *cert. denied*, 393 U.S. 1084 (1969); First Nat'l Bank v. Village of Skokie, 85 Ill. App. 2d 326, 229 N.E.2d 378 (1967); Casey v. Zoning Hearing Bd., 328 A.2d 464 (Pa. 1974); Camp Hill Dev. Co. v. Zoning Bd. of Adjustment, 13 Pa. Commw. 519, 319 A.2d 197 (1974); Sauer v. Richland Twp., 8 Pa. Commw. 464, 303 A.2d 269 (1973).

[172] Casey v. Zoning Hearing Bd., 328 A.2d 464, 468 (Pa. 1974).

[173] *See, e.g.*, Fiore v. City of Highland Park, 93 Ill. App. 2d 24, 33–34, 235 N.E.2d 23, 28 (1968), *cert. denied*, 393 U.S. 1084 (1969).

[174] First Nat'l Bank v. Village of Skokie, 85 Ill. App. 2d 326, 334, 229 N.E.2d 378, 383 (1967) (quoting from the unreported order of the trial court); *cf.* Board of Supervisors v. Allman, 215 Va. 434, 446, 211 S.E.2d 48, 55–56 (1975).

4. Compliance with other land-use regulations.

Once the court has exorcised a municipality's exclusionary practices, the question arises whether the developer should be permitted to proceed with his project without further ado or whether he should be required to comply with other land-use regulations. By and large, compliance has been compelled.[175] If final plans have been submitted to the municipality at the outset, the court can expedite matters by passing upon them as well as ruling on the constitutional challenge,[176] or by adopting conditions (in whole or in part) set by the local zoning agency.[177]

The bad-faith municipality presents the usual problem of obstruction. Subdivision controls, building codes, environmental reviews, and the like, can be used to delay construction of needed housing. Still, there is the objective of preserving amenities, and expediency is no answer.

Several solutions may be suggested. The court can retain its own planning expert to review the developer's plans and recommend modifications and conditions which can be implemented by court order.[178] Alternatively, to short-circuit delay, the court could proceed summarily by order to show cause requiring the municipality's various land-use agencies to set forth any objections or conditions they believe to be warranted. This proceeding could take place as part of the settlement of the form of order implementing the court's decision to invalidate the exclusionary ordinance. Finally, of course, proof of arbitrary or bad-faith tactics could—and should—result in a simple order requiring issuance of the necessary permits.[179]

5. Additional relief.

"Courts do not build housing,"[180] but if other remedies do not

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[175] *See, e.g.*, Dailey v. City of Lawton, 296 F. Supp. 266, 269 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970); Casey v. Zoning Hearing Bd., 328 A.2d 464, 469–70 (Pa. 1974).

[176] *See* Casey v. Zoning Hearing Bd., 328 A.2d 464, 469–70 (Pa. 1974).

[177] *See* Duggan v. County of Cook, 60 Ill. 2d 107, 114–16, 324 N.E.2d 406, 410–11 (1975).

[178] *See* Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 207–08, 329 A.2d 89, 97 (L. Div. 1974), *rev'd on other grounds*, Nos. A-3790-72, A-1841-73 (N.J. Super. Ct., App. Div., June 25, 1975), *cert. granted*, No. 11754 (N.J., Oct. 14, 1975). Although *Pascack* was reversed, its remedy provisions were cited with apparent approval in the *Mount Laurel* decision, 67 N.J. at 192, 215, 336 A.2d at 734, 746.

[179] *See, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 113–15 (2d Cir.), *aff'g* 318 F. Supp. 669, 697–98 (W.D.N.Y. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[180] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 192, 336 A.2d 713, 734 (1975).

succeed, courts could order governmental agencies to do so.[181] Persuaded by the ugly living conditions extant in poor districts and the township's failure to act,[182] the trial judge in *Mount Laurel* ordered affirmative action, including (inferentially) the construction of housing.[183] Although this remedy was reversed,[184] the concurring opinion stated that "there may be circumstances in which the municipality has an affirmative duty to provide housing."[185] Professor Williams suggests that even the majority may ultimately head in that direction.[186] The federal courts have come closest to ordering affirmative action, requiring governmental expenditures to secure housing for low- and moderate-income groups.[187] At the least, courts can compel municipalities to cooperate in obtaining federal and state housing programs.[188]

To effectuate the relief suggested in the previous paragraphs, courts should retain jurisdiction,[189] require periodic reports,[190] set time limits,[191] issue supplemental orders,[192] and the like. In this area, more than in most, continual supervision can be crucial.[193]

CONCLUSION

For too many years, exclusionary zoning has been a wrong without a remedy. The wrong has now been recognized. It is hoped that the remedy is not far behind.

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[181] RUBINOWITZ, *supra* note 75, at 222.

[182] *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 166–70, 290 A.2d 465, 466–68 (L. Div. 1972), *modified*, 67 N.J. 151, 336 A.2d 713 (1975).

[183] 119 N.J. Super. at 178–80, 290 A.2d at 473–74.

[184] 67 N.J. at 192, 336 A.2d at 734.

[185] *Id.* at 211, 336 A.2d at 745 (Pashman, J., concurring).

[186] WILLIAMS, *supra* note 20, § 66.13n.

[187] *See* Crow v. Brown, 332 F. Supp. 382, 395–96 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 697 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Southern Alameda Spanish Speaking Organization v. City of Union City, 357 F. Supp. 1188, 1199 (N.D. Cal. 1970).

[188] RUBINOWITZ, *supra* note 75, at 222; Mytelka, *supra* note 20, at 522, col. 3. There is also the suggestion that "inclusionary zoning" could be implemented judicially. RUBINOWITZ, *supra*.

[189] *See, e.g.*, City of Miami Beach v. Weiss, 217 So. 2d 836, 838 (Fla. 1969).

[190] *See, e.g.*, Southern Alameda Spanish Speaking Organization v. City of Union City, 357 F. Supp. 1188, 1199 (N.D. Cal. 1970).

[191] *See id.*

[192] Krasnowiecki, *supra* note 142, at 1109.

[193] RUBINOWITZ, *supra* note 75, at 211.