

**EXCLUDING THROUGH LAND USE CONTROLS: THE DIM LIGHT OF
INCLUSIONARY ZONING IN THE CAVE OF SOCIO-ECONOMIC SEGREGATION**

In its historical context, and setting class and race issues aside, the term "exclusionary zoning" is redundant. Planners and policy makers intended zoning to exclude; zoning's aim is to segregate and to depopulate.¹ The unfortunate legacy of zoning in America is the destruction of high-density, mixed-use centers and the promotion of low-density, segregated uses.² A tool created by early twentieth century New York City planners seeking relief from a perceived density crisis,³ zoning quickly became a tool of the already sparsely populated suburbs to keep out unwanted classes and races.⁴ In the 1970s, the Supreme Court abandoned housing as a national priority despite the growing disparate impact of zoning on housing for low-income and minority populations. Since then a few states have tried to reverse the socio-economic segregation caused by zoning. This Article argues that inclusionary housing laws are unlikely to grow in number and, even if they should grow, will not be effective in stemming years of social disaggregation.

Part I examines the development of land use controls used by local units of government to exclude low and moderate income and minority populations. Part II reviews the New Jersey Supreme Court case touted as turning the tide against exclusionary housing laws. Further, this Part identifies the aims of inclusionary housing laws and enumerates the means used to combat exclusionary housing practices. Part III reviews the effectiveness of inclusionary laws at combating the ill effects of exclusionary land use controls in lieu of available data. The Article concludes that the presence of hurdles to legally challenge exclusionary housing laws coupled with the effected populations' dearth of political clout makes the future of inclusionary laws bleak.

¹ In 1922, the Standard Zoning Enabling Act identified zoning's purpose: "to lessen congestion in the streets; . . . to prevent the overcrowding of land; [and] to avoid undue concentration of population." Jay Wickersham, *Jane Jacobs's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 555 (2001) (quoting STANDARD ZONING ENABLING ACT § 3 (1926)).

² *Id.* at 557.

³ See EDWARD M. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 23 (1940).

⁴ See SEYMOUR I. TOLL, ZONED AMERICAN 193 (1969) ("The suburbs were among the first municipalities in the nation to enact zoning. During the twenties they were the prime contributors to the extraordinary spread of the institution."); Marsha Ritzdorf, *Locked Out of Paradise: Contemporary Exclusionary Zoning, the Supreme Court, and African Americans, 1970 to the Present*, in J.M. THOMAS & MARSHA RITZDORF, URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 43-44 (1997).

I. PROGENITOR OF LAND DEVELOPMENT EXCLUSION: ZONING

In 1926, the United States Supreme Court fanned the flames of the zoning-adoption fire that raced across America one suburb at a time. In that year, the Court upheld the right of the Village of Euclid (estimated population of 5,000 to 10,000 inhabitants) to, for all practicable purposes, intentionally exclude all industrial developments within its jurisdiction.⁵ Thus, from the inception of its legal validation, zoning has been a tool of intentional, yet legal, discrimination.⁶

Thus, zoning intends to exclude. Still, some utility exists in creating and defining a term: "exclusionary land use controls." Defining this term is useful for two reasons: (1) zoning no longer encompasses all exclusionary land use controls; (2) an attempt to combat zoning's ill effects has given rise to something called "inclusionary" housing laws, making the use of "exclusionary" useful for, if no other reason, grammatical parallelism. The term "exclusionary land use controls" encapsulates those legal tools used by state subdivisions to "exclude most low-income and many moderate-income households from suburban communities and, indirectly, most members of minority groups as well."⁷

Exclusionary land use controls include: (1) restricting single-family zoning districts through minimum lot size, floor area, and garage space requirements; (2) restricting multi-family zoning districts through minimum lot sizes, maximum density, floor area, and garage space requirements; (3) imposing high fees for zoning and building permits; (4) charging to connect to sewer and water (e.g., a charge per lot) and to use these services (e.g., a water main charge per unit); (5) charging park and other amenity fees for single-family and multi-family housing developments (6) "downzoning" properties from multiple to single-family use; (7) implementing growth moratoria; (8) limiting land zoned for high-density housing; (9) creating long delays in the review of permits and other approvals; and (10) imposing expensive environmental protection requirements.⁸ A study of ten suburbs in the

⁵ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also DANIEL R. MANDELKER & JOHN M. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 96 (5th ed. 2001) (citing a letter by one of the attorneys involved in Euclid on behalf of the Village: "The City made no scientific survey, and in an effort to keep the village entirely residential, the local authorities zoned all as residential business, except a very narrow piece along the railroads, too narrow for a practical industrial development.").

⁶ Indeed the contemporary debate of zoning's use to exclude other uses near single-family neighborhood raged on before 1926. See Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, U. PITT. L. REV. 367, 375-76 (1994) ("Euclidean zoning promoted class segregation for the simple and self-evident reason that the ability to afford different types of housing varies with income. . . . Thus, ordinances excluding all but single-family dwellings from certain neighborhoods created districts where few working-class people could afford to live.").

⁷ MANDELKER & PAYNE *supra* note 5, at 379.

⁸ See John S. Adams, et al., *The Role of Housing Markets, Regulatory Frameworks, and Local Government Finance, Report #1: Transportation and Regional Growth Study*, at 69-70 (1998) (citing BARBARA L LUKERMANN &

Twin Cities metropolitan area in 1997 revealed numerous examples of exclusionary land use controls in place.⁹

II. THE JUDICIAL PENDULUM SWINGS BACK?

In the early 1970s, the United States Supreme Court dashed hopes that it would raise housing to the level of a fundamental right and provide a legal means to attack exclusionary land use controls. Abandoned by the Court, one state supreme court took matters into its own hands. In 1983, after more than ten years of litigation, the New Jersey Supreme Court mandated that Mount Laurel (a township in the rapidly growing area between Camden, New Jersey and Philadelphia, Pennsylvania) abandon exclusionary zoning that "at its core" reflected the township's "determination to exclude the poor."¹⁰ It did so on state constitutional grounds.¹¹ The New Jersey court required Mount Laurel to implement a simple policy—inclusionary zoning: "in exchange for a profitable increase in allowable density of residential development," an increase forced on the village by the court, builders would be required to "set aside" some of the units built for sale or lease to low- and moderate-income households.¹²

The New Jersey legislature followed suit by adopting the Fair Housing Act of 1985.¹³ Then, in 1988, Congress amended Title VIII of the Civil Rights Act of 1968 to extend housing rights granted under that Act to cover discrimination based on disability and familial status.¹⁴ Considered one of the strongest, the New Jersey inclusionary law established a state agency charged with assigning municipalities their fair share of affordable housing. Municipalities must work with developers to meet affordable housing quotas set by the state.¹⁵

While the Mount Laurel case spurred the development of so-called "inclusionary" housing laws in New Jersey, New York, Massachusetts, California, New Hampshire, Maryland, Oregon, Connecticut, Montgomery County, Maryland, and a few municipalities, few other states or state

MICHAEL P. KANE, *LAND USE PRACTICES: EXCLUSIONARY ZONING, DE FACTO OR DE JURE?* (1994)); ANTHONY DOWNS, *STUCK IN TRAFFIC* 102 (1992).

⁹ Adams, *supra* note 8, at 70-77 (examining in 1997 the ten suburbs studied by Lukermann and Kane from 1977 through 1993: Burnsville, Coon Rapids, Eden Prairie, Edina, Lakeville, Maple Grove, Minnetonka, Plymouth, Shakopee, and Woodbury).

¹⁰ *S. Burlington County NAACP v. Township of Mt. Laurel (II)*, 456 A.2d 390 (N.J. 1983).

¹¹ The New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of *acquiring*, possessing, and protecting property . . ." MANDELKER & PAYNE, *supra* note 4, at 387. The New Jersey Supreme Court was not the first state court to attack exclusionary housing. The first case came in Pennsylvania in 1965. *See Nat. Land & Invest. Co., Inc. v. Kohn*, 215 A.2d 957 (Pa. 1965).

¹² *See* MANDELKER AND PAYNE, *supra* note 4, at 392.

¹³ *See* N.J. Stat. §§ 52:27D-301 et seq. (2002).

¹⁴ *See* 42 U.S.C. § 3604(a), (f) (1999).

¹⁵ *See* MANDELKER AND PAYNE, *supra* note 4, at 390.

subdivisions have done so.¹⁶ Outside of the states and areas mentioned above, parties seeking to sue municipalities for maintaining exclusionary housing laws must rely on U.S. or state constitutional law or Title VIII (the Federal Fair Housing Act).¹⁷ Under these weaker laws, courts often require proof of intentional discrimination or evidence of a significant disparate impact, leaving many exclusionary laws unchallenged.

III. THE FAILURE OF INCLUSIONARY HOUSING LAWS

This Part analyzes inclusionary housing laws using four primary criteria as defined by Levinson and Krizek: (1) efficiency; (2) equity; (3) environmental viability; and (4) experience. As relative-success meter, this Part also compares the success of exclusionary housing laws under each criterion.

A. Efficiency

Under the definition of exclusionary housing used in this Article, such practices are inefficient by definition. They promote sparsely populated areas when compared to those proposed by inclusionary housing. More dense inclusionary housing areas are likely to produce lower annual miles driven, shorter work commute distances, higher transit availability, closer proximity to transit, and lower single-occupant vehicle use.¹⁸ Further, "exclusionary requirements force low- and moderate-income workers to live far from suburban jobs and commute long distances, which increases traffic congestion . . . and imposes time losses on all commuters."¹⁹ Finally, inclusionary laws, by encouraging compact growth, make more efficient use of the available supply of vacate land.²⁰

B. Equity

One of the primary purposes of inclusionary zoning is to correct the inequitable ills of exclusionary land use efforts.²¹ New trends, however, show that newer suburbs favor private land

¹⁶ See Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U. SAN FRAN. L. REV. 971, 971 (2002); MYRON ORFIELD, *AMERICAN METRO POLITICS* 124 (2002); MANDELKER AND PAYNE, *supra* note 4, at 387, 392 (noting that other state laws and rulings are weaker than those from New Jersey); DANIEL R. MANDELKER, *LAND USE LAW* § 7.25, at 324 (Lexis Publ'g 4th ed. 2000) (1982).

¹⁷ See Alice M. Burr, *The Problem of Sunnyvale, Texas, and Exclusionary Zoning Practices*, 11 J. OF AFFORDABLE HOUSING AND COMM. DEVEL. L. 203, 203 (2002).

¹⁸ See Catherine L. Ross & Anne. F. Dunning, *Land Use Transportation Interaction: An Examination of the 1995 NPTS Data*, U.S. Dept. of Transp., Fed. Highway Admin., at 30-35 (1997).

¹⁹ ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 13-14 (1994).

²⁰ See Gerrit Knaap, *State Land Use Planning and Inclusionary Zoning: Evidence from Oregon*, J. OF PLANNING EDUC. AND RESEARCH, at 40-41 (Fall 1990).

²¹ PETER DREIER ET AL., *PLACE MATTERS* 195 (2001).

use restrictions that provide more comprehensive controls,²² leaving the effectiveness of inclusionary laws in doubt. These, controls often come via neighborhood associations, privately held corporations that dole out their own land use controls effecting, on average, 200 people.²³ Over "half of the new housing" built in the top fifty metropolitan areas "is . . . built in neighborhood associations."²⁴ These trends show that efforts to utilize inclusionary housing laws (which target traditional zoning techniques) will soon lose the little effectiveness they have now to stymie self-segregation. In fact, where given the choice to zone or not to zone, some evidence suggests minorities prefer to take their chances in the private market system than risk the known racial inequities prevalent in zoned communities.²⁵ In sum, to date, state inclusionary laws have not shown much promise in providing suburban housing for low-income families.²⁶

C. Environmental Viability

The availability of large tracts of open land has been used to this county's advantage on a number of occasions. For example, when New York City faced significant problems associated with overcrowding, zoning laws (which "excluded" certain uses) were passed and the city spread out into available space surrounding the city. The efficiencies of inclusionary housing laws identified above, require a willingness and an ability to address the problems that would result from widespread use of such laws.²⁷ Efforts to stifle growth through urban utility service limits or growth boundaries can often lead to "leap frog" effects—those who can develop in isolated areas do so.²⁸ The consequences of development in these areas (which could also be spurred on by the fear of inclusionary housing bringing "unwanted" elements into existing neighborhoods) can be severe.²⁹ On the other hand, concerns over the environmental degradation of open spaces in some states has garnered support for some urban growth boundary legislation.³⁰

²² Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 831 (1999).

²³ *Id.* at 829.

²⁴ *Id.*

²⁵ Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693, 695-96 (2001) (noting that the strongest opponents of proposed zoning for Houston, TX have been minorities).

²⁶ DREIER ET AL., *supra* note 21, at 185; *But see*, ORFIELD, *supra* note 16, at 124 (noting the success in Massachusetts creating 25,000 affordable units in the last thirty years).

²⁷ *See* discussion *supra* Part III.A.

²⁸ Adams, *supra* note 8, at 78.

²⁹ *E.g.*, Recent studies conducted by the Minnesota Pollution Control Agency demonstrate that the ground water beneath metropolitan communities using septic systems is elevated above background concentrations. Minnesota Pollution Control Agency and Metropolitan Council, *Ground Water Beneath Twin Cities Metropolitan Communities Served by Individual Sewage Treatment Systems*, at 5 (February 2000).

³⁰ DOWNS, *NEW VISIONS*, *supra* note 19, at 15.

D. Experience

As discussed above, as traditional zoning laws fail to provide the segregation desired by many Americans, private land use controls crop up. The ordinances of Sunnyvale, Texas provide a modern example of the use of land use controls to exclude the poor. A municipality of just 2,500 residents, Sunnyvale lies twelve miles outside of booming Dallas.³¹ Sunnyvale prohibited construction of apartments and "require[d] homes to be built on lots of at least one acre."³² Their zoning laws recently struck down by a federal court, the town is now seeking ways to charge impact fees for roadway costs to developers.³³ Local units of government have "compelling economic motives for trying to minimize the number of low-cost housing units."³⁴ Most communities believe their net benefit would increase more by dedicating land to commercial, rather than high-density, low-income housing.³⁵

CONCLUSION

If rated on a scale of one to four with four being the least likely to accomplish an intended purpose, inclusionary housing laws should receive a four. To date, the lack of support for inclusionary housing interpretations and laws by the United States Supreme Court and Congress have left the battle against the segregation effects of zoning to the states. Few states have adopted strong inclusionary housing laws. The success of these laws is in doubt. Despite the theoretical benefits of inclusionary housing laws, few have demonstrated significant results in reintegrating socioeconomic factors into housing location. Moreover, self-segregation by individuals coupled with the views of municipalities towards multiple-dwelling housing suggests inclusionary laws are not likely to address income and race segregation.

³¹ See Alice M. Burr, The Problem of Sunnyvale, Texas, and Exclusionary Zoning Practices, 11 J. OF AFFORDABLE HOUSING AND COMM. DEVEL. L. 203, 203 (2002).

³² *Id.*

³³ See Minutes of Sunnyvale Town Council Meeting, (Nov. 12, 2002), available at http://www.townofsunnyvale.org/minutes_agendas/TOWNCOUNCIL_files/MTC11-12-02.pdf.

³⁴ THE COSTS OF SPRAWL—REVISITED, TRANSIT COOPERATIVE RESEARCH PROGRAM, REPORT NO. 39 106-107 (1998) (noting that "these include: maintaining housing prices as high as possible and excluding households whose need for public services—especially schools—will cost the community more than the taxes these households will contribute to the community").

³⁵ DOWNS, STUCK IN TRAFFIC, *supra* note 8, at 102.