Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor

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Introduction: The Sociological Dimension of Economic Segregation in Housing

Our cities are presently engaged in a struggle to survive. The influx of low-income persons into industrial urban areas, combined with the migration of white middle-class families to suburban communities, has left urban areas with swollen populations and deflated tax bases. As a result, residents of the central city suffer from second-rate municipal services, inadequate police and fire protection, infrequent garbage service, poor street maintenance, outdated and overburdened public transportation systems, severely limited recreational opportunities, and inferior schools. All too often the poor are also victimized by unscrupulous landlords who profit from the rental of dilapidated and often unsafe apartments, and by private merchants who reap extraordinary profits by offering credit to the desperately needy. While environmental pollution affects our entire country, the inner city receives a disproportionate share. The poor suffer the most oppressive assault in every conceivable category of pollution—noise, air and water pollution, visual blight, solid waste, and landscape destruction.[1]

Given such an urban environment, the sensible thing to do would be to pack up and leave. For those fortunate enough to have attained a level of "social mobility," the land of promise in a neighboring suburb is generally accessible. The lower-income families of the central city also have a vision of this land of promise. It is tantalizingly close, perhaps only a few miles away; yet for them, it is virtually inaccessible. Moreover, the constant portrayal of the "good life" in the advertising

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1. CONSERVATION FOUNDATION NEWSLETTER, July, 1973, at 2-4.

media makes such a dream a source of constant frustration and personal despair and a potential cause of violence.[2]

The desire to move out of our cities is not only a response to urban decay but also to the basic need for work. More businesses and industries are moving to the suburbs, creating an unemployment rate in the central city twice the national average.[3] The reasons for this trend include a variety of factors—transportation access, expansion requirements, and, more importantly, the fact that suburban communities have welcomed these firms with open arms because of the communities' dependence on the property tax. The welcome mat, however, has not been rolled out for the firms' workers. These communities have been distinctly reluctant to modify their zoning requirements to permit housing for industry's labor force. As unemployment increases because the poor are separated from job opportunities, our welfare rolls increase. As rotting cities demand to be saved; and, as reverse commuting becomes increasingly necessary for those fortunate enough to find work, the environmental costs also increase. It does not take a fertile imagination to recognize the myriad ways in which economic segregation eats away at our tax dollars. In the long run, it would be far cheaper to integrate our communities than to maintain the poor in separate enclaves.

There are other less direct, though perhaps more severe social costs resulting from economic segregation in housing. When the poor are excluded from certain areas, or confined in others, a "separate-but-equal" situation arises. As we have learned from the civil rights movement, separate never really can be equal, at least at this point in our history. As long as the poorer, less influential members of our society remain confined in enclaves, city and county services available in those areas will remain inferior to the services provided in areas where the citizenry is more politically effective. School integration will continue to be artificially created as long as the poor, a high proportion of whom are minorities, must live in segregated housing. True communication and integration among the classes will not occur when the railroad tracks, or the modern-day equivalents, separate one economic class from another. The ultimate effect of such segregation is that the minds of a substantial portion of our citizenry are never really given a chance to fully develop. Those few that do break the chains of confinement find their energies sapped by spending a lifetime combatting

2. *See* Levitt, *The New Markets*, 47 HARV. BUS. REV. 61 (May-June, 1969).
3. CONSERVATION FOUNDATION NEWSLETTER, July, 1973, at 4.

the effects of economic segregation in our communities. The greatest waste of all is the waste of human potential.[4]

Thus economic segregation in housing can be seen as one of our most serious social problems. With the premise that the law can effect meaningful social change, this note will examine the means by which the poor are excluded from suburban communities and determine whether these means are subject to constitutional attack.

Although low income families are often excluded from communities through the use of private covenants among neighboring landowners, the most prevalent tools for such segregation are local zoning ordinances which may require minimum lot sizes or may forbid multiple unit dwellings. Such ordinances keep housing costs beyond the reach of low-income families.[5]

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4. The Court in Berman v. Parker, 348 U.S. 26, 32 (1954), took judicial notice of the effects of poor housing on the society as a whole; *see also* R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPIL'S INTELLECTUAL DEVELOPMENT (1968).

5. Piedmont, in Alameda County, California, is an incorporated city encompassed within the city of Oakland. 1970 Census figures show that Piedmont comfortably houses a population of 10,917 within its 1.2 square miles, whereas Alameda County as a whole must distribute its 1,073,184 residents within 56.945 square miles—a population density approximately *twice* that of Piedmont. These area figures include Alameda County's non-residential districts, of which Piedmont has none. The median price of a Piedmont home is $46,600.00, compared to a median price of $23,000.00 in all of Alameda County. Of the Piedmont homes, only 3 per cent could be purchased for $20,000.00 or less. Whereas only 9.7 per cent of all housing units in Piedmont are rental units, the percentage for all of Alameda County is 48.1 per cent. The median rental price in Piedmont is $191.00, yet it is only $121.00 in Alameda County as a whole. The 1970 census figures further indicate that the median family income in the city of Piedmont is $20,017.00, and 65.1 per cent of the families earn $15,000.00 or more annually. In the county of Alameda, the median family income is $11,133.00, with only 27.5 per cent of the families earning over $15,000.00. The percentage of families with an income below the poverty level is a mere 1.3 per cent in Piedmont, compared with 8.1 per cent in all of Alameda County. And finally, the mean incomes, which reflect a more meaningful comparison than median incomes, of the city of Piedmont and the county of Alameda, are $29,454.00 and $12,340.00 respectively. These contrasting figures are largely the result of Piedmont's zoning ordinances, which allow its residents to totally ignore the problems of overpopulation and poverty which surround their little "island". Specifically, a study of the zoning ordinances reveals the following relevant factors:

A) Multiple unit dwellings may be built only on zone "C" lots;
B) In the entire city of Piedmont, only 13 lots, comprising approximately 44 units, are zoned "C". The most recent "C" zone was created more than 30 years ago, and there are no plans for the creation of further "C" zones;
C) There is a two-story, or 35-foot height limit on zone "C" structures;
D) A minimum frontage of 90 feet is required for zone "C" lots.

Legal Theories Challenging Economic Discrimination By Use of the Zoning Power.

Zoning is presumed to be a legitimate exercise of the police power which may limit an individual's property rights.[6] However, such limitations cannot be unreasonable,[7] cannot deprive the landowner or prospective residents of due process of the law and/or of equal protection of the law. Thus, there exists the oft-repeated, although ill-defined, limitation upon the exercise of the zoning power requiring that zoning ordinances be enacted for the health, safety, morals or general welfare of the community, and that the ordinances must, in fact, bear a substantial relationship to those police power purposes.[8]

Although the requirement that zoning ordinances promote the "general welfare" might appear to be too vague to limit the zoning power, the United States Supreme Court has recognized that the interest of a community in promoting its own welfare may be abused. In the early case of *Mugler v. Kansas,* the Court recognized the possibility of abuse:

> If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation* to those objects, or is a *palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjudge and thereby give effect to the Constitution.[9]

In the landmark case of *Village of Euclid v. Ambler Realty Co.,* the Court recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[10] Thus, in 1926, the Court acknowledged the existence of a "general public interest" that stretches beyond the boundaries of any one municipality.

This note will argue for giving an expansive interpretation of the concept of "general welfare." If "general welfare" is defined as a regional rather than a local concept—as it has been in the case law of many states—zoning ordinances, which work to exclude the poor from particular communities, can be challenged as violative of due process and equal protection. In such situations, low income persons are denied their right not to "be deprived of . . . liberty" (to live in the community of their choice) by means of zoning ordinances which

6. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
7. *See, e.g.,* Eller v. Board of Adjustments, 414 Pa. 1, 198 A.2d 863 (1964).
8. *See, e.g.,* Nectow v. City of Cambridge, 277 U.S. 183 (1928).
9. 123 U.S. 623, 661 (1887) (emphasis added).
10. 272 U.S. 365, 390 (1926).

do *not* promote the general welfare unless provisions are made for regional housing needs.

An equal protection analysis suggests that the right to housing has been denied to low-income persons by means of zoning ordinances which discriminate on the basis of wealth. The pivotal questions are whether wealth is a "suspect criterion" and whether housing is a "fundamental right." If the answer is affirmative, such zoning ordinances will be upheld by the courts *only* if a compelling governmental interest is demonstrated and if there are no less burdensome alternatives.[11] Even if the answer is not affirmative, other judicial tests, such as that which speaks of "important rights" as something short of "fundamental rights" but nonetheless deserving judicial protection, require a weighing by the courts of the interests involved.[12] When one strips away the legal jargon which distinguishes one test from the other, one finds that courts in exclusionary zoning cases weigh the right of individuals to low-cost housing against the right of communities to preserve the status quo.[13]

Exclusionary Zoning: Cases Expanding the Concept of the General Welfare During the Last Thirty Years

In *Brookdale Homes, Inc. v. Johnson*[14] the New Jersey Supreme Court in 1940 struck down a zoning ordinance which included a height restriction in residential zones resulting in the exclusion of everything but large, expensive homes. In response to respondents' claim that the ordinance was justified in order to protect the value of the surrounding property and to prevent any increase in the general tax burden, the court stated:

> [I]f respondents' theory be sound, a municipality, under the cloak of its zoning power, might provide that no house costing less than a certain sum should be erected in a specified area. This it cannot legally do. . . . No person under the zoning power can legally be deprived of his right to build a house on his land merely because the cost of that house is less than the cost of his neighbor's house.[15]

11. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948).

12. *See* Reed v. Reed, 404 U.S. 71 (1971).

13. *Cf.* Construction Ind. Ass'n. v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974).

14. 123 N.J.L. 602, 10 A.2d 477 (Sup. Ct. 1940), *aff'd mem.* 126 N.J.L. 516, 19 A.2d 868 (Ct. Err. & App. 1941).

15. 123 N.J.L. at 606, 10 A.2d at 478. In the city of Piedmont, zoning and building codes (see note 5 *supra*), real estate and home construction costs, and property tax

More recently, *N.A.A.C.P. v. Mount Laurel*[16] dealt with a zoning ordinance which permitted multi-family dwellings *only* for farmers, their families, and employees; since no other multi-family dwellings were permitted, only middle and upper-income housing was available in the community.

The demographic effect of Mount Laurel's zoning ordinance is similar to that of the zoning ordinances of wealthy communities across the country. Low income families simply cannot afford to live there. In the Mount Laurel case, evidence was presented that single-family homes would cost at least $23,000.00 and would not qualify for federally subsidized programs within the reach of resident plaintiffs.[17] Additionally, since multi-family dwellings were not permitted, the exclusion of poor people from that township was ensured. The New Jersey court, in invalidating the ordinance, found that:

> The patterns and practice clearly indicate that defendant municipality through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing. . . .[18]

The court also presented a comprehensive discussion of the prior cases dealing with restrictive zoning ordinances, noting that the earlier cases which had upheld minimum lot sizes as a means to preserve the character of a community and to maintain property values had recognized the need to alter zoning patterns in conjunction with changing community needs. In *Fischer v. Bedminster Township*, while upholding five-acre minimum lots in a very sparsely populated region, the New Jersey court stated: "[A]n ordinance which is reasonable today may at some future time by reason of changed conditions prove to be unreasonable. If so, it may then be set aside. . . ."[19] The *Mount Laurel* court also referred to *Pierro v. Baxendale*, where the court stated:

> In the light of existing population and land conditions within our State, these powers may fairly be exercised without in anywise endangering the needs or reasonable expectations of any segments of

assessments effectively prohibit low income persons from buying real estate and building homes. The construction of federally-financed, multi-unit dwellings may be the only avenue open to many, but this avenue has been blocked by the city's zoning ordinances. The city has effectively excluded homes of less than a certain value and families earning less than a certain income.

16. 119 N.J. Super. 164, 290 A.2d 465 (1972).

17. *Id.* at 465.

18. *Id.* at 473.

19. 11 N.J. 194, 205, 93 A.2d 378, 384 (1952).

> our people. If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed.[20]

Mount Laurel distinguished the case of *James v. Valtierra*[21] in which the United States Supreme Court upheld a California constitutional provision which required that all public housing proposals be submitted to a referendum.[22] However, the Court in *Valtierra* stated that the referendum did not discriminate against the plaintiffs; "[P]ersons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle."[23] Thus, the *Mount Laurel* court concludes, "[v]ery little weight should be placed on the majority opinion in *James v. Valtierra*. . . ."[24]

Reference was also made by the *Mount Laurel* court to *Southern Alameda Spanish Speaking Organization v. Union City*,[25] in which the court, while refusing to declare zoning referenda unconstitutional, observed that if Union City's zoning laws denied low-income people decent housing an equal protection claim could have been validly presented. Furthermore, it stated:

> Given the recognized importance of equal opportunities in housing, it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accomodates the needs of its low-income families, who usually—if not always—are members of minority groups.[26]

The particular facts of the case did not show that the city was failing to provide adequate low-cost housing.[27]

Although the majority of the New Jersey Supreme Court in *Lionshead Lake, Inc. v. Wayne Township*,[28] a 1952 decision, upheld minimum floor space requirements in a predominantly rural area, Justice Oliphant's dissent in that case has been acclaimed as "eloquent testimony to his farsightedness".[29] In fact, as the *Mount Laurel* decision pointed out, in 1972 there remained on the court only one jurist

20. 20 N.J. 17, 29, 118 A.2d 401, 408 (1955).
21. 402 U.S. 137 (1971).
22. On Nov. 7, 1974, California voters had an opportunity to repeal, by ballot, the state constitutional provision involved in *James v. Valtiera*. The repeal measure, Proposition 15, failed.
23. 402 U.S. at 142.
24. 119 N.J. Super. at 171, 290 A.2d at 469.
25. 424 F.2d 291 (9th Cir. 1970).
26. *Id.* at 295-96.
27. *Id.* at 296.
28. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).
29. Aloi, Goldberg and White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?* 1 U. Tol. L. Rev. 65, 76 (1969).

who concurred with the majority in *Lionshead*.[30] Justice Oliphant's dissent stated:

> Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case. They will be relegated to living in the large cities or in multiple-family dwellings even though it be against what they consider the welfare of their immediate families.[31]

Finally the *Mount Laurel* decision cites Justice Hall's dissent in the New Jersey Supreme Court decision of *Vickers v. Gloucester Township Committee*,[32] in which he warned against the abuse of zoning power:

> In my opinion legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendancy and courts must not be hesitant to strike down purely selfish and undemocratic enactments. I am not suggesting that every such municipality must endure a plague of locusts or suffer transition to a metropolis over night. I suggest only that regulation rather than prohibition is the appropriate technique for attaining a balanced and attractive community.[33]

This opinion by Justice Hall is generally recognized as one of the best modern zoning opinions. Eight years later in *DeSimone v. Greater Englewood Housing Corp. No. 1*[34] Justice Hall, writing for a unanimous court, upheld a variance for a moderate cost housing project outside the ghetto as promoting the "general welfare" and racial balance. The dictum in this case indicated that a denial of the requested variance would have itself been invalid, thus implying an affirmative duty to make such housing possible.[35]

Having considered these cases, the *Mount Laurel* court held that the township, through its zoning ordinances, had exhibited economic discrimination in that the poor had been deprived of adequate housing

30. 119 N.J. Super. at 173, 290 A.2d at 470.
31. 10 N.J. at 182, 89 A.2d at 701.
32. 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1963).
33. *Id.* at 264-65, 181 A.2d at 147.
34. 56 N.J. 428, 267 A.2d 31 (1970).
35. *Id.* at 443, 267 A.2d at 39.

and of the opportunity to secure the construction of subsidized housing.[36] Not only did the court declare the zoning ordinance invalid, but the court charged the township with the *affirmative duty to construct low and moderate income housing* to meet the projected needs of the population.[37]

In *Inganamort v. Borough of Fort Lee*,[38] a rent-leveling system (rent control) was upheld as a proper function of zoning. The New Jersey Supreme Court stated its policy of examining zoning regulations:

> Because the law must be an instrument for justice, yesterday's dissent is today's law review article urging tomorrow's promises of the necessary capacity for growth to meet changing needs. The law should be based on current concepts of what is right and just . . . . Exclusionary zoning is rapidly drawing the indignation of the courts and may no longer be sustained as a valid exercise of the police power . . . .
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> Food, clothing, and shelter are perhaps more fundamental to life than free speech, freedom of worship and other inalienable rights . . . . One can detect a movement—perhaps erratic but progressive—towards the *constitutional right to be housed* . . . . [O]nly by securing the right to decent housing will we hope to assist our elderly, our poor and our younger middle-income families with children of pre-school age or in early elementary grades. Our hope of keeping together children from economically and ethnically different areas rests in no small measure upon some assurances of the right to housing. . . . Just as man is entitled to his life, to his free pursuit of happiness, so he is entitled to a roof over his head. And if the unregulated laws of supply and demand decree that dwellings should skyrocket in price, leaving human beings without homes, then these laws must be regulated.[39] [emphasis added]

The Most Common Justifications Offered by Municipalities in Defense of Exclusionary Zoning Ordinances.

Having examined a few major cases in the field, it may be worthwhile to select the more common justifications, both legitimate and contrived, offered by municipalities in defense of their zoning ordinances. Restrictive zoning ordinances are usually justified as promoting one or more of the following governmental objectives: 1) ensuring the health and safety of the residents, 2) balancing the demand for municipal service with resources available to meet those demands, 3)

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36. 119 N.J. Super. 164, 178, 290 A.2d 465, 473.
37. *Id.* at 178-80, 290 A.2d at 473-74.
38. 120 N.J. Super. 286, 293 A.2d 720 (1972).
39. *Id.* at 324-29, 293 A.2d at 741-43.

preserving the character and beauty of the area, 4) preserving property values.[40]

Health and Safety

Many cases have upheld certain zoning restrictions as reasonably related to health and safety and thus legitimate exercises of the police power. The courts in *Simon v. Needham*[41] and *De Mars v. Zoning Commission*[42] upheld minimum lot sizes as reasonably related to sewage disposal problems. However, courts have often rejected the municipality's claim that its zoning is necessary for health and safety when the claim is factually unsupported. In *National Land and Investment Co. v. Kohn*[43] the Pennsylvania Supreme Court found no evidence to support the defendant city's contention that a four acre minimum was necessary to insure proper sewage disposal and to avoid water pollution. In *Oakwood at Madison, Inc. v. Township of Madison*,[44] the New Jersey Supreme Court found that the record failed to substantiate the defendant's claim that one and two acre minimum lot sizes in a largely underdeveloped area were necessary to protect drainage systems and underground resources.[45]

A federal district court rejected the claim made by defendants in *Construction Industry Association v. City of Petaluma*[46] that Petaluma's exclusionary zoning was based on the city's inadequate water and sewage treatment facilities. The court found that Petaluma had requested from its major supplier only that amount of water which would be required if population growth were controlled. The court stated:

> Where a municipality purposefully limits the quantity of any particular commodity available, then seeks to justify a population limitation based upon an alleged inadequacy of that commodity, it has not stated a compelling interest which supports the limitation.[47]

Increased Cost Burden

That a town does not have sufficient financial resources to pay for increased demand on municipal services is often a second justification

40. *See generally*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 794 (1969) (hereinafter cited as Sager).

41. 311 Mass. 560, 42 N.E.2d 516 (1942).

42. 142 Conn. 580, 115 A.2d 653 (1955).

43. 419 Pa. 504, 215 A.2d 597 (1966).

44. 117 N.J. Super. 11, 283 A.2d 353 (1971).

45. *See also* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970).

46. 375 F. Supp. 574 (N.D. Cal. 1974).

47. *Id.* at 583.

for zoning restrictions.[48] The argument is based on the notion that large, single-family dwellings, of greater value, will produce greater tax revenue, and their wealthy residents will place fewer demands on municipal services; certainly on welfare programs, perhaps on schools, and possibly even on police services. Though perhaps factually accurate, this argument is of dubious constitutional merit. It would seem constitutionally questionable to permit a system of incorporation, local taxation, and provision of services that would allow radical inequalities in services and tax burdens. To suggest that exclusionary zoning can be constitutionally justified by a municipality's desire to insulate itself from expenses which surrounding areas must bear and to constitute itself of a select population which is most able to bear those very expenses, is unacceptable.

In *Board of County Supervisors v. Carper*,[49] the Virginia Supreme Court of Appeals found a two acre restriction to be unreasonable and arbitrary despite the county's contention that it would not be able to pay for necessary police and fire protection, public schools, and other services:

> The practical effect of the amendment is to prevent people in the low-income bracket from living in the western area and forcing them into the eastern area. . . . This would serve private rather than public interests. Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare.[50]

Quoting from *Simon v. Needham*,[51] the early Massachusetts case, the court noted that "[a] zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens. . . . The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interest of the public at large."[52]

In *Town of Los Altos Hills v. Adobe Creek Properties, Inc.*,[53] the California Court of Appeal, although it did not find exclusionary practices in the facts presented, quoted with favor and at length from *National Land*[54] and *Appeal of Girsh*.[55]

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48. *See* Construction Ind. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974); National Land and Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966).

49. 200 Va. 653, 107 S.E.2d 390 (1959).

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

51. See text accompanying note 41 *supra*.

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

53. 32 Cal. App. 3d 488, 108 Cal. Rptr. 271 (1971).

54. 419 Pa. 504, 215 A.2d 597 (1966).

55. 437 Pa. 237, 263 A.2d 395 (1970).

In *National Land*, in addition to the health and safety consideration offered to justify its zoning regulations, the township claimed that it could not afford to provide additional roads and fire protection. The court rejected this claim, observing that:

> Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. . . . Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring. It is not difficult to envision the tremendous hardship, as well as the chaotic conditions, which would result if all the townships in this area decided to deny to a growing population sites for residential development within the means of at least a significant segment of the people.[56]

The court concluded that four-acre zoning represented Easttown's desire not to accomodate any newcomers who might create additional burdens upon governmental functions and services. As such, the ordinance was invalidated. A township cannot, ruled the court, "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live."[57]

In *Appeal of Girsh*,[58] the court struck down a zoning ordinance which failed to permit apartment construction. It noted that people are attempting to move away from the grossly overcrowded conditions of our urban areas and that every community must accept its "rightful part of the burden."[59] The court concluded that "if Nether Providence is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth; it cannot be allowed to close its doors to others seeking "a comfortable place to live."[60]

A final case exemplifying the argument that "we-can't-pay-for-additional-municipal-services" is *Molino v. Borough of Glassboro*,[61] in which the town sought to keep out low-income families with children so it would not have to pay for more schools. A number of devious ordinances were used, including one requiring that no less than 70 per cent of all apartments have only one bedroom.[62] Recognizing the immediate need for housing for low and middle income families, the New Jersey Supreme Court stated:

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56. 419 Pa. at 528, 215 A.2d at 610.
57. *Id.* at 531, 215 A.2d at 612.
58. 437 Pa. 237, 263 A.2d 395 (1970).
59. *Id* at 245, 263 A.2d at 399.
60. *Id.*
61. 116 N.J. Super. 195, 281 A.2d 401 (1971).
62. *Id*, at 202, 281 A,2d at 403,

> There is a right to be free from discrimination based on economic status. . . . No municipality can isolate itself from the difficulties that are prevalent in all segments of society. When the general public interest is paramount to the limited interest of the municipality then the municipality cannot create roadblocks. Zoning is not a boundless license to structure a municipality. . . . This is a community where Mr. Average Man lives with his family. He cannot pay high rentals. . . . He buys in the business district. He is employed in industry, or other places of employment. He should not be barred from living there.[63]

Aesthetic Considerations

The third common justification offered by municipalities in regard to exclusionary zoning is the preservation of character and beauty. In cases where very large lot area requirements could not be upheld as promoting the public health and safety, some courts have upheld the ordinances by expanding the concept of "general welfare" to include aesthetic considerations.[64]

In considering this justification, the cases of *National Land*[65] and *Appeal of Girsh*[66] are once again pertinent. The Pennsylvania Supreme Court found in *National Land* (later quoting itself in *Girsh*) that if the preservation of open spaces was the township's objective, there were other means by which this could be accomplished. For example, the court suggested, "cluster zoning" could be authorized, or development rights could be condemned with compensation paid.[67] But clearly, a four-acre minimum acreage requirement was not a reasonable method. The court reasoned:

> There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate.[68]

A community may argue that apartment buildings will destroy the beauty of the area, but such a blanket statement does not merit consti-

63. *Id.* at 204-05, 281 A.2d at 405-06.

64. *See* Flora Realty and Investment v. Ladue, 362 Mo. 1025, 246 S.W.2d 771, *appeal dismissed*, 344 U.S. 802 (1952); County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (this case involved a situation in which only 6.7% of the county's land was zoned).

65. 419 Pa. 504, 215 A.2d 597 (1966).

66. 437 Pa. 237, 263 A.2d 395 (1970).

67. *See also* Construction Ind. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974).

68. 419 Pa. at 530-33, 215 A.2d at 611.

tutional protection. Unquestionably, municipalities should be concerned with the burgeoning growth of tacky, plastic buildings, but a ban on all apartments would be both under and over-inclusive. Some large single-family homes can be glaring eyesores, while well-designed cluster-type apartments may be beautiful. Perhaps the creation of an architectural review board would be a more reasonable and effective means of preserving the aesthetics of the city. As Professor Sager points out, if the city fathers argue that the poor are simply incapable of maintaining their premises as well as individuals with greater resources, the contention would have little empirical foundation, particularly since those of lesser means have only rarely been afforded the opportunity to live in neighborhoods where blight is not in some way endemic.[69]

Property Values

Finally, local government may attempt to justify restrictive zoning in terms of preserving property values. These may correlate with the desire for an adequate property tax base to produce municipal services, or with aesthetic considerations, but the issue may very well be one of social, or "snob" values. People often like to live in exclusive neighborhoods because of the status afforded, and they are prepared to pay for the privilege. That their neighbors are more apt not to be black or brown may enhance their comfort. Zoning restrictions that cater to these tastes thus increase the value of the affected property. As Professor Sager explains:

> The argument is not only simple, it is pernicious. If the preferences of those of means made it profitable for a city to segregate people on its transit facilities, one would hardly be moved to view that circumstance as speaking to the question of justification for the discrimination. Similarly, to employ property values as a basis for excluding the poor from neighborhoods is to employ the apparent neutrality of dollar valuation as a means of placing government in a posture of implementing preferences it is constitutionally estopped from accomodating. If this were acknowledged as justificatory here, presumably much the same argument would apply to overt racial zoning.[70]

These then, are the most common justifications offered by municipalities in defense of their exclusionary zoning ordinances. As we have seen, some ordinances may be reasonable responses to legitimate community needs, and only indirectly, slightly, and uninten-

69. Sager, *supra* note 40, at 796.
70. *Id.* at 795.

tionally affect the availability of low cost housing. Other ordinances, however, are clearly exclusionary in intent and in effect, and serve only to promote the interests of class bigotry. It is with these distinctions in mind that the courts must scrutinize those zoning ordinances which exclude the poor to determine whether rights of due process and equal protection have been violated.

Specific Suggestions for Judicial Analysis of Exclusionary Zoning Problems

After reviewing the manner in which courts have dealt with zoning ordinances which exclude low-income persons, what lies ahead in the judicial treatment of such cases remains in question. A day may be anticipated in the not-so-distant future when the courts will condemn exclusionary zoning on the basis of wealth in as broad a fashion as they now condemn racial discrimination in housing. For this prediction to become a reality, there are three specific aspects of judicial analysis which courts must adopt if they have not already done so.

Courts Should Consider Regional Low-Cost Housing Needs When Defining General Welfare.

The first suggestion, to define "general welfare" as a regional concept, has already been adopted by a number of enlightened courts in cases previously cited. Region-wide planning must supersede purely local concerns. No municipality should be permitted to select one of the choicest areas within a metropolis, incorporate itself as a separate entity, and then totally ignore the myriad problems of urban life surrounding it on all sides. Communities should not be permitted to insulate themselves from the problems of over-population and poverty affecting the nation as a whole. "[S]trictly local interests of a municipality must yield if such conflict with the overall state interests of the public at large."[71] One town's zoning must recognize conditions across its boundaries; the "general welfare" transcends the artificial limits of political subdivisions beyond merely narrow local desires.[72]

Once regional needs become an element in the definition of "general welfare," local zoning ordinances which ignore the larger community can be successfully attacked on constitutional grounds as a denial of due process of law. Purely local referendums, such as those

71. Bristow v. City of Woodhaven, 35 Mich. App. 205, 217-18, 192 N.W.2d 322, 328 (1971).

72. Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954).

in *Southern Alameda Spanish Speaking Organization v. Union City*[73] and *James v. Valtierra*[74] could also be struck down as a denial of due process to those residents of the overall region whose lives are affected but whose votes were not sought.

Once a Zoning Ordinance is Shown to Have Exclusionary Effects, Courts Should Reverse the Traditional Presumption of Validity, Shifting the Burden of Proof to the Municipality.

The courts, recognizing that due process and equal protection considerations necessitate the showing of a compelling state interest, must *reverse the traditional presumption of validity* in all zoning ordinances affecting regional housing needs. In such cases, the courts must abandon the notion that local zoning bodies have expertise in zoning matters, deserving a judicial presumption of validity. The usual redress for the abuses of local officials, to vote them out of office, is not available to those who, though affected, are not yet residents and thus have no voting power. The only way the nonresident's interests can be protected, at least until regional zoning bodies are created, is with heightened judicial scrutiny of the acts of local zoning boards. Once an exclusionary effect has been documented, there ought to be a presumption of invalidity, and the burden of going forward to show the reasonableness of the ordinance should be placed on the municipality.[75]

There is ample precedent for shifting the burden of proof. In *Bristow v. City of Woodhaven*,[76] plaintiffs sought to construct a mobile home park in excess of the seventy-five sites limitation provided for in the local zoning ordinance. The complaint alleged that the ordinance bore no relationship to the health, safety, morals, or general welfare of the community.

In its lengthy opinion, the court began by recognizing the traditional presumption of validity that had been characteristic in zoning cases; the *Bristow* court stated that normally a zoning ordinance

> comes to us clothed with every presumption of validity . . . and it is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the

73. 424 F.2d 291 (9th Cir. 1970).

74. 402 U.S. 137 (1971).

75. *See* Comment, *Zoning: Closing the Economic Gap* 43 TEMPLE L.Q. 347 (1970); Note, *Removing The Bar of Exclusionary Zoning* 32 OHIO STATE L.J. 373 (1971).

76. 35 Mich. App. 205, 192 N.W.2d 322 (1971).

> owner's use of his property. . . . This is not to say, of course, that a local body may with impunity abrogate constitutional restraints.[77]

Where it is shown that local zoning exists in conflict with, rather than in furtherance of, the general public welfare, the *Bristow* court emphasized that there could be no presumed validity attaching to the ordinance. Certain uses of land, including housing, have come to be recognized as bearing a real, substantial, and beneficial relationship to the public health, safety, and welfare and therefore are afforded what the court described as a preferred or favored status.[78]

The *Bristow* court further stated that the

> presumption of the existence of such relationship [to public health, safety, morals, or general welfare] and, hence, of the validity of the ordinance is resorted to in the absence of proof on the subject, but not when there are proofs upon which a judicial determination thereof may be made, as when the contrary is shown by competent evidence or appears on the face of the enactment.[79]

Clearly, therefore, since the need for housing is fundamental, and particularly in light of the nationwide housing shortage which necessitates a broadening of the term "general welfare," there is competent evidence to negate any contrary presumption. "As with other recognized uses, so too with certain residential uses, it becomes incumbent upon the municipality to establish or substantiate the existence of a relationship between the exclusion of this legitimate use and public health, safety, morals, or general welfare."[80] In *Bristow,* the court found no such relationship and thus permitted construction of the mobile home park.

Similarly, a year later, in *Simmons v. City of Royal Oak*, the Michigan Court of Appeals found that:

> [T]he same housing needs which would justify mobile home expansion apply with equal force to multiple dwellings. In *Girsh Appeal* . . . cited with approval in . . . *Bristow*, the Court held unconstitutional the zoning out of multiples. Accordingly, we find that the use of land for multiple dwellings must be given the same 'favored' status that it would have if used for mobile homes. Consequently, the burden of proof rests on the municipality to prove the validity of any ordinance which would operate to exclude multiple dwellings.[81]

In *Appeal of Kit-Mar Builders, Inc.*[82] and *Appeal of Girsh,*[83] the

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77. *Id.* at 210, 192 N.W.2d at 324.
78. *Id.* at 215-16, 218, 192 N.W.2d at 327-28, 330.
79. *Id.* at 216, 192 N.W.2d at 327.
80. *Id.* at 218, 192 N.W.2d at 328.
81. 38 Mich. App. 496, 498, 196 N.W.2d 811, 812 (1972).
82. 439 Pa. 466, 268 A.2d 765 (1970).

majority of the Pennsylvania Supreme Court totally disregarded the traditional presumption of constitutionality in finding the two and three acre minimum lot requirements invalid. The court in *Kit-Mar* emphasized that, "[a]bsent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable."[84] In both *Kit-Mar* and *Girsh*, the common theme was that people have been attempting to move away from the grossly overcrowded conditions of our urban areas and that every community must accept "its rightful part of the burden" in dealing with problems of population growth. This does not mean that a community must meet *more* than its rightful share and permit runaway construction. The presumption of invalidity can always be overcome if a community demonstrates that it has done an adequate planning job, considering regional as well as local needs. As stated by the court in *Bristow*:

> Once a use is shown to be *prima facie* related to the public health, safety, or general welfare, the task of justifying local restrictions or prohibitions is not and should not be viewed as an impossible one for the municipality. The lack of need for the proposed use or the overabundance of similar, existing uses are matters for consideration. Where a particular parcel is involved, a showing of predesignated and available sites better suited could bear on the reasonableness of restrictions as to given property. Such a showing would, however, seriously depend on the existence of a carefully prepared, well-reasoned, properly adopted, and flexible master plan which would carry special weight only where noticeably implemented. In this regard, particular care should be taken that an unwanted yet necessary use is not being "pushed off" onto a neighboring community where it may be equally unwanted.[85]

In *Fanale v. Borough of Hasbrouck Heights*,[86] the court upheld the city's prohibition on further construction of apartment units. Hasbrouck Heights comprised an area of approximately 1.6 square miles with a population of 11,000.[87] However, Hasbrouck Heights could reasonably decide that it had reached a saturation point with its 573 apartment units.[88] Likewise, in *Confederacion de la Raza Unida v. City of Morgan Hill*,[89] the court upheld lot-size requirements because the minimum was only one-half acre and because it only pertained to

83. 437 Pa. 237, 263 A.2d 395 (1970).

84. 439 Pa. at 471, 268 A.2d at 767 (1970).

85. 35 Mich. App. at 219-20, 192 N.W2.d at 329.

86. 26 N.J. 320, 139 A.2d 749 (1958).

87. *Id.* at 324, 139 A.2d at 751. Approximately equal in both respects to the city of Piedmont, *supra* note 5.

88. *Id.* at 324, 139 A.2d at 751. In contrast Piedmont's 44 meager units can hardly justify a prohibition on further apartment construction.

89. 324 F. Supp. 895 (N.D. Cal. 1971).

a certain hilly region of the town, leaving plenty of room for low-cost housing.[90]

Recognizing that the presumption of invalidity can be overcome, it does not seem unfair to place the burden of proof on the municipality once an exclusionary effect has been shown. If a community has done its fair share to contribute to regional housing needs, it should be permitted to zone restrictively.

Courts Should Employ Affirmative Action as a Judicial Remedy and Uphold Reasonable Legislative Attempts at Affirmative Action.

Following the example set in the *Mount Laurel* case, courts should demand *affirmative action*, requiring certain communities to construct adequate low-cost housing as part of the relief given successful plaintiffs.

In *Mount Laurel*, the New Jersey Supreme Court not only invalidated the Township's zoning ordinance which deprived the poor of adequate housing, but also found "a desperate need for affirmative municipal action."[91] Specifically, the court ordered the township to: 1) undertake a study to identify the low-cost housing needs of present residents and present employees of the township, as well as the needs of those expected to be employed locally; 2) to establish an estimated number of low and moderate income units which should be constructed each year to provide for the projected needs; and 3) "develop a plan of implementation . . . of an affirmative program . . . [which] shall encompass the most effective and thorough means by which municipal action can be utilized to accomplish the goals set forth above."[92] Finally the court stated that it "retains jurisdiction until a final order issues requiring implementation of the plan."[93]

Affirmative action might also originate through the legislative process, and the courts should endeavor to uphold any plan that reason-

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90. *See also* County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (where only 6.7% of county land was covered by the minimum lot-size requirements, the zoning ordinance was upheld). In Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973), the court found no showing of a regional need for low-income housing. Had the facts indicated that such a need existed, the court implied that Los Altos Hills would have been required to meet its fair share of the burden. However when a New Hampshire developer sought a variance to allow construction of vacation homes for wealthy non residents, the court did not find that vacation homes constituted a pressing regional need for housing, sufficient to justify granting a variance. Steel Hill Development Co. v. Town of Sanborton, 469 F.2d 956 (1st Cir. 1972).

91. 119 N.J. Super. at 178, 290 A.2d at 473 (1972).

92. *Id.* at 179, 290 A.2d at 473-74.

93. *Id.* at 180, 290 A.2d at 474.

ably provides for needed low-income housing. Such judicial approval has not always been forthcoming, however, as evidenced in *Board of Supervisors v. DeGroff Enterprises, Inc.*[94] There, Fairfax County enacted a zoning ordinance establishing maximum rental and sale prices for fifteen percent of the units in multi-family project developments in exchange for a certain density bonus. The court found that this arrangement

> exceeds the authority granted by the enabling act to the local governing body because it is socio-economic zoning and attempts to control the compensation for the use of the land and the improvements thereon.[95]

Such reasoning is patently absurd. All zoning, by its very nature, has socio-economic effects. Only when a court disapproves of a particular zoning ordinance is the term "socio-economic" used—as if it indicated a socialist conspiracy. Yet when a court approves certain zoning, it earns the label of careful planning for the general welfare. In *DeGroff*, the court attempted to defend its holding by referring to *Board of County Supervisors v. Carper*,[96] in which the same court held invalid a "socio-economic" zoning ordinance which excluded low and middle income groups from the western area of Fairfax County. That case, however, involved gross racial and economic discrimination and can hardly be viewed as authority to strike down a limited attempt to remedy the very inequities which had been found in *Carper*. The *DeGroff* court's reliance on the *Carper* rationale was misplaced.

The court also stated that the setting of maximum prices for fifteen percent of the units violated the guarantee within the Virginia State Constitution that "no property will be taken or damaged for public purposes without just compensation."[97] This seems to be a bogus argument used to pad the court's opinion. By extending the court's reasoning, all zoning measures, which by definition serve public purposes and which often limit the landowner's profit maximization would be invalidated, as would the widely-accepted practice of exactions, of which the Fairfax County ordinance is a variation.

The practice of exactions, such as that provided for within California's Subdivision Map Act,[98] permits municipalities to require subdivision developers (of five parcels or more) to dedicate land, or pay a

94. 214 Va. 235, 198 S.E.2d 600 (1973).
95. *Id.* at 238, 198 S.E.2d at 602.
96. 200 Va. 653, 107 S.E.2d 390 (1959).
97. 214 Va. at 238, 198 S.E.2d at 602.
98. CAL. BUS. & PROF. CODE §§ 11500-11641 (West 1962).

fee in lieu thereof, or a combination of both, for park purposes as a precondition to building approval. This requirement is simply a response to the need to alleviate the impact of population congestion caused by the proliferation of residential subdivisions. The cases which affirm the constitutionality of the dedication statutes hold that they are valid under the state's police power.[99] As the court in *Associated Home Builders* reasoned:

> [T]he subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. . . . Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements.[100]

Thus, the court is speaking of a quid pro quo: in exchange for the privilege of subdividing, developers can be required to dedicate. Whereas homebuilding on a small scale (four parcels or less in California) is regarded as a right, large developments are regarded as a privilege.

Of course, subdividers will shift the burden of the cost of the land dedicated or the in-lieu fee to the consumers who ultimately purchase homes in the subdivision, thereby reducing the number of homes which low-income families can afford. The California Supreme Court in *Associated Home Builders* recognized "the ominous possibility that the contributions required by a city can be deliberately set unreasonably high in order to prevent the influx of economically depressed persons into the community, a circumstance which would present serious social and legal problems."[101] Thus, the court implied a necessary and reasonable limitation on the municipality's power to enact in recognition of the need for low-cost housing.

The reasons for permitting exactions from subdividers would seem to apply equally well to large-scale apartment builders. Though the California Legislature excluded apartments from the Subdivision Map Act on the theory that vertical construction consumed less open space,[102] the logic appears rather short-sighted in light of the fact that apartment developments may contribute equally to further population

99. *See* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Comment, *Subdivision Exactions in California: Expansion of Municipal Power*, 23 HASTINGS L.J. 403 (1972).

100. 4 Cal. 3d at 644-645, 484 P.2d at 615, 94 Cal. Rptr. at 639.

101. *Id.* at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

102. *Id.* at 643, 484 P.2d at 614, 94 Cal. Rptr. at 638.

congestion, and in turn, to the need for increased municipal services and park and recreational facilities. Furthermore, if exactions are permitted to help fulfill the public's need for park facilities, surely exactions should be allowed in order to provide needed low-cost housing, which is also in the "general welfare". The construction of highly profitable, luxury apartments simply shifts the burden of constructing low-cost housing to the general public, thus permitting the apartment builder to reap the benefits without fulfilling his fair share of the community's burden.

Affirmative action, whether required by the courts or by the legislature, is a reasonable and necessary step toward meeting a municipality's obligation to provide low-cost housing in accordance with regional needs. The kind of relief ordered by the New Jersey Supreme Court in the *Mount Laurel* case hopefully will be typical of future cases.

Conclusion

All of us seek to live in quiet, comfortable, environmentally sound communities. Nevertheless, poverty and overpopulation are national problems and cannot become the burden solely of the politically powerless. Before being permitted to zone out the poor or to restrict growth, counties and municipalities must meet their fair share of regional housing needs, providing, in particular, their share of low-income housing. Regional housing authorities—such as one for the Greater Bay Area, perhaps—must be constituted for the purpose of distributing the burden of increased housing equitably throughout the region. Once a community has provided its fair share of needed housing, restrictive zoning may be permissible.

Unquestionably, massive efforts must be made on various fronts to curb our rising population. But the solution does not lie in allowing counties and municipalities to restrict growth (or certain kinds of growth by preventing construction of low-cost housing) in a haphazard, first-come-first-served basis, thus encouraging existing residential patterns, which dump the burden of growth and poverty and their concomitant effects onto the cities while maintaining enclaves for the rich nearby. Nor does the solution lie in forbidding *all* growth limitation proposals in deference to the right to travel. Presently, the burden of overpopulation is grossly maldistributed among our nation's communities, and it would be cruelly naive to believe that such a blanket "solution," so egalitarian on its face, would do anything to cure the inequali-

ties. We have seen the results of a laissez-faire housing policy; regional planning must become the norm. As is often the case when the court is forced to balance various interests, certain constitutional rights must yield to others in some situations. Thus, once a community has fulfilled its share of the regional housing burden, it should then and only then be allowed to zone restrictively. In such a situation, the right to travel must be treated as something less than absolute when balanced against the right to housing and decent environment for all Americans without regard to economic status.