DEVELOPING INCLUSIONARY ZONING ORDINANCES

A Study prepared for the
Connecticut Commission on Human Rights and Opportunities

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INTRODUCTION

This report to the Connecticut Commission on Human Rights and Opportunities (CHRO) is part of a series of studies funded by HUD aimed at enlarging the capacity of CHRO and other state human rights organizations to combat systemic or institutionalized form of housing discrimination. Human rights organizations typically work on a case by a case approach. Each case involving a claim of discrimination against an individual or family. The grant from HUD permitted CHRO to examine larger patterns and forces that work to deny equal opportunity in houses to classes of citizens legally protected from discriminatory action. This report is the final part of a project undertaken for the Commission by the Suburban Action Institute (SAI). SAI was employed to assist the Commission in examining the extent of exclusionary zoning practice in Connecticut and the means to overcome such practices. This particular part of the study concerns the development of models of zoning that aim to make possible within communities adequate housing opportunities for all citizens.

A prior report to the Commission on the Status of Zoning in Connecticut looked at present zoning practices to determine whether towns within Connecticut were employing forms of zoning that had a tendency to exclude lower income and minority persons. Many towns were found employing such practices, but the report went on to indicate that the exclusionary nature of a municipality cannot be determined in the absence of a close scrutiny of local zoning practices and administration. The study concluded that there were grounds for closer examination of particular communities to see if their practices did produce exclusionary effects

reducing housing opportunities available in the State.

This final section of work addresses the issue of the reforms that could be made in the practice of zoning so as to reduce and then eliminate exclusionary effects. In preparing this part of the report the consultant has been conscious of the fact that zoning is more than regulation; it provides a sense of security as well as regulating development to yield a secure community. Any proposals for modifying zoning practices in Connecticut must be based on strong reasons for change and must, as well, aim to assure communities and their residents that the environmental protection afforded through zoning will be maintained.

The major goals we have sought to preserve in developing this proposal for inclusionary standards in zoning are these:

1. Zoning should serve to protect and enhance environmental and community values;
2. Zoning should not be used to exclude any class of households;
3. Zoning should work to expand the opportunities for relatively lower income households to obtain housing opportunities.

Developing Inclusionary Zoning Ordinances

The means for achieving inclusionary zoning in Connecticut include:

1. Local units of government modifying their zoning ordinances so as that they are inclusionary;
2. Continuation and enlargement of efforts by Regional Planning

Agencies to support methods of inclusion;

3. Revising the State Zoning Statutes in such a manner as to require localities to zone in a manner reflecting the needs of their larger region;

4. Challenging exclusionary zoning in the courts of Connecticut.

Of these means, the last is one that should be avoided unless the other means fail. In the first instance, however, the CHRO and other parties interested in creating more inclusionary zoning and curtailment of exclusionary practice, should work to bring about local, regional and state reforms.

The movement toward inclusionary zoning in Connecticut involves the development of standards for zoning that meet goals of both non-exclusion and inclusion. It also involves building support for a shift toward this new type of zoning. This report focuses on the first, primarily. It suggests standards that may be applied. But the consultant would be negligent if it did not emphasize the importance of establishing an on-going process of education around the state in which the concepts of inclusionary zoning and their benefits are discussed. Groups and agencies with an historic interest in the subject of community growth controls would be appropriate conveners of meetings to reflect on the alternatives about to be presented in this report as compared with the existing methods having exclusionary effect.

The most persuasive arguments for non-exclusionary zoning and for the practice of inclusion are to be found in recent zoning opinions of the highest courts of neighboring states. While

these decisions are not controlling in Connecticut, the fact that these courts have ruled against exclusionary practices may, at the least, persuade citizens and public officials of Connecticut that a full discussion should be held on current zoning practices.

Three basic guidelines can be identified from court opinions that provide broad mandates which a local unit of government should consider in developing an inclusionary zoning ordinance.

The first is that the zoning provisions cannot present exclusionary obstacles to the provision of housing. Zoning regulations must not exclude certain housing types nor be excessive in their cost-inducing influence on residential uses. Such restrictions make it impossible to provide housing at the lower cost ranges of the housing market. These restrictive provisions have been labelled as exclusionary regulations and are discussed in greater detail in this report.

The second is that there must be provision for a variety of housing types, at varying densities and within a wide range of costs. The basic mandate of the Mt. Laurel court was the requirement that zoning regulations provide "an appropriate variety and choice of housing" for "all categories of people."[1]

The New York Court of Appeals (New York's highest court), in Berenson v. Town of New Castle[2], in a ruling resembling Mt. Laurel, stated that "The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available

land."[3] In meeting this guideline, the court stated that it was necessary for the township to ascertain what types of housing presently exist in the community, whether this adequately meets the present needs of the town, and also whether new construction is necessary to meet future needs.

The third is that the jurisdictions must consider the housing needs of the region as well as needs within the town itself. The Court in Mt. Laurel identified an obligation to meet the "municipality's fair share of the present and prospective regional need thereof."[4] In Berenson, the Court stated that "in enacting a zoning ordinance, consideration must be given to regional needs and requirements."[5] Moreover, the Court stated that "there must be a balancing of the local desire to maintain the status quo within the community and greater public interest that regional needs be met."[6] The Court continued that it should, in examining the ordinance of a community "take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities."[7] Finally, the Court felt it was necessary to examine whether the Town Board, "in excluding new multiple housing within its township, considered the needs of the region as well as the town for such housing."[8]

The Pennsylvania Supreme Court in Surrick v. Zoning Board of the Township of Upper Providence embraced the proposition that "...a political subdivision cannot isolate itself and ignore the housing needs of the areas surrounding it."[9]

The New Jersey Supreme Court found that Mount Laurel behaved

characteristically, for developing suburban communities, in administering its zoning ordinance:

> Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing.[10]

Jurisdictions should understand that as the law relative to exclusionary zoning develops, a duty to plan and zone affirmatively for the benefit of lower income households may become more explicit.[11] Indeed, courts in New Jersey, New York, and Pennsylvania have made clear this obligation. In several instances courts have invalidated entire zoning ordinances and ordered jurisdictions to design land use regulations that account for meeting the jurisdiction's share of regional housing needs for low and moderate income households.[12]

Courts have also ruled on the unconstitutionality of certain zoning regulations because of their exclusionary characteristics. Yet the courts have varied in their determination of when a standard is exclusionary. And in virtually no instance has a court suggested what those standards ought to be, leaving to the local jurisdiction an obligation to fulfill the broader mandates of a court order.

Neither do the consultants intend to particularize standards in this report. It is easily understood why this would be unwise. Jurisdictions throughout the State of Connecticut vary widely in the nature and state of development thus far and in their planning capabilities and capacity for additional development. They vary widely in the amount and characteristics

of land remaining for future development. The pressures for additional growth differ considerably from one community to another. Finally, there is considerable variation in the extent to which various jurisdictions have contributed to meeting the housing needs of all categories of persons within the State.

In developing an inclusionary zoning ordinance, however, it is not sufficient that a community provides the best substantive and procedural requirements within its zoning ordinance as a whole. It is also important that the manner in which the community receives and approves proposals for residential development, that include low and moderate income housing opportunities, works to achieve the inclusionary objectives of providing equal housing opportunities.

Environmental Considerations

The essence of zoning is protection and enhancement of environment. There can be no movement away from high environmental standards. Those who seek to expand opportunities for minorities presently excluded from communities do so in large measure to enlarge the opportunities for such households to reside in environmentally sound communities. A significant part of the argument against the costs of continued ghettoization of minorities is premised on concern with the environment within those communities.

The expansion of housing opportunities in communities now not housing many lower income households or minorities thus may be beneficial to the regional environment in so far as it

enables fewer residents in a region to live under environmentally unsound conditions. But if inclusionary zoning is to be accepted by the majority, it will be necessary for its proponents to show that this new zoning will not be harmful to conditions in a community.

Proponents of inclusionary controls assert that the form of development they propose, while generally calling for higher density development, calls for clustered development; that is, development that is conserving of spaces that should be left undeveloped. The argument is that clustered development can offer better protection or conservation than can typical individual lots in a subdivision. The standard form of subdivision development has spread detached housing units over the suburban landscape with little ability to dissociate lands that should be protected from dvelopment from a cookie-cutter like plan of development.

It also should be said in support of the environmental benefits of the zoning favored by proponents of inclusion, that attached dwellings, garden apartments or town houses by the very fact of the attached quality of the units represent forms of development that conserve more energy than the single family detached structure can, the basic form of housing permitted under present zoning. Having fewer exposed walls, the attached unit is a less costly unit to heat than is one whose four sides are exposed.

The major environmental problems raised by inclusionary standards concern the adequacy of water and sewer facilities

and the difficulties associated with water run-off from relatively highly developed land. These are complex problems. An obvious advantage to large lot zoning, e.g., lots zoned for a half acre or more, is that low density developmenet permits, in most circumstances, use of wells and septic tanks. Aside from the great amount of pavement required to serve households spread apart by large lot standards, the denisty of use is so low as to make feasible in most circumstances natural absorption of run-off.

Inclusionary zoning, calling, in general, for higher and more concentrated densities, necessitates, in most cases, a public water supply and a large sewage disposal system. Additionally, special drainage systems are required to handle the more heavily concentrated run-off that results normally from more intensive use and paving of the land required for parking, sidewalks and entrances. Many communities now not allowing relatively intense use of the land, such as town houses or garden apartments, have no public water or sewer facilities. Frequently, the absence of such systems is proposed as a reason for not allowing such uses of land.

Must every community in Connecticut provide adequate water and sewer facilities so that land can be more intensively developed? Is it possible to provide such facilities at reasonable costs everywhere? Is it possible that some areas of the state now not heavily developed are better situated than other areas in terms of their ability to sustan water and sewer facilities at reasonable cost and in an environmentally sound manner? Would

it be possible to stage the development of the expansion of such facilities so that lower income households might be afforded a broader range of choices? Is it not also possible that those rural areas of the state, where lower income households have not been excluded, may be able to demonstrate an ability to provide relatively lower costs housing while not requiring public water or sewer facilities?

Answers to these questions, while a part of the zoning issue, must be found in public policy and programs regarding state investment in new facilities. The State Plan of Development now being prepared should give emphasis to the social considerations of expanding housing opportunities for minorities in developing its plan for infrastructure development. It should do this to a far greater extent than it has in the preliminary draft. The State Plan of Development should be premised on a policy that enables all classes of the population and, in particular, minorities to have much greater freedom of locational choice. That goal should help to establish policies for the provision of water and sewer faciliities. Strange as it may seem, those who determine where water and sewer facilities will be extended, determine to a great extent the degree of freedom to locate that will be possessed by lower income and minority persons.

In truth, the policy of inclusion is one that must cut across all agencies of government. If discrimination and segregation are to be ended, then all agencies whose work affects opportunities for minorities must work in harmony toward that

goal. Zoning by itself is not the sole cause of segregation and exclusion. Nor can it be a sufficient basis for inclusion. State planners as well as the state legislators carry heave responsibility for establishing and implementing policies that expand freedom and prohibit discrimination.

The Spirit of Inclusion and Providing Housing Opportunities

The sentiments against welcoming newcomers, particularly newcomers who because of their class or race are deemed undesirable neighbors, is often based on a strong desire to maintain the quality of a community and its environment. Present residents often feel more secure when certain groups of the population remain outside their community. The demand for protecting community life and environment is of the highest importance and should be given very high value. Often, however, these demands clash with the demand of individuals for exercise of their liberty. It is a typical conflict in America and the discussion about zoning is one part of this larger question.

The desire for protecting the quality of life may result in denying to others the liberties and opportunities to which they are entitled. A zoning control may be employed to protect the community and may have the effect of excluding even though such an effect was not considered by those enacting the regulation. That is, some people are not aware that their own desires and preferences have negative effects on others. In such cases, it may be sufficient to bring this point to light to encourage a more positive attitude toward inclusionary zoning.

In other cases, however, where people understand the impli-

cations of their zoning practices, it may be necessary to remind them that their worst fears need not be realized through inclusionary zoning policies, that often their concerns about the intrusiveness of new neighbors is exaggerated, that real estate values need not plumet, or that their needs for physical security need not be threatened.

If citizens themselves join together to plan and promote sound and open housing policies, rational land use decisions can take the place of the reactive behavior that so often results in response to outside pressures for changes in the past patterns of community development.

The spirit of inclusion, the spirit of law serving all equally, requires that those enacting laws do consider whether the effect is or is not exclusionary. The fact is that public regulations designed to protect the quality of life in a community may regulate, as well, the right or liberty of others outside of that community to move and live there. This denial of opportunity cannot be an acceptable result of governmental regulation.

Land use regulations may control the type, the amount, the location, and the cost of housing available in a community. Land use regulations control, as well, many other elements of the growth and development of a community that may or may not affect housing. Moreover, many other factors, outside of land use regulations, affect the availability of housing. Regardless, land use regulations, as the subject of this discussion, through the influence exerted on housing availability, contribute

significantly to the opportunity that persons, not presently living in the community or desiring to move within the community, have to do so. While this is neither the sole influence of zoning regulations, nor are zoning regulations the sole influence over the availability of housing, its importance as a contributor to that availability must be recognized.

Outline of the Report

This report examines the components of an inclusionary ordinance and the comprehensive policies which such an ordinance aims to achieve. The first four sections are directed essentially toward local municipal policies. The fifth section of the report suggests possible state action to require localities to zone in an inclusionary manner. A concluding section summarizes the recommendations of this report. The sections of the report are these:

1. Inclusionary Development Policies
2. Zoning Practices Having Potentially Discriminatory and Exclusionary Effect that Should Not Be a Part of an Inclusionary Ordinance
3. Inclusionary Zoning Standards
4. Inclusionary Zoning Procedure
5. State Zoning and Planning Enabling Legislation to Establish Inclusionary Zoning Guidelines for All Municipalities
6. Conclusions

INCLUSIONARY DEVELOPMENT POLICIES

When a community develops an inclusionary zoning ordinance, the official policies that frame that effort should be given careful and serious consideration. These policies will define as well as limit the efforts and capabilities of the community. The process of developing an official statement of inclusionary housing policies is an important method of generating support from the publis, other agencies, and other levels of government with which the jurisdiction must cooperate to implement its housing program.

The extent to which there must be a relationship between official land use policies of the jurisdiction and administration of the zoning ordinance is not clearly defined. Courts, for instance, have generally refused to review the adequacy of a comprehensive plan as a basis for their determinations about zoning practices.[13] In fact, there has been an increasing judicial reliance on shifting the presumption of validity to the jurisdiction and placing on the locality the burden of justifying zoning changes.[14]

Courts in Connecticut, however, have generally treated the comprehensive plan as advisory in its influence on the zoning ordinance and have not looked to a comprehensive plan external to the zoning ordinance.[15]

Undoubtedly, when communities respond to development proposals on an ad hoc basis, with little regard to any plan or policies, land use patterns may develop that bear little resem-

blance to the patterns either indicated on the zoning map or the general plans and policies for the community. Clearly, communities must avoic the appearance of arbitrarily rezoning land, and written land use policies can provide support for zoning regulations and practices, particularly when land use allocations are made through various discretionary techniques.[16]

The policies serve a variety of purposes. They make explicit the community's commitment to the provision of low and moderate income housing. They underscore the community's intent to comply with the law. They assist the community in tackling the difficult political and social effort required to understand the larger benefits to be had from an inclusionary policy. They assist the community in making program and funding commitments in realizing those policies. They serve to alert private entrepreneurs of the community's intent to provide a balanced housing supply. They help the community embrace a common view of the nature of the community that is being sought and that future decisions will support. They serve as a foundation for developing regulations designed to pursue those goals.

The policies themselves should be directed to at least six major areas. These are outlined below with some sample language for policy statements.

1. Policies should outline how the community's inclusionary land use program relates to broader regional or state housing needs and contributes to meeting the objectives or regional or state housing goals. While specific state-

ments might be directed to a particular state or regional housing plan or program, broader statements such as the following may also be appropriate:

> Provide adquate housing for all households at a price they can afford by increasing the supply of good quality housing units especially for low and moderate income households.[17]

> Expand the range of housing opportunity for everyone geographically, and ensure a balanced distribution of housing and employment opportunities.[18]

2. Policies should indicate how the community's inclusionary land use program reflects good planning principles and is consistent with the comprehensive plan or other general development objectives of the community. While specific statements might be related to other planning documents for the community or the larger region or state, statements such as the following may also be appropriate:

> Provide a quality living environment for all households by providing adequate public services and facilities and by maintaining sound, viable neighborhoods, and revitalizing those which have suffered disrepair and neglect.[19]

> Prohibit the location of lower income housing in areas that are not suitable for residential development, such as: conservation and preservation areas, floor plains or wetlands, airport environs, heavy industrial areas, etc.[20]

> Encourage the development and utilization of all appropriate human services, particularly those affecting the quality of life for low and moderate income households.[21]

> Encourage housing development designed to facilitate constructive social interaction between low and moderate income households and their neighbors in the larger community.[22]

3. Policies should indicate how the community's inclusionary

land use program will alleviate problems in housing finance, government organization, land development regulations, public support, housing quality, housing discrimination, and so forth.[23] In particular, policy statements should be directed to the community's intent to reduce the cost of housing through revisions in codes and a review, alteration, and/or adoption of regulatory techniques to accomplish that end.[24] The community may wish to draw on recommendations from national studies and other government publications. A particularly useful document is the Final Report of the U. S. HUD Task Force on Housing Costs which will be released in May, 1978. Examples of such policy statements are the following:

> Eliminate code and other land use regulatory provisions that are cost-inducing to residential construction, including land acquisition and preparation and administrative procedures, and which are not essential to protect the health, safety, morals, and general welfare of the public.
>
> Conserve that portion of the housing inventory that is sound and repair or rehabilitate deteriorating housing stock.[25]
>
> Improve housing planning, policy-making, and implementation processes.[26]

4. Policies should indicate how the community's inclusionary land use program is related to other state and federal programs. Of particular importance is the relationship of the community's housing program to the Housing Assistance Plan, if it is an applicant for Housing and Community Development funds, or to its regional planning agency's housing element if it receives Comprehensive Planning Assistance ("701") funds,

or if it has an approved Housing Opportunity Plan or to any state housing finance or related programs and any federal housing assistance funds. The community should identify what housing resources, through plans and funding programs, are available and how they will be utilized in implementing the community's inclusionary housing program.

5. Policies should indicate how the community's inclusionary land use program will be administered. In particular, the community should give some indication of how it will receive and evaluate proposals for new residential development. Such statements might include:

> A declaration that the municipality intends to encourage new housing with a variety of types and costs and that incorporate a mix of such units.
>
> A schedule of the pace and extent of such development that the community regards as reasonable.
>
> The types of areas where proposals for such development will be sympathetically considered, and why those areas have been selected.[27]
>
> A statement of the ways in which the community intends to encourage such development and provide cooperation to expedite its accomplishment.
>
> A statement of the ways in which the community itself will advance the provision of a balanced housing supply through such measures as the creation of a housing authority, a land banking program, rehabilitation funds, write down of costs for new construction of low and moderate income or subsidized housing, tax abatement programs, and so forth.

6. Policies should outline how the community intends to remove discrimination in the provision of housing within the community. The jurisdiction should make a clear commitment to refrain from any discriminatory practice,

and outline its intent to remove the effects of past discrimination through current and future policies and practices. At a minimum, the jurisdiction should consider for their discriminatory effects: all land use regulations, including the zoning ordinance, subdivision regulations, and other codes; the provision of municipal services and facilities and other capital programming objectives; practices and policies which lead to discrimination in lending, real estate brokers, advertising, appraisals and property insurance.

REMOVING DISCRIMINATORY ZONING PROVISIONS

A jurisdiction developing an inclusionary land use program must include in its efforts an evaluation of the zoning ordinance and other land use regulations presently in force. The objective is to remove or alter those regulations that work against the provision of a balanced housing supply.

The task of identifying restrictive land use regulations is not an easy one. Complications arise because most zoning regulations interact with other provisions and may become restrictive only in combination. Moreover, many provisions which may be restrictive may also have other beneficial features or justifications. In addition, the cost imposed by a single regulation may not appear significant to the overall cost of a housing unit in isolation. However, the cumulative impact of several such regulations may be quite significant. Finally, the cost imposed by a regulation may not be the direct result of that regulation. Rather, there may be indirect costs associated with the regulation that do not become manifest until the regulation is operable.

Although there have been numerous studies identifying the land use regulations that increase the cost of housing[28], out of the context of a particular jurisdiction, the material may not be sufficiently convincing to justify a blanket removal of these provisions. Nonetheless, such studies provide a useful foundation for examining those provisions that are most suspect in their cost-inducing effect.

In essence the community must determine if lower cost housing can be built within the jurisdiction. Several steps are involved. A jurisdiction should begin by identifying the costs that various regulations impose on the price of housing and other restrictions that limit the supply of housing.

Second, the jursidiction should identify the specific regulations that reduce the possibility of producing low and moderate income housing in the community. When a regulation is either of such magnitude or so pervasive within the community that it interferes with the possibility of producing low and moderate income housing it must be removed or altered.

> Large lot zoning, for instance, increases the land required for a single family residence, which results in a higher final cost for the unit. Large lots also add costs by virtue of the large frontage and the excessive length of streets and other facilities that are required. Morevoer, most developers maintain some proportion between the size of a residence and the size of the lot, so that as the latter increases so does the former. Thus, it is clear that large lot zoning adds to the cost of housing. However, it need not prevent the construction of low and moderate income housing if it is limited to only a small portion of the developable land in the community.

Third, the community should carefully identify the objectives of the regulations in question. This understanding may

suggest alternative provisions that meet those objectives without the negative effects on the provision of housing. The community is then in a position to suggest removal of negative regulations, revisions of those that can be altered to reduce the negative effects, and additions that may be necessary to replace those regulations that were deleted but were meeting otherwise legal and worthwhile objectives.

Zoning Regulations That Restrict Housing Opportunities

Discriminatory or restrictive zoning provisions are those regulations, in excess of minimum standards of public health and safety, which result in restricting the housing and land markets of a community so that an economic prohibition is created against households of low and moderate income within the State from being able to afford housing in the community.

In the consultant's first report to the CHRO, the various provisions within a zoning ordinance that affect the availability of housing at costs affordable by low and moderate income households were listed. This has been reproduced here because it provides a useful outline of the zoning regulations that a jurisdiction should review in an effort to remove discriminatory provisions. These provisions can be divided into four areas:

1. Restrictions that limit the type of dwelling unit permitted. Such regulations may limit the possibility of constructing multi-family units or mobile homes. These housing types can be provided at less expensive costs than single family units. Thus, to elminate the possibility of providing

these types of units lessens the chances that housing will be made available at lower costs.

2. Provisions that add to the cost of the dwelling unit. Requirements which add to the necessary costs of constructing units are those provisions which are in excess of those required to protect the health, safety, morals, and general welfare of the public. Eliminating those regulations allows for housing to be constructed at lower costs but does not prevent individual homeowners from adding to these basic requirements in the construction of their own housing unit when they can afford to do so.

3. Administration or procedural provisions over approvals for residential development. There are a variety of decisions, controls, and processes that may work to lessen the desireability and/or feasibility of developing less expensive housing types. These provisions discourage developers from proposing certain types of residential developments and may involve sufficient additional approval time to add substantial costs to the price of the housing units. Some procedures can provide particular hardships for proposed publicly assisted housing developments making it impossible to provide such alternatives within the jurisdiction.

4. Restrictions on the location of certain types of housing development. Zoning ordinances regulate where development can take place as well as what kind of development is

allowed. The amount of land and the location of that land within the jurisdiction will affect the cost of the housing unit. A more complex relationship results from the availability of sites for development of lower cost housing throughout a region of which that jurisdiction is a part. Availability will affect not only the supply of that housing, but its cost as well, including many housing related costs.

Examples of Provisions That Are Restrictive

1. Restrictions that limit the type of dwelling unit permitted.

   a. Exclusion of multi-family housing. Many zoning ordinances restrict the type of residential dwelling permitted to single-family detached dwelling units. This effectively excludes any type of multi-family unit, such as: town houses, row houses, garden apartments, duplexes, or multi-family units. Because these types of dwelling units are generally considered to be less expensive to construct, exclusion of these dwelling units will generally exclude low and moderate income households and minorities from the community because they cannot afford the more expensive types of dwelling units.

   b. Exclusion of mobile homes. Many zoning ordinances do not permit mobile homes or permit them only in undesirable rural or industrial areas or only as temporary uses rather than residences. Mobile homes can also be

excluded in indirect ways by imposing minimums related to floor area, lot size, or other factors which mobile homes cannot reasonably meet. Because mobile homes tend to be less expensive units, their exclusion is another way of restricting the housing possibilities for low and moderate income households.

c. Density controls. Density requirements or other yard and bulk regulations may effectively work to exclude the possibility of constructing multi-family housing units, even though they may not be prohibited directly. Most developers will not attempt to construct multi-family housing at very low densities. Some ordinances will permit clustering or may have a planned unit development provision which may not necessarily alter the basic density allowed and which may, in effect, still not permit the developer to construct multi-family housing.

2. Provisions which add to the cost of the dwelling unit

a. Large lot zoning. Large-lot zoning, usually defined as any minimum lot size over one-half acre per unit, increases the cost of housing in several ways: it increases the cost of land per unit by reducing the total amount of housing that can be accommodated; it increases the house size most developers will provide for the site; and it increases site development costs through the large linear feet of streets, sidewalks, gutters, sewer and water lines required for

each lot.

b. Other yard and bulk requirements. Excessive yard requirements have the same effect as large lot requirements. Front yard, side and rear yards, set backs, frontage requirements may have such an effect. Floor area ratios, where the size of the house may occupy no more than a certain proportion of the total lot, in combination with a minimum floor area, may have the same effect.

c. Minimum floor area requirements. The larger the required size of the dwelling unit, the more expensive it will be to construct. Established to protect the health and safety of the resident, they need be no larger than minimum set in standard codes and do not need to vary for different types of dwelling units or different districts within the zoning ordinance.

d. Bedroom restrictions. Bedrooms restrictions may not increase the cost of the dwelling unit, except to the extent that they increase the demand, and therefore the price, of larger units. Bedrooms restrictions usually attempt to limit the number of bedrooms permitted in dwelling units or to limit the number or percent of dwelling units with a certain number of bedrooms. They are primarily fiscal regulations designed to regulate the number of children that would require school facilities and have the effect

of restricting the availability of units to larger households.

e. Design and improvement requirements. Regulations that represent unnecessary requirements to protect the health and safety of the resident will increase the cost of housing unnecessarily. These items are better left to the discretion of households who can choose to add such improvements when they can afford them. Examples are: architectural controls, required garages, brick veneer, high fences or walls, extensive landscaping, thatched roofs, parking spaces.

f. Site development requirements and other exactions. The question of whether regulations are either necessary or justified that require exactions from developers is an unresolved one. In no instance does the developer bear such costs and all are passed on to the future homeowner or renter. Both the number and cost of these requirements have greatly increased over the last decade. Examples are: grading requirements, burying and disposal requirements, landscaping requirements, street requirements and road specifications (including alignments, grades, intersections, alleys, thickness of the roadbed), street lighting, sidewalks and curbing, sewers and drainage facilities, off-street parking and garages, accessory storage buildings, landscape amenities (fences, walls, natural

screenings), architectural controls, schools and school site dedication, park and open space dedication, extension of utility services to the subdivision site, tie-ins with existing streets, and enlarging existing sewer or water mains to accomodate proposed development.

3. Administration or procedural provisions over approvals for residential development.

   a. Special approval processes. Most zoning ordinances require that multi-family developments and other housing types that may be provided at lower cost be approved through some mechanism such as special permit, special exception, or site plan review. For all developments, time means additional costs either to hold the land or because money is tied up in some way.

   b. Lack of performance or development standards. Most zoning ordinances outline the information that must be submitted for approval but fail to outline what standards or guidelines will be used to approve the residential developments. If performance or development standards were prepared, as is often the case with other types of land uses, including single family developments, the special processes required for approval would not be so vague, so time-consuming, and consequently so costly.

c. Complex and overlapping review procedures. Most jurisdictions require numerous review approvals before final approval is secured. Engineering, water and sewer, fire building, zoning and planning departments may all have reviews and approvals that are necessary, creating numerous overlapping reviews and much duplication of materials required of the developer, all adding to the cost of the development.

d. Fees and charges required. Many fees may be added to the cost of the development, allegedly to cover administrative functions of the jurisdiction. Checking, filing and recording plats, inspections may all require fees of the developer. Fees are often required for building permits, certificates of occupancy, filing of variances, special permits or PUD applications, sewer tap-ins which may be unduly excessive for multi-family residential developments and where numerous review procedures are required. In addition, some jurisdictions have begun to utilize a "bedroom tax" applied to the number of bedrooms provided in the development.

4. Restrictions on the location of certain types of housing development.

a. Restrictive mapping for multi-family units or smaller lot sizes. Many communities map all vacant developable land for the lower density districts within their zoning ordinance, requiring that approval for any other

type of residential construction will depend on a zoning change. Restrictive mapping of such districts will, because of their relative scarcity, escalate their value and increase the cost of housing. Such "holding patterns" can have the effect of keeping the cost of land down and allowing the developer to obtain re-zoning and construct higher densities at lower costs. However, the predominance of restrictive re-zoning policies suggests more reasonable mapping procedures are probably a better alternative. The use of "floating zones" for multi-family residential developments, where the performance or development standards are established and a zoning map change approved for a proposed site meeting those standards, has not been widely used, but may represent a seemingly appropriate alternative.

b. Poor selection of areas mapped for multi-family units or smaller lot sizes. Where the land within a jurisdiction that is mapped for multi-family residential development or districts permitting smaller lot sizes and/or higher densities is minimally developable, requiring excessive site improvements; or poorly located, substantial distances from available water and sewer, school sites, open space, or adequate roads; or inadequately located, near to industrial or other possible incompatible land uses or in flood plains or

near railroad tracts necessitating environmental reviews, the costs of such development are increased or the development may become infeasible because of such costs.

A jurisdiction which has approved or practiced such zoning mechanisms is engaging in or contributing to the following:

1. Where housing needs of low and moderate income households exist in a larger area or region of which the jurisdiction is a part, that jurisdiction is failing to provide the opportunity to meet some of those housing needs within its own borders. By using zoning regulations to restrict the availability of lower cost housing, the jursidiction is violating its mandate to protect the general welfare through its police powers granted in State Enabling Legislation.

2. The jurisdiction denies to a disportionately large percent of racial and ethnic minorities, as well as other special groups, such as women heads of households, the right to compete for used and new housing in the community in which such zoning is practiced. Non-white households in the United States and in each of its metropolitan areas have, on the average, significantly less income than white households. Moreover, minority households are generally segregated and restricted to certain sections of the metropolitan region. Thus, such zoning practices may be racially discriminatory. Claims or discrimination are even more apparent where the

zoning regulations work to prohibit or discourage publicly-assisted housing, wherein affirmative efforts are required to make such housing available to minorities.

The Role of the Courts in Defining Exclusion

It is instructive at this point to review the various court cases that have analyzed and ruled on zoning provisions as to their exclusionary effect. The regulations with which the courts have grappled over the years are: large lot zoning, prohibition of multi-family housing, prohibition of mobile homes, minimum house size, and bedroom restrictions. Each of these is treated separately below.

1. Large Lot Zoning

In 1959 the Virginia Supreme Court of Appeals invalidated a large lot zoning amendment (a two-acre minimum lot size) as unreasonable and arbitrary because it was not substantially related to health, safety, morals, or general welfare of the community. The court wrote that:

> 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, thereby reserving the western area for those who could afford to build on two acres or more. 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.[29]

Pennsylvania was the next state to treat the question of minimum lot sizes in National Land & Investment Co. v. Kohn.[30] The Pennsylvania Supreme Court invalidated two and four acre restrictions which covered almost half of

Easttown Township. The court declared:

> A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.[31]

National Land is important because it considered the rights of persons living outside of Easttown Township who might want to live there. "While judicial consideration of the impact of zoning beyond local political boundaries has gained gradual acceptance in the courts, National Land is the first case which has invalidated a zoning ordinance because it denied outsiders to housing in a suburb."[32]

One of the most important cases to date with respect to large-lot zoning also occurred in Pennsylvania: Appeal of Kit-Mar Buildings, Inc.[33] The Pennsylvania Supreme Court ruled that "...(a)bsent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable."[34] In this case Concord Township's zoning ordinance contained two and three acre zoning for 10% of the land in the Township.

The court ruled:

> We once again reaffirm our past authority and refuse to allow the township to do precisely what we have never permitted - keep out people, rather than make community improvements.
>
> The implication of our decision in National Land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not

> for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.[35]

Two important aspects of the Kit-Mar case should be noted. First, in Justice Robert's statement that "...we fully realize...the overall solution to these problems lies with greater regional planning..." there is clearly judicial encouragement for regional planning.[36] Second, the refusal of the court to recognize the presumption of validity is important. "The majority has thus shifted the burden of proof as to the validity of the municipal ordinance from the challengers to the township."[37]

2. Prohibition of Multifamily Housing

The segregation of uses within the zoning ordinance and the separation of apartments, in particular, has long been held as a valid restriction.[38] Historically, arguments against apartment houses were based primarily on the dangers and ill-effects of these uses as compared to single-family residences.

There were opposing opinions, however, that claimed the segregation of apartments was unconstitutional or constituted economic segregation.[39]

The Supreme Court of Pennsylvania was one of the first courts to deal with effects of a complete exclusion of apartments in a zoning ordinance in Appeal of Girsh.[40] In this case the court specifically noted that local land-use policies significantly affect regional development.[41]

The court held that:

> By emphasizing the possibility that a given land owner could obtain a variance, the Township overlooks the broader question that is presented by this case. In refusing to allow apartment development as part of its zoning scheme, appellee has in effect decided to zone out the people who would be able to live in the Township if apartments were available.[42]

> Apartment living is a fact of life that communities like Nether Providence must learn to accept. 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."[43]

In Township of Williston v. Chesterdale Farms[44] Pennsylvania's highest court in 1975, invalidated a township's ordinance which provided only 80 acres for multi-family housing out of a township area of 11,589 acres, on the ground that the ordinance "does not provide for a fair share of the township acreage for apartment construction."

In striking down the Willistown land use scheme, the Pennsylvania court extended the prohibition in Girsh to include not only total exclusion of multi-family dwellings but also partial exclusion, or "selection admission."[45] The court set forth the following rationale:

> The implication of our decision in National land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels.[46]

In Surrick v. Zoning Board of the Township of Upper Providence, the Pennsylvania court was more precise on

this issue in stating:

> In analyzing the effect of a zoning ordinance, the extent of the exclusion, if any, must be considered. Is there total exclusion of multi-family dwellings, which we disapproved in Girsh Appeal, supra, or is the exclusion partial? If the zoning exclusion is partial, obviously the question of the ordinance's validity is more difficult to answer. In resolving this issue, once again the percentage of community land available under the zoning ordinance for multi-family dwellings becomes relevant. This percentage must be considered in light of current population growth pressure, within the community as well as the region, and in light of the total amount of undeveloped land in the community. Where the amount of land zoned as being available for multi-family dwellings is disportionately small in relation to these latter factors, the ordinance will be held to be exclusionary.[47]

In the case of Berenson v. the Town of New Castle, a developer deprived of the right to build multi-family housing on his land sued for relief. The New York State Court of Appeals returned the case to the lower court, asking that court to evaluate the zoning ordinance in the light of two tests of validity. The first test was simply whether the Board had provided a properly balanced and well ordered plan for the community.

> ..."The second branch of the test is whether the Town Board, in excluding new multiple housing within its township, considered the needs of the region as well as the town for such housing. So long as the regional and local needs for such housing were supplied by either the local community or by other accessible areas in the community at large, it cannot be said, as a matter of law, that such an ordinance had no substantial relation to the public health, safety, morals or general welfare."
>
> ..."Whether New Castle should be permitted to exclude high density residential developments depends on the facts and circumstances present in the town and the community at large. Until the day comes when regional, rather than local, governmental units can make such

> determinations, the Courts must assess the reasonableness of what the locality has done. That is what remains to be considered upon the trial of this case."[48]

The Supreme Court ruled that the Town of New Castle must zone to provide for the construction of 3,500 units of multi-family housing in order to meet the needs of persons employed in the Town as well as its portion of regional needs.

3. Prohibition of Mobile Homes

In 1962 the exclusion of mobile homes was upheld in New Jersey in Vickers v. Gloucester Township.[49] In his dissenting opinion, however, Justice Frederick W. Hall described his view of the proper function of a court and wrote that:

> ...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.[50]

In 1972 in the case of Derry Borough v. Shomo the Pennsylvania Court determined that a zoning ordinance that had the effect of precluding mobile homes was invalid and unconstitutional. In this case, the court quoted from a prior decision, Beaver Gasoline Co. v. Osborne Borough[52] that had dealt with a zoning ordinance which specifically

prohibited gasoline stations throughout the borough.

In two cases in Michigan the Michigan Court of Appeals overturned local ordinances that prohibited mobile home parks. In Bristown v. City of Woodhaven[53] the court held that mobile homes parks constituted a legitimate and necessary land use, and this fact, combined with a severe housing shortage in the state, gave mobile home parks a "favored" status. The court stressed that the term "general welfare" must be interpreted to encompass the interest of the broader area, and not just the narrow parochial interests of an individual community.

In Green v. Township of Lima[54], the Michigan Court, relying heavily on Bristow, again overturned a local ordinance preventing the construction of a mobile home park. The court concluded that:

> Townships such as Lima are heterogenous governmental units whose political boundaries are largely artificial. To allow the first 600 people in an area to use these artificial boundaries to exclude all but 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, subverts the idea of zoning promoting the general welfare.

4. Minimum House Size

The case history of floor area restrictions has been less well-defined than that of minimum lot sizes. This has been primarily the result of a widely-publicized New Jersey Supreme Court decisions, Lionshead Lake, Inc. v. Wayne Township[55] in 1952. In sustaining the ordinance, which contained minimum floor area restrictions ranging

from 768 square feet to 1200 square feet, the court espoused two basic ideas: first, that a reasonable use of property depends:

> (N)ot only on all conditions...within the municipality...but also on the nature of the entire region in which the municipality is located...

and second that, in light of facts pertaining to Lionshead Lake, the township has:

> (S)ought to safeguard itself within limits which seem to us to be altogether reasonable.[56]

The dissenting opinion, however, recognized the practical effect of the ordinance:

> (T)he effect of the majority opinion precludes individuals in those income brackets who could not pay between $8,500 and $12,000 for the erection of a house on a lot from ever establishing a residence in this community...A zoning amendment that can produce this effect certainly runs afoul of the fundamental principles of our form of government.[57]

Since this landmark case, minimum floor area sizes have been upheld ranging from 900 square feet to 1800 square feet based on the validity of such objectives as: the character and needs of the community, the aesthetics of the locality, the maintenance of property values, the prosperity of the community.[58]

Again, a Pennsylvania case broke the trend. The Pennsylvania Supreme Court decided in Medinger v. Springfield Township[59] that a sliding scale of minimum floor area sizes was not reasonably related to the public health, safety, morals or general welfare. The court held that:

> ...neither aesthetic reasons nor the conservation

> of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or morals or the safety or the general welfare of the township.[60]

The most recent opinion in this area involves a New Jersey Superior Court decision in a case brought by builders to test directly varying floor area controls in suburban zoning ordinances. In the case of Home Builders League of South Jersey v. Township of Berling, Borough of Pine Hill, Borough of Stratford, and Township of Voorhees, the court declared that the floor area controls, because they were not based upon occupancy, are invalid.[61]

The court concluded that:

> Plaintiffs have shown that no interest of public health is advanced through non-occupancy based on minimum standards. An obvious flaw in any argument in favor of the health rationale is the fact that different standards exist for different parts of each town. It is ridiculous to suggest that an 1100 square foot house may be "healthful" in one part of town and not another...

5. Bedroom Restrictions

The Superior Court of the State of New Jersey discussed the problem of bedroom restrictions in 1971. Bedroom restrictions normally limit the number of bedrooms permitted in multifamily structures and thereby limit the number of children inhabiting such structures.

In Molino v. Mayor and Council of the Borough of Glassboro[63] the New Jersey Court noted that "...the bedroom restrictions denied occupancy by families with

children, and that the various required amenities would so elevate costs of construction as to preclude housing for the needs of middle income and low income families."[64]

The Glassboro ordinance required that 70% of all units have no more than one bedroom; 25% nor more than two bedrooms; and the remaining 5% no more than three bedrooms. The ordinance also required many amenities, such as swimming pool and tennis court space per unit.

INCLUSIONARY ZONING STANDARDS

Standards for residential development in an inclusionary zoning ordinance must take into account:

1. The variety of housing types, the varying densities, and the range of costs for those units;
2. The amount of growth in residential units and the timing for such development; and
3. The types of areas where proposals for such development will be encouraged or accepted.[65]

Providing for a variety of housing types, at varying densities, and within a wide range of costs

Objectives

A variety of housing types: All dwelling unit types should be permitted within a jurisdiction, that is, single family dwelling units, duplexes, multi-family dwelling units, including townhouses and garden apartments, and mobile homes. Under no circumstance should all alternatives for a type of dwelling unit be excluded from a jurisdiction. For some types of dwelling units, development above certain densities or heights may be inappropriate in some jurisdictions or areas of a community, but it is difficult to imagine circumstances where it would be justifiable to exclude totally a certain type of dwelling unit.

In the case of mobile homes and manufactured housing, a jurisdiction may find it desirable to regulate them within controlled parks, or may choose to treat them as single family dwelling units. Under no circumstances is the total exclusion of this important

alternative justified.

The ability to provide units suitable for various household sizes, as measured by the number of bedrooms provided, is very important to the provision of a variety of dwelling units. Thus, regulations restricting the number of bedrooms or units with a specific number of bedrooms, should not be present in a zoning ordinance.

At varying densities: There must be a sufficient range in allowable densities so that housing in the lower price categories can be developed. Higher densities and small lot sizes are virtually a pre-condition to the construction of lower cost housing. Moreover, the range in allowable densities should apply to all dwelling unit types; thus, there should be small lots for single family as well as higher densities for multi-family dwelling units.

Within a side range of costs: In addition to removing the zoning regulations which add to the cost of housing and which otherwise restrict the housing supply, as discussed earlier, regulations should encourage the provision of a variety of housing prices and rents. Zoning regulations may encourage a mix of residential types, provide incentives for constructing lower cost housing, or require the inclusion of units for low and moderate income households within a residential development.

Zoning Alternatives

While it is possible that the above objectives could be

met through the identification of traditional districts, the permitted uses, and the standards governing those uses, several zoning techniques have been developed over the last few years that have a greater potential for encouraging the provision of a variety of housing types, at varying densities and within a wide range of costs. Each of these is discussed briefly below:

Clustering: Provisions within a zoning ordinance may allow for developers to be flexible in the siting of dwelling units without altering the overall density allowed. In essence, variable lot sizes or zero lot lines may be allowed with more flexible yard, setback, frontage, and coverage requirements while simultaneously allowing for setting aside the remaining land for open space or recreational areas. Developers may reserve marginal land and utilize the most developable land for construction resulting in lower overall costs for the development, and subsequently, for some or all of the individual dwelling units.

Planned Unit Development: The planned unit development approach calls for the complete design of a single site, subject to the requirements and administrative direction of the planning staff. It is planned as a single entity providing the developer with certain flexibility in exchange for attention to objectives of preserved open space, improved siting and design, variety of development, and other design and performance criteria. The PUD concept is unique also in the

administrative discretion applied to the development. Usually the PUD is basically either a floating zone or overlay zone, or a conditional or special permit use which is not mapped but for which the zoning ordinance may specify a variety of requirements that must be met before mapping would be approved.

Planned unit developments are certainly the most discussed of the new techniques to provide for more flexibility in a zoning ordinance. The technique has been both praised and criticized for the innovations introduced. Improved design and site planning, lower costs through increased flexibility, larger scale creation of complete environments, variety and mix of dwelling units and other land uses, and improved utilization of land are cited in its favor. Criticisms have been voiced about the increased discretion in the approval process and bargaining that results between developer and local officials. Time-consuming procedures drive up the costs of development and the trade-offs that may occur during the approval process can jeopardize the interests of the public and distort the opportunities available through the planned unit development concept. PUDs have also been criticized as a guise for a community's wishing to appear flexible in their zoning provisions by designing a PUD ordinance but which actually, because of detailed requirements and approval processes, will not encourage a variety of dwelling unit types at varying costs.

The PUD concept can be an effective technique if its

advantages are understood, if potential pitfalls are avoided, if the objectives are well-formulated, if the ordinance is clearly drafted, and if the community is capable of providing the necessary professional administration.[66] Planned unit developments, in many instances, offer the basic network within which a variety of other techniques can be utilized, such as those discussed here.

Incentive Zoning: Provisions in the zoning ordinance may offer a developer certain economic incentives, generally through more intensive use of the property, in return for the provision of benefits to the community which it believes it would otherwise not be able to obtain, such as open space, parking, or a portion of lower cost units. Density bonuses have been the most common type of incentive zoning used and have been utilized in central cities and planned unit developments in exchange for amenities or facilities desired to enhance the liveability and environment of the core area or the development itself.

Bonus provisions can be administered as of right or through a special permit process and with or without a site plan review process. Where the provisions are relatively straightforward, the usual zoning permission process will suffice.

Fremont, California; New Castle, Delaware; Arlington County, Virginia; Bellingham, Massachusetts (only for public housing); and Montgomery County, Maryland (within a mandatory

inclusion ordinance) have adopted various forms of incentive zoning for encouraging the provision of lower cost housing. While most of these provisions were adopted while subsidized housing construction programs were in effect, even under the newer forms of housing assistance payments, developers may be encouraged to participate in the program through such incentive zoning provisions.

While increased density has been the most common form of incentive zoning, other incentives may also encourage developers to include a portion of their development as lower cost housing. Faster processing and approvals, mixing of uses, or lower construction costs might also function as incentives, particularly where increased densities are not particularly needed or desirable.[67]

Mandatory Inclusionary Ordinances: A zoning ordinance may contain a provision that requires, under certain circumstances, each residential development to include a portion of the total dwelling units for sale or rent to lower income households. In general, the provisons apply to any residential development with more than a minimum number of dwelling units, require that a certain portion of the total number of units be sold or rented to low and moderate income households, and may or may not depend on housing subsidies and/or density bonuses to ensure economic feasibility.

These provisions are usually intended to both increase the supply of lower cost housing and encourage dispersal of

these units throughout the jurisdiction.[68] They are thought to be most useful where there is significant pressure for additional growth.

The successful court challenge to the first of these provisions has caused some hesitation to design them. However, the limited availability of federal funds for housing assistance has really been the most problematic aspect of their implementation.

Some of the requirements attached to the earlier housing subsidy programs made it difficult to incorporate these units into the developments subject to themandatory inclusionary provisions. However, the recently enacted housing assistance payments program alleviates many of these difficulties. On the whole, it is believed that the new programs are better suited to the mandatory inclusionary provisions than the earlier housing subsidy programs.[69]

The economic profitability of the project is the single most important question about the feasibility of mandatory inclusionary ordinances. One commentator concludes that the economic profitability of the project depends upon the following: (1) the extent of density bonuses granted under the ordinance; (2) the ability of the developer to reduce construction costs by reducing the dimensions and amenities of the low and moderate income units; (3) the maximum sales and rent levels set for these units, and (4) whether any losses on the low and moderate income units can be recouped from unsubsidized

buyers and tenants through higher prices or rents, or from the landowner through a reduced price for the site.[70]

Mandatory inclusionary ordinances have been adopted by Fairfax County, Virginia; Montgomery County, Maryland; Los Angeles, California; Lewisboro, New York; and Cherry Hill, New Jersey. Fairfax County's ordinance was later struck down by the Virginia Supreme Court as outside the power granted by the state's zoning enabling act.[71] Because of the questions raised by this ruling, both Montgomery County and Los Angeles have taken the authority for their ordinance from the police powers granted to those communities under their home rule charters. In any event, a special state enabling law would the best provide support for the adoption of mandatory inclusionary ordinances.[72]

Transfer of Development Rights: The concept of transfer of development rights (TDR) stems from the economic benefits that are conferred on property owners because of the rights to use or develop land designated through the zoning ordinance. TDR provisions assume that the ownership of the property itself can be separated from the right to develop it, and allow for a transfer of those development rights from one landowner to another either through sale or regulation.[73]

The TDR system enables a landowner purchasing the rights to develop at a higher intensity and enables the landowner transferring the rights to realize an economic return from the sale of the development rights and still build at a lower

intensity, if at all. The greatest difficulties arise from the determination of the value of the rights and incorporation of those values into the system.[74]

Transfer of development rights has been proposed most often in order to protect a valuable resource, such as farm land. However, the TDR system has been proposed in Southampton, New York as a means to encourage the construction of low and moderate income housing.[75] It has also been suggested that a TDR system could be developed whereby a jursidiction would project the anticipated new dwelling units expected for growth and apportion those among landowners, reserving some for use by the jurisdiction. Those apportioned to the jurisdiction could then be made available to developers for the specific purpose of building lower cost housing.[76]

Providing for growth and timing of residential development

It is not surprising that local jurisdictions have become increasingly concerned about the rate and amount of growth appropriate to the nature of the community that the community can sustain. Fiscal pressures and an increasing awareness of environmental issues have heightened these concerns. It is unlikely that a court would sustain any jurisdiction's attempt to totally restrict its future residential development in order to protect itself from the pressures of future growth. However, a court could be expected to look favorably upon a community that included provision for future residential growth and for accommodating regional needs, in its attempt to plan

for and control the nature and timing of that development.

Objectives

Coordinating land management tools: The improtance of a comprehensive plan and policies identifying the objectives of the community for its future growth were discussed earlier. Communities should develop a comprehensive approach that will guide future development and prevent the use of zoning regulations to restrict development as an ad hoc response to pressures of population growth from within and outside the community. An important part of comprehensive planning is to coordinate zoning and other land use regulations with other techniques that control the future development of the community, such as: capital programming and the use of state and federal funds.

Providing for regional housing needs: Earlier discussions have pointed out that zoning is intrinsically tied to the police power obligations granted to the local jurisdiction through the State Enabling Act. The provision of housing relates to protecting the general welfare of the population of the State and therefore must taken into account both the needs of the community's indigenous population as well as the housing needs of the region or State of which it is a part.

The courts in neighboring states have interpreted this basic obligation on the part of a local jurisdiction as contributory to a determination of whether or not a jurisdictions's zoning ordinance is exclusionary. A community's approach toward planning and zoning for residential development ought to include

meeting community and regional housing needs.

Maintaining even-handed decision-making: Administrative discretion has increasingly dominated zoning practice in recent years. Part of the community's obligation to remain open and free from discrimination involves the removal, to the extent possible, of the arbitrariness that so often goes hand in hand with administrative discretion. To this end, a local jurisdiction needs a sound and rational basis for its zoning policies and practices, particularly for evaluating proposals submitted to it for future residential development.

Zoning Alternatives

We will not discuss specific techniques that provide for the growth and timing of future residential development in a community. Many alternatives have been developed that account for meeting housing needs to varying degrees. Growth management techniques are essentially no more than a "modern" attempt to coordinate a variety of land management controls.

The implications of these new approaches for expanding housing opportunities are not clear.[77] With the exception of those that restrict growth altogether or to such an extent that housing needs cannot possibly be met, the techniques are basically neutral. As a consequence, their impact depends largely on the objectives their users seek to achieve.[78]

Alternatives for developing an inclusionary zoning approach to future residential growth is best seen, perhaps, by looking at two extremes which could be developed to meet

inclusionary objectives.

Obviously, there is a broad area that lies between these two extremes. And it is within this range that most communities' approaches toward providing for future residential growth and low and moderate income housing, in particular, fall. The extent to which a community can move toward either of the two extremes is the extent to which that community will be able to develop a more direct approach to meeting the objectives of providing for expanded housing opportunities.

At one end, a jurisdiction could identify the precise quantified goals for future residential development, including that for low and moderate income households. Regulations would then be developed to accommodate those goals; however, the jurisdiction could retain maximum discretion over the review of future residential development as long as all decisions were consistent with meeting the goals established. Its administrative practices could always be reviewed, for instance, in light of its progress in reaching those goals.

At the other end, the jursidiction could refrain from establishing specific goals, opting for broader policy statements of the jurisdiction's intent to provide for a balanced housing supply. Of course, in this case it would be necessary to remove to the largest possible extent the possibility for arbitrary or discriminatory decision-making. This would require a very detailed exposition of the standards and administrative review procedures governing future residential development.

The influence of the standards and review procedures on future residential development could be evaluated by assessing the extent to which the community had advanced toward its goal of a balanced housing supply.

Thus, the first instance involves maximum goal setting and maximum discretion; the second instance involves minimum goal setting and minimum discretion.

A more detailed look at these two extremes will provide guidelines to assist a community in developing an inclusionary policy toward future residential growth.

Maximum goal setting/Maximum discretion: The clearest example of establishing inclusionary goals for future residential development is the fair share or housing allocation plan. The community could develop or cooperate in a regional housing allocation plan that would identify a short-range minimum goal for the jurisdiction's obligation to accommodate future housing, including housing for low and moderate income households.

In Mt. Laurel, the New Jersey Court ordered that every municipality must bear its present and future fair share of the region's housing need, and sought a quantification of this fair share so that Mr. Laurel could allocate a sufficient amount of land to meet these needs and alter its zoning ordinance accordingly.

In Madison, however, the Court agreed that the municipality was obligated to provide the opportunity for a fair share

of the regional housing needs, but did not seek a formula or numerical identification of that obligation. The court accepted a standard of reasonableness of a fair share obligation which stated that the existing municipal proportions of low and moderate income population should correspond at least roughly with the proportions of the appropriate region.

In addition, the court in Madison, endorsed a concept of over-zoning for "least cost housing." The court cited several reasons that would explain why the land allocated for such use might not actually result in housing opportunities for lower income households. Developers might not use all or some of the land for such purposes, or at a time appropriate to meeting the need that exists, or the housing might be constructed but not occupied by lower income households.

While the Court in Berenson did not specifically endorse a concept of fair share, it did establish a numerical obligation and state that regional needs could be excluded from a municipality's zoning ordinance only if those needs were being adequately addressed by other municipalities.[79] Such a notion of shared resonsibilities is clearly consistent with fair share housing allocations.

The Supreme Court of Pennsylvania, in Surrick v. Zoning Board of the Township of Upper Providence, supported the proposition that "a political subdivision cannot isolate itself and ignore the housing needs of the areas surrounding it." The court stated that in "establishing the 'fair share' standard,

this Court has merely stated the general precept which zoning hearing boards and governing bodies must satisfy by the full utilization of their respective administrative and legislative expertise."[80]

The goal for providing low and moderate income housing opportunities that is established through a fair share plan must be a reasonable one. Thus, it is important to provide here some discussion of the parameters that define an appropriate fair share allocation.

A fair share plan allocates housing need to jurisdictions throughout a region so that the need for housing is balanced with the capability to absorb additional housing units. The plan results in a fairer or more equitable distribution of housing opportunities throughout the region for those households economically unable to compete on the open housing market.

A fair share plan must estimate the present, existing need within a region for additional housing units for persons of low and moderate incomes as well as the prospective need.[81] A need estimate is the basis of any fair share plan and must be accurate to have a workable and reasonable plan.[82]

Estimating present housing need for low and moderate income households requires an assessment of the number of substandard dwelling units (deteriorated and/or dilapidated), overcrowded units, households paying more than 25% of their incomes for housing costs, and a number of additional standard units necessary to achieve an acceptable vacancy rate. Exist-

ing housing needs are normally regarded as distinctive principally of low and moderate income households.

Prospective housing need is based on a projected population growth divided by a projected household size to obtain the number of additional households requiring housing units. Again, a number of additional units may be added as necessary to maintain an acceptable vacancy rate.

In calculating the prospective housing needs of the low and moderate income population, the proportion of the population projected which can be expected to be of low and moderate income must be estimated.

In housing planning, the low and moderate income population is properly that proportion of the population that cannot economically compete on the open market for housing. That proportion may shift over time, given changes in income patterns and housing costs.

Once a need estimate for low and moderate income households is arrived at for a particular region, that need will be allocated, in a fair share housing plan, to the municipalities within the region in a manner that best approximates the demand for those units if low and moderate income households competed effectively on the housing market. This is achieved through a consideration of the:

1. suitability of each municipality for receiving additional housing units, e.g., the availability of vacant land, etc.
2. need for additional housing units within each municipal-

ity, e.g., the growth of employment opportunities, etc.

3. distribution of additional housing among the region's municipalities to avoid concentration of the region's poor and to expand housing choice, e.g., the proportion of low and moderate income households.

A fair share plan should meet the spatial deconcentration objectives of fair share planning by allocating present and prospective low and moderate income units to meet housing needs and expand housing choice to areas capable of absorbing additional units. It should avoid concentrating the poor into specific areas and should prevent inundating other areas with additional units. Additionally, the plan must be consistent with the nature of development throughout the particular region, take into account the influence of central cities, and be responsive to characteristics of that region.

The N. J. Supreme Court endorsed a test by which the reasonableness of a fair share plan (allocation) could be evaluated. As a guideline, the Court suggested that a fair share plan is prima facie reasonable if it results in a proportion within the community equivalent to the regional percentage of persons with low and moderate incomes.[83]

The N. J. Supreme Court test is a fair guideline to use in determining the reasonableness of a fair share plan. Fair share means that every jurisdiction provides for the choice of all income groups to live there if they so choose, particularly those households who are unable to compete on the open

housing market. The N. J. Supreme Court test measures the extent to which that choice has been made available within a fair share plan by identifying as an objective guideline the proportion of those households that exist within the region for comparison. Presumably, that proportion would exist within the jurisdiction, in question, all other factors equal, absent mechanisms that prevent that choice from being available.

The fair share or housing allocation plan provides a reasonable estimate of a community's responsibility to contribute to meeting the housing needs of the region of which it is a part. It is the consultant's opinion, however, that these estimates represent a minimum obligation on the part of the community and that it can operate only within a limited time frame; at the end of which it must be up-dated and revised. At least part of the consideration that should be made in that revision is th contribution made thus far by the community toward meeting those needs.

There are many risks in zoning for a specific number of additionally needed low and moderate income dwelling units. As the Madison court pointed out, a community should "overzone" for such housing because even after the community has designated a sufficient opportunity for providing these units, there is no guarantee that they will be occupied by low and moderate income households or that developers will take complete or timely advantage of the opportunity.

Moreover, while fair share plans define obligation, it seems questionable that a jurisdiction, even after complying with a minimum fair share, could then justify closing its doors by zoning out any class or category of persons desiring to live there. Regardless, fair share plans have been supported, at times, because they are politically attractive instruments that provide jurisdictions with a quantifiable limit to the number of low and moderate income dwelling units that they must provide for in their zoning ordinance.

This obligation applies, however, to the jurisdiction's responsibility to contribute toward meeting a regional need for housing low and moderate income households. The fair share plan is fair and reasonable because it provides a method for distributing that obligation and for identifying responsibilities for all jurisdictions within a region. Thus, the fair share plan works to prevent any one community from being innundated with low and moderate income housing units in that it may have been the first to open its land use regulations to provide for such housing. The fair share plan works on the assumption that as long as there are unmet housing needs within the region, all jurisdictions should share in meeting those needs and should affirmatively provide for the opportunity to construct such housing within that community. That affirmative obligation exists, at least in large part, because of the unmet needs that exist and the widespread discrimination and exclusion that prevents those needs from being met.

If all jurisdictions had contributed toward meeting regional housing needs for low and moderate income households and that region were free from discrimination and exclusions, the need for affirmative action would be less apparent. Regardless, all jurisdictions would continue to have a responsibility to be open and free from discrimination in the provision of housing opportunities. Thus, the fair share plan has an extremely useful, although limited, contribution to make in assisting jurisdictions in determining how to zone for low and moderate income housing.

While the usefulness of goal-setting through a regional housing allocation plan is limited to the establishment of those goals, it cannot be used to circumscribe the non-discriminatory zoning regulations which must be developed pursuant to those goals.

After establishing the goals, then, the jurisdiction must provide within its zoning ordinance for the possibility of meeting those housing needs. However, because it has a goal against which to measure its determination about future residential development, it may be reasonable for that jurisdiction to retain considerable administrative discretion over the review of proposals for residential development, as long as it continues to meet the goal established. Of course, a jurisdiction must always comply with other responsibilities associated with the administration of zoning controls, such as non-discrimination and the prevention of arbitrary or capricious decisions.

Minimum goal-setting/Minimum discretion: The second circumstance would involve developing performance standards for the approval of residential developments. The community may choose not to identify precise goals for future residential development, although it would establish policy statements that would guide the nature of that growth and provide an affirmative statement of the community's intent to provide housing opportunities for low and moderate income households consistent with seeking a balanced housing supply.

A proposal for residential development, in conformance with the policy objectives of the community and the performance standards, would obtain approval with a minimum amount of review and administrative discretion by the community.

Thus a community may be able to by-pass the need to identify numerical objectives, through a fair share plan or the equivalent, by designing, adopting, and implementing a process for accepting future residential growth that was completely open to all proposals for residential development that fulfilled the stated objectives and the performance criteria established by the community.

The policy objectives and the performance criteria, however, would necessarily need to reasonably provide for low and moderate income housing. Characteristics of an appropriate policy statement and alternatives for establishing standards for residential development were discussed earlier. The performance criteria could include, for instance, a mandatory

requirement that a proportion of the dwelling units be provided for low and moderate income households. That proportion would bear a relationship to the proportion of low and moderate income households in the region. Additional mechanisms could also be developed, whereby, for instance, a proportion of the units would be offered for sale to a local housing authority.

Identifying the types of areas where proposals for the development of low and moderate income housing will be encouraged or accepted

The amount, location, and developability of land for residential development probably have more influence over the feasibility of constructing low and moderate income housing than any other single item. A variety of circumstances must exist in order for land to be available for the construction of low and moderate income housing, and for the land management policies of the jurisdiction to promote a balanced housing supply.

Objectives

Suitable for development: The land must be of such a quality that it can be reasonably developed. Generally questions center on soil quality, slope, water table, natural vegetation and other characteristics of the land itself. The more difficult the land is to develop, the more preparation that is required, the more costly the development.

Environmentally sound: The land area in question must meet any state or federal requirements relating to environmental protection and preservation of environmentally sensitive

areas. Thus, areas which are in a flood plain, near noise producing land uses, congested areas, non-sewered or watered areas, or areas which suggest other environmental impacts may not be viewed as suitable for the development of housing. It is particularly important to note that such areas might be considered suitable for certain types of residential uses or for residential development at a certain density, but would not be considered suitable for higher density uses or development of greater concentration which might be necessary to produce lower cost housing.

Compatible with existing development: The area must be located in a neighborhood within which the proposed or permitted uses will be compatible with present land uses. If the area is developing, the proposed or permitted residential uses should conform to the plans and policies for the area in question. Compatibility does not suggest, however, that a mix of residential types or even of other land uses should be avoided. Objectives of compatibility are intended to prevent the identification of areas for low and moderate income housing that are located in heavy industrial or other questionably suitable locations within the community.

Reasonable land prices: In any effort to reduce the costs for developments containing some or all low and moderate income housing units, the community should be cognizant of the relative land prices in the jurisdiction. Clearly, all other factors being equal, the lower the price of the land the bet-

ter the location for encouraging the construction of low and moderate income housing.

Feasible site aggregation: The community should evaluate the size of parcels and ownership patterns to determine the feasibility of encouraging economies of scale through larger development tracts for residential construction. Some communities, for instance, limit the planned unit development options to sites of at least 5 acres in size. It is important to understand the possibilities for aggregating single-owner parcels of land to comply with such a limit or to enable such an alternative when limits are not present in the zoning ordinance.

Conformance to other land use regulations: The areas or types of areas selected for residential development that may contain low and moderate income housing should conform completely to any requirements that are present in the zoning ordinance or any other land use regulations, including codes, applicable to residential development.

Deconcentration: Sufficient locational alternatives should be provided so that lower income and minority households can exercise a choice in the location of available housing and so that lower cost, subsidized, or public housing units are not concentrated into specific areas of the community. Any involvement in the community may have with federally funded housing planning efforts, such as a housing element, an approved housing opportunity plan, or a housing assistance plan, carries with it specific obligations to work toward eliminating the

effects of discrimination, reducing the isolation of income groups, and expanding housing opportunities for lower income and minority households.

Housing-related Opportunities: The location of land areas within the community that may be made available for residential development has important implications about the opportunities afforded those who may eventually live there. Employment opportunities, available transportation, communities services and facilities provided, are among the considerations that become particularly important when low and moderate income households may reside there.

Zoning Alternatives

The resolution of two major issues will serve to provide communities with appropriate guidelines for selecting zoning alternatives that will satisfactorily identify the types of areas where proposals for the development of low and moderate income housing will be encouraged or accepted.

Pre-mapping versus review approvals: There has been considerable discussion of the pros and cons of mapping for multi-family dwelling units in an attempt to promote the provision of low and moderate income housing.[84] Similarly, discussions have focused on the advantages and disadvantages of depending on various discretionary techniques for making land available for residential development.[85]

Jurisdictions may choose to map those areas in which they believe multi-family dwelling units would be appropriate.

Alternatively, they may wish to develop certain districts in which multi-family dwellings are encouraged or required but not pre-map such districts, e.g., floating or overlay zones, planned unit developments, etc. Finally, a jurisdiction may choose to identify those districts within which multi-family would be permitted but allow such development only after some review procedures have been adhered to, relying on administrative discretion for final approval.

In the first instance, where pre-mapping of districts permitting multi-family dwellings as of right has occurred, it is likely that the costs of those areas will increase and often make it impossible to construct lower cost housing. This is particularly true where there are few such areas mapped or where market demands are high. Moreover, where both multi-family and single-family dwellings are permitted in the district(s), the jurisdiction has little assurance that multi-family residential development will actually occur. On the other hand, if the districts are limited to multi-family residences, the community runs the risk of separating and stigmatizing those developments within the community, particularly where low and moderate income housing has been included.

The problems of zoning for forms of lower cost housing, to assure that some such housing actually results in providing opportunities for low and moderate income households, drove the Madison court to suggest over-zoning as a technique.

However, over-zoning may have some drawbacks as well if the community cannot exercise sufficient control to prevent undesirable development patterns and to ensure adequate opportunities for lower cost housing.

In the second instance, where certain districts are described but which are not pre-mapped, jurisdictions have been most influential where they have developed strong policies regarding the nature of future development and their intent to promote housing opportunities for low and moderate income households. These techniques are discussed in greater detail in the following section.

In the third instance, jurisdictions rely much more fully on market forces and developer interests, even where strong policies statements are in force. The community generally provides for multi-family housing construction through discretionary procedures but provides little compensation to developers for tackling the process where other types of development may be more easily pursued.

Serviced versus un-serviced areas: A variety of housing-related services and facilities are necessary before the construction of housing is possible. Generally, the greater the availability of these services and facilities, the higher the cost of the land. Similarly, the lesser the availability of these services and facilities, the higher the cost of development. In promoting the construction of low and moderate income housing, these are important considerations.

Three factors are important. First, the community must consider the services and facilities which are presently in place to ensure that there exists an equalization of such services and facilities to all types of residential development and to all neighborhoods, regardless of the class or race of households residing there. Thus, where serviced areas are selected, or approved, the community must be cognizant of the services and facilities that will be available to the housing units.

Where un-serviced areas are selected or approved, the community must consider the exactions required of developers for approval of residential development. Such exactions increase the cost of housing in those developments and may preclude the development of low and moderate income housing. The community at large should bear the costs of: meeting governmental requirements which are higher than the minimums specified by HUD; extra-sized pipes or streets on-site, of off-site streets, sewage treatment capacity and interceptor lines needed to serve primarily existing or future residents living off the site; and schools, parks, libraries and fire stations.

Finally, the jurisdiction must evaluate its future capital programming and other land management devices in considering the availability of land for low and moderate income housing. The careful selection of sites and thoughtful coordination of capital programming with future residential developments should

be a priority concern of the community in its efforts to encourage the construction of low and moderate income housing.

Where a community wished to fill in relatively developed areas and promote the provision of low and moderate income housing in those areas, land banking or advance land acquisition programs in combination with a write-down on land costs or increased density options may sufficiently enable a feasible low and moderate income housing development to occur.

Where the lower costs of relatively raw land appear to be a better incentive to encourage low and moderate income housing, a community may also wish to consider a land banking approach. In addition, however, a community may consider subsidizing fees or exactions for those developers that contribute to achieving public policies of expanding housing opportunities for low and moderate income households.

INCLUSIONARY ZONING PROCEDURES

Over the last several years, administrative procedures have been subject to as much scrutiny and evaluation as many other portions of the zoning ordinance. Compliance with administrative procedures required for approval of proposed developments can be timely and cost-inducing. Moreover, such procedures play an important role in encouraging or discouraging developers from proposing residential development within a particular community.

Many jurisdictions have substituted administrative discretion for other development standards within the zoning ordinance to maintain control over the type, amount and timing of future development. The popular "wait and see" land use regulatory techniques, whereby communities zone vast amounts of vacant land in large acreages and depend on the use of administrative discretion when proposals are submitted to develop those lands, have become the norm for land use controls in many areas outside of and beyond urban centers.

There are numerous reasons for this greater reliance on discretion.[86] Some of these are: a desire for greater flexibility in the development process to encourage innovation and good design; the increasing scale and complexity of land development projects; attention to broader objectives, such as environmental protection; increased awareness and sophistication of the land development process by public officials and citizens; and the involvement of different levels of

government in the land development process.

In this section reference to administrative procedures are made to residential developments that may or will definitely include dwelling units that would be available to households of low and moderate income. These procedures may govern, for instance, mobile homes, multi-family dwelling units, planned unit developments, clustering provisions, or specific requirements for low and moderate income housing.

Objectives

Legal validity: The provision must be legally valid within the State of Connecticut and be sustainable under a challenge in court.

Fair administration: The provision should work to eliminate the possibility of arbitrary decisions being made with regard to proposed residential development. Low and moderate income housing developments should be subject to the same administrative procedures used in the community for other significant development proposals.

Effective promotion of low and moderate income housing: The provision should be effective in working to achieve the policies and objectives of the community regarding future residential development and the expansion of the housing opportunities.

Reduction of housing costs: The provision should work to reduce the costs attached to residential development because of time-consuming review procedures and other costly

administrative mechanisms.

Zoning Alternatives

On the following pages, a variety of techniques for the administration of residential development within the zoning ordinance are discussed with particular reference to the provision of low and moderate income housing.

As of Right : All residential development could be permitted as of right when the requirements, as established for the various districts, are met in the proposed development. All discretion is removed from approval of proposed developments, because compliance with stated district requirements is all that is required for approval. Process costs for the developer are minimized because the review process has been reduced to a minimum.

Allowing residential development as of right may not, however, be very effective in encouraging the provision of housing opportunities, unless couple with strong policy statements and district requirements that would encourage or mandate the provision of a variety of housing types and costs.

Most jurisdictions facing development pressures with significant amounts of vacant land are unwilling to remove themselves so thoroughly from the review and approval process for new development. Moreover, when residential uses are allowed as of right, any permitted use within a designated district can be developed within that district if it meets whatever requirements have been established. Depending, of

course, on the character of the zoning ordinance, proposals may be submitted which may not necessarily promote specific objectives or policies of the community even while supporting other stated objectives. The community may be able to exercise very little influence on the quantity, the timing, or the quality of the proposed development, except to the extent that requirements in the various districts can exert such control.

Special Districts: One alternative is to establish special districts for housing that would be available to low and moderate income households. The district could specify multi-family dwellings, units available to low and moderate income households, subsidized units, or public housing. While communities have designed such districts, few allow for development as of right.

Where development is allowed as of right, the issues are similar to those outlined in the previous discussion. The special district signals a particular commitment and concern on the part of the jurisdiction to provide for the type of housing allowed for in the district. However, it does run a serious risk of stigmatizing and separating such units from other residential developments and from the community as a whole.

Variances: Generally, the most important consideration in granting a variance is to permit a land use not otherwise permitted to avoid some unnecessary hardship to the landowner.

A use variance was granted in Englewood, New Jersey to permit the construction of a multi-family housing project financed through the State Housing Finance Agency and federal housing subsidy funds. In New Jersey, however, a use variance may be granted for "special reasons" rather than the more strict "hardship" test. The State Supreme Court upheld the variance, stating: "public, or, as here, semi-public housing accommodations to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason adequate...to ground a use variance."[87]

Granting variances for low and moderate income housing, however, is likely to receive stricter review than is suggested by the Englewood case above. Where a landowner can otherwise receive a reasonable economic return, where there are not unique circumstances present, or where special privileges would be granted the landowner or the character of the community altered, the variance procedure is more likely not to be upheld in court.

The variance procedure places considerable burden on the applicant to show hardship and may therefore be a costly process. It is an extremely discretionary process and does not represent a sound device to implement policies and objectives of the community to provide housing opportunities.

Special Permits, Special Uses, Special Exemptions, or Conditional Uses: Zoning ordinances employ special permit procedures, or any of the above terms, to grant approval for a use that is permitted only through administrative discretion when requirements set forth in the zoning ordinance have been met. Three-fourths of the jurisdictions in the State of Connecticut allow multi-family dwelling through special permit procedures and nearly two-thirds allow those units only through such procedures.

One commentator felt that the widespread use of special permit for controlling development in a jurisdiction was of questionable validity, stating:

> Precedent does not permit the special permit technique, combined with low density "wait and see" zoning, to be a community's chosen means for guiding its growth and development. Such a growth management technique is likely to be held inconsistent with zoning by districts and the comprehensive plan requirements of the state zoning enabling act. On the other hand, where special permits can by authorized only for a small class of special uses, including low and moderate income housing, precedent indicates that the technique will be upheld.[88]

Speical permits should be limited to specific permissible uses and the governing criteria should be clearly drawn in the ordinance. Otherwise, the special permit procedures offer considerable opportunity for arbitrary discretion on the part of the community. The special permit procedure can be used to discourage proposals and place unrealistic conditions on a proposed development, while otherwise giving the impression that such uses are "allowed" in the community. Moreover, it

is unlikely, unless there are strongly stated policy objectives and historical support of those objectives as indicated by the approval of special permits in the past that this procedure offers much incentive, economic or otherwise, for developers to propose residential developments that expand housing opportunities within the community.

Cambridge, Massachusetts, considered a special permit procedure for proposals of low and moderate income housing. The City of Eugene, Oregon, adopted an ordinance that established a conditional use permit for "controlled income and rent housing."

Bellingham, Massachusetts, provides for special exemptions for public housing on land owned by the local housing authority, from the usual multi-family dwelling requirements and allows those units to be built as of right in any district other than industrial. The Bellinham provisions were upheld by the Supreme Judicial Court of Massachusetts,[89] because the public nature of and regulation imposed on public housing allowed for special classification.

The more specific the special permit procedures are, the greater the likelihood of their receiving sanction. On the other hand, it is also true that the more limited the use, the greater the stigma attached to those developments within the community and the more difficult it will be to integrate such uses within residential areas or the community as a whole.

The special permit procedure has considerable potential

but also invites arbitrariness. One commentator summarizes the pros and cons in the following statement:

> In conclusion, special permits--when bound by officially adopted policies and criteria for their application--can be a valuable tool in promoting heterogeneous development, housing opportunity and creativity in design; in timing development (when tied to standards of adequate public facilities) as part of a managed growth policy; and in inviting greater public scrutiny of selected proposals. On the other hand, when used as a wholesale delegation of legislative responsibility to administrative bodies (thereby precluding predictability and uniformity), the extreme use of special permits can turn zoning into a system of licensing and lead to arbitrary decisionmaking. Insistence on a fair and rational process, implemented through adequate standards and grounded in sound planning, makes the special permit a useful technique to mediate between the two extremes of arbitrariness and rigidity in land-use controls.[90]

Conditional or Contract Zoning: Conditional zoning refers to the practice of requiring a landowner to meet certain conditions before a re-zoning is granted. The conditions can be applied on a case by case basis or may be spelled out in the zoning ordinance. Under contract zoning, the landowner actually enters into an agreement with the jurisdiction as an assurance that certain improvements will be made on the land in return for which the local government rezones the property, and may agree to limit for a period its power to rezone the property to its former classification.

These devices were developed, along with such measures as deed restrictions, in response to the difficulties jurisdictions often faced when a rezoning was granted and the actual development that occured failed to resemble the proposal upon which the rezoning was based.

While these techniques do provide flexibility in the administration of a zoning ordinance, they have not received solid support in the courts, in most states. Courts have not supported a jurisdiction contracting away its future right to exercise zoning control and have often viewed these techniques as "spot zoning" violating requirements that properties be treated uniformly.[91]

Without procedural safeguards and substantive criteria for decision-making, including supportive guidelines within state enabling legislation, these devices have limited potential for encouraging the provision of housing opportunities within a jurisdiction.

Floating Zones and Overlay Zoning: An overlay zone establishes a set of requirements that apply to a mapped area in addition to those of the existing district(s). Usually overlay zones apply where there is a particular interest that may extend over more than one district, for example, historical preservation standards or flood plain districts.

Overlay zones are discussed in the zoning text and mapped through legislative approval much as a zoning ordinance is. Thus, it is administered through normal zoning procedures, and the flexibility occurs because the development is allowed through a special permit procedure. The overlay zone does not replace the underlying district classification, rather it adds to it.

An overlay zone could be applied to all residential dis-

tricts permitting lower cost or subsidized housing at a higher density than would be permitted in the underlying district.[92] The overlay zone does offer an opportunity to implement specific public policies and because it is more restricted than the floating zone, it is less likely to be invalidated by the courts.[93]

While the procedures and timing required for approval may not provide for any cost savings to the developer, the savings that may result from re-zoning and developing a site at a higher density than was possible at its purchase may provide economic incentives that encourage developers to take advantage of either the overlay zones or the floating zones to promote housing opportunities.

A floating zone, in contrast, is described in the zoning text but it is not mapped, and will replace the district presently governing the area in question. Thus, the floating zone is controlled through legislative action rather than administrative procedures. The most common examples of floating zones are planned unit developments, shopping centers, or industrial parks.

Floating zones are appropriately applied to specific community objectives and have been upheld generally in several states, including Connecticut.[94] While similar to rezonings, the floating zone has the advantage of being considered on the basis of whether the conditions for complying with the floating zone, as spelled out in the ordinance, have been met.

Because the floating zone relies on a discretionary process, the standards which must be met for approval should be specific and thorough. Moreover, the provisions should be in clear accord with stated policies and guidelines governing future residential development in the community. In this way, landowners and developers will be aware of the intent of the community and local staff and legislators will have standards for approval of submitted proposals to ensure their support of the community's housing objectives.[95]

A community could utilize the floating zone device by designing a lower cost housing development or subsidized housing as a floating zone. However, this allows for too much separation and stigma to be attached to these developments, and makes more difficult the task of integrating housing opportunities throughout the community. A floating zone might more appropriately be designed by developing a district within which lower cost or subsidized dwellings represented a portion of the residential units. Other standards and requirements would be identified and incentives such as increased density, could be built into the district.

The clearest advantage of a floating zone, of course, is that it removes the threat of increased or inflated land costs when specific areas of the community are mapped for higher density uses.

Lexington, Massachusetts adopted a multifamily floating district that applied only when at least 40% of the units were to be federally or state subsidized for low and moderate income households.[96]

STATE ACTION TO PROMOTE INCLUSIONARY ZONING

While State legislators have advanced state involvement in land use matters significantly over the last few years, this initiative has been largely represented by efforts to curb urban development generally rather than to promote development supporting broad objectives.[97] A few states have adopted measures that do relate to housing opportunities.

California incorporated state housing objectives into its zoning enabling legislation. The California law requires each local unit of government to include a housing element in their planning that provides for the housing needs of all economic segments of the community.[98] The law further requires that, except through an affirmative plan to encourage housing which has been approved by the state's Department of Housing and Community Development, no local unit of government may treat any federally subsidized, assisted, or insured housing differently from any conventional housing.[99]

The law does not prohibit exclusionary zoning against all housing. At this time, a proposed amendment would clarify that economic segments of the community refers to the general housing market area rather than only the local jurisdiction. It is further proposed that the Department would prepare a fair share allocation plan for each general housing market.[100]

New Jersey, under an Executive Order rather than State Legislation, has developed a state-wide housing allocation plan. Primarily in response to Mount Laurel, Executive Order No. 35 was issued by the Governor. The Order states that"there exists a

serious shortage of adequate, safe and sanitary housing accommodations for many households at rents and prices they can reasonably afford. . . and. . . it is the policy of the State of New Jersey. . . to alleviate this housing shortage; and it is the law of the State of New Jersey that each municipality, by its land-use regulations provide the opportunity for the development of an appropriate variety and choice of housing for all categories of people, consistent with its fair share of the need for housing in its region..."[101]

The Order further directs the Division of State and Regional Planning in the Department of Community Affairs for the State to prepare State housing goals to guide municipalities in adjusting their municipal land-use regulations to provide for such opportunities.

Legislation has been introduced in New York to expressly prohibit "discrimination by zoning regulations." The proposal would modify the existing zoning enabling act. Among the proposed additions, is the following language:

> (A)ny such regulation may not have as its purpose or effect discrimination against any race, religious group, ethnic group, sex or economic class or the exclusion of any such person, group or class from any district of the city; and, provided, further that it may not: (1) set a minimum floor size or house size greater than the minimum established by the commissioner of health as the minimum size necessary for the maintenance of health and safety; (2) regulate the maximum number of bedrooms which are to be included in any dwelling; (3) regulate any area for lot sizes of greater than one-half acre unless there has been a finding by the commissioner of health that such zoning is required for the protection of health and safety; (4) regulate less than thirty percent of land for the construction of multiple dwellings, as generally defined in the multiple dwelling law, which land so regulated shall, not be concentrated in one district of the city, except that in order to preserve community character, no multiple dwellings shall be constructed in an area which is built up on the effective date

> of this act with single family detached residences unless there exists therein a plot of vacant land of ten acres or more; (5) regulate from the date of this act property for industrial purposes without regulating property for residential purposes, in which multiple dwellings, as generally defined in the multiple dwelling law may be constructed sufficient to provide accommodations for at least fifty percent of the persons who might reasonable be employed by enterprises utilizing such land zoned for industrial purposes.[102]

Both Oregon and Florida have passed legislation that direct local communities to undertake comprehensive land use planning. In Oregon, these plans must be consistent with state-established policies and guidelines and localities must enforce the plans.[103] In Florida, the plans must include plans for low and moderate income housing, but they are not subject to state guidelines.[104] Other states have passed local planning requirements.[105]

Several states have adopted state-wide land-use controls and/or multi-purpose authorities to protect certain lands or to control major projects. In Vermont, for example, a state environmental board and district commissions have been established, as well as a system that involves a statewide land-use plan and permit requirements for development. There is a statement of legislative intent concerning housing:

> (A) Opportunity for decent housing is a basic need of all Vermont's citizens... The housing requirements 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...
> (B) Sites for multi-family and manufactured housing should 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.[106]

In 1969, Massachusetts enacted the Zoning Appeals Act that allows a developer to seek a comprehensive building permit for state or federally assisted housing.[107] If a local jurisdiction denies the permit, the developer may appeal to a state housing appeals committee. The statute defines rough fair share housing obligations for localities which must be used as the basis for the committee's review. If the locality's fair share obligation has not been met, the committee can determine that the planning objections raised by the locality are outweighed by the need for the housing, and the permit should be approved. The fair share standards establish that a locality's obligation is met when:

> (1) low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest census;
> (2) such housing exists on sites comprising one and one half percent or more of the total land area zoned for residential, commercial or industrial use, excluding public land; or
> (3) the application before the board would result in the commencement of construction of such housing on site comprising more than three tenths of one percent of such land area or ten acres, whichever is larger, in any one calendar year.

The Massachusetts Act was upheld by the Massachusetts Supreme Judicial Court.[108] When the law was enacted, two communities met the 10% test, since then some 15 communities in the state have done so. After the first five years, 27 permits were issued, almost half after the state committee reversed the initial decision.[109]

The most popular initiative adopted by states for promoting low and moderate income housing has been the state housing finance agency. Thirty-nine states, including Connecticut, have created such agencies. Generally, these agencies finance housing in various ways through the sale of tax-exempt bonds and notes. Some states take active roles in promoting and packaging projects in

locations where housing is needed.[110]

New York State's Urban Development Corporation is one form of such an agency that received considerably notice.[111] Its power included condemnation and clearance of land, relocation, replanning and reconstruction, provision of land use improvement projects and override of local laws and ordinances. The legislation was later amended to allow any town or incorporated village to veto any UDC project, even when it complied with zoning regulations. While the controversy in suburban areas created the restricted authority, during its six years of activity, it financed the construction of a high volume of housing.

The Connecticut State Housing Finance Agency was created in 1969. It has provided mortgage loans and insurance and purchased existing mortgages for housing. While all states are required to abate taxes on public housing projects, Connecticut has extended tax abatement to privately owned federal and state assisted housing. The refunded payment varies. However, Connecticut reimburses local units of government for a percentage of the property tax revenue lost through the tax abatement requirements on subsidized housing.

Connecticut's State Housing Finance Agency is authorized to evaluate housing proposals and to provide technical assistance to developers, as well as to provide construction loans but these activities have not been implemented. There is no statutory authority for acquiring land or for the construction of housing. A state public housing authority does not exist.

There are two major initiatives that can be taken by the State Legislature in promoting low and moderate income housing within the State. The first involves amendments to the State Enabling Legislation and the second involves additional legislation to promote the provision of low and moderate income housing. Each of these is treated in further detail below.

1. The State Zoning Enabling Act

At least four general areas should be considered in an approach toward revision of the State Zoning Enabling Act that prevents exclusion of low and moderate income and minority households from localities and promotes the creation of balanced housing supplies in jurisdictions throughout the State.

The State Act should prohibit discrimination against or unequal treatment of state or federal subsidized housing. It should further outline prohibited acts of exclusion within a zoning ordinance, against any form of low and moderate income housing. Such statements should not be so specific, however, that the result is to increase the difficulty of challenging local provisions as exclusionary which are not listed in the statute. The State Act should contain a strong statement of purpose that promotes the provision of housing opportunities in all jurisdictions with the state. Moreover, the Act could expressly neutralize or reverse the traditional presumption of validity where exclusionary intent or effect has been shown.

The State Legislature could also provide greater clarity with respect to the mandates of local obligation to protect

the health, safety, morals and general welfare of the public through the police power. Defining a regional basis for general welfare of the public would place on localities an obligation to consider the influence of its zoning regulations on the population of the State rather than only its own indigenous population.

The State Act could be amended to specify the parties who should be given party status and would thus gain standing to challenge a local zoning action. Standing should be given to private persons, including any subsidized housing sponsor, developer, or potential occupant, whether or not of a minority racial, religious or national origin group, and any minority person living in the metropolitan housing market area in which the alleged discriminatory local government is located.

The State Zoning Enabling Act should also be reviewed and revised to provide authority for localities to adopt various inclusionary zoning techniques. While the courts have not formed a consensus as to the validity of many of these techniques, particularly in Connecticut where many have not been tested, the legislature can provide considerable support by granting localities statutory authority to adopt such provisions. Authorization for incentive provisions to encourage the provision of low and moderate income housing and mandatory requirements that such housing be a part of most residential developments are two examples.

2. Legislation to Promote Low and Moderate Income Housing

At least two additional areas deserve some serious consideration by the state legislature. The first is improve-

ments and revisions with respect to the State Housing Finance Agency and its powers and authorities. The second concerns the nature of a review or appeals process that could be established by the State over local land use decisions that affect low and moderate income housing.

A thorough review of the power and authorities of the Connecticut State Housing Authority is beyond the scope of this study. However, such an effort is strongly recommended. A careful evaluation of the lending and financial activities which the agency is authorized to undertake should be conducted. Where other state agencies have successfully implemented programs, not yet available in Connecticut, amendments and authorizations should be proposed. In addition, such provisions as would require income mixing in state projects, such as is contained in Massachusetts legislation and for other states, should be considered. Moreover, expanding the development capabilities of the state agency, including land banking capacity, should receive serious consideration.

The combination of an effective and active State Housing Finance Agency with an appeals or review process may be an effective model for a state inclusionary housing policy.[112] Thus, Connecticut should also give serious consideration to the development of a review procedures and/or appeals process over local decisions that affect the provision of low and moderate income housing, such as is contained in Massachusetts.

Provision for granting a consolidated building permit for projects that are of state or regional benefit, such as proposed

in the American Law Institute's Model Code, should be considered. The ALI code suggests that development permits be granted where:

> (1) the probable net benefit from the development exceeds the probable net detriment,
> (2) the development does not substantially or unreasonably interfere with the ability to achieve the objectives of an approved local or state land development plan, and
> (3) the development departs from the ordinance no more than is reasonably necessary to enable a substantial segment of the population of the state to obtain reasonable access to housing, employment, educational, and recreational opportunities.[113]

The ALI Code also calls for close scrutiny of developments of regional impact that will substantially increase employment opportunities within a municipality in order to ensure that adequate housing is built in areas of expanding job opportunities.[114] Even though otherwise qualified, a locality should be prohibited from granting a permit for a development of regional impact that will create more than 100 new full-time employees within the local jurisdiction, unless a state agency also finds that:

> (1) adequate and reasonably accessible housing for prospective employees is available within or without the jurisdiction of the local government.
> (2) the local government has adopted a land development plan designed to make available adequate and reasonably accessible housing within a reasonable time.
> (3) a State Land Development Plan shows that the proposed location is a desirable location for the proposed employment source.[115]

Given the advancing employment opportunities made available in Connecticut, the State Legislature should give serious consideration to legislation that treats the issue of available housing opportunities in jurisdictions approving significant employment generating land uses along the lines suggested by the American Law Institute.

The Connecticut legislature should also give serious consider-

ation to legislation that requires the development of comprehensive plans by local jurisdictions that provide for low and moderate income housing opportunities to conformance with statewide objectives.

While the above provides a broad agenda for state action and suggests specific areas for attention by the state legislature, each of these areas deserves specific investigation beyond what could be provided here.

CONCLUSIONS

A zoning ordinance is a tool employed by a community to manage its land development. An inclusionary zoning ordinance works to manage land development in such a way that a balanced housing supply is sought in the community and that the provision of housing opportunities for low and moderate income households is made possible.

The claim has been made that the objective of being inclusionary is, in fact, an obligation of a local unit of government employing the police power on behalf of the state to protect the health, safety, morals, and general welfare of the population, through its zoning ordinance. That obligation may call upon a community, through its zoning, to make possible the provision of housing that contributes to meeting the needs of the population, particularly those of low and moderate income, within the region in which the community is located.

These are relatively new views of zoning which many communities view as opposite in purpose to their belief that zoning functions to preserve the environmental quality of their community. But these views need not be in opposition to one another. In fact, many zoning techniques have been developed over the last several years that attempt to satisfy both objectives. No advocate of open housing intends to jeopardize the quality of life that communities rightly hold so dear.

But in order for a zoning ordinance to become an inclusionary tool, communities must become open to learning about, evaluating, and trying some new techniques that may have broader objectives than the community believed to be in their interest, in the past,

and they must be willing to let go of some provisions that they may have, in the past, viewed as essential to the preservation of their community.

This report has focused on the design of a zoning ordinance, including the zoning map, that incorporates the standards and procedures for residential development which the community supports as inclusionary.

To meet such an objective, a community must employ the zoning ordinance in an open and fair way in response to proposals for low and moderate income housing that come before it.

The policies, standards, and procedures contained in a zoning ordinance that meet inclusionary objectives do so because, in total, the ordinance, along with other land management tools, makes possible the construction of low and moderate income housing that is responsive to the needs that exist within the larger region of which this community is a part.

But the community's response to proposals for residential development that include low and moderate income housing may well be the true test of whether or not the community's zoning ordinance is in fact and in effect an inclusionary one. Thus, a community must still consider how it will support proposals for residential development, particularly those that contain housing that would be available to low and moderate income households.

Identifying the principles that a community should use in these instances, serves as well as a useful summary of the principles a community endorses as it chooses to become inclusionary.

1. Complying with Requirements for Residential Development

The standards and procedural requirements that have been adopted by the community in its zoning ordinance to guide residential development must have been complied with before approval will be forthcoming for any residential development.

2. Prohibiting Discrimination

The community should assure developers and potential residents alike that discrimination is prohibited in the review and approval of proposed developments. Where that project is to contain housing units that will be made available to low and moderate income households, which may be minority or members of a protected class under State legislation, the community must adhere to the same procedures and standards applied to any residential development. In addition, the community should require affirmative marketing plans from all developers to further assure that discrimination is not encouraged.

3. Meeting Regional Housing Needs

In the review of a proposed residential development, a community should give consideration to its contribution toward meeting regional housing needs that exist, particularly for low and moderate income households. Where those needs remain unmet, the community must consider the extent to which it has participated in meeting such needs and the extent to which the proposed residential development will contribute to meeting those needs, which remain unmet. If there are unmet housing needs, the community must present some overriding obligation on its part to justify the disapproval of a

residential development that would assist the community in meeting its obligation toward regional housing needs.

4. Providing a Balanced Housing Supply

In the review of a proposed residential development, a community should give consideration to the extent to which it has promoted a balanced housing supply within its borders. It ought to consider the variation which it can provide in housing type, housing size, and housing costs. In addition, it should consider variations in housing tenure (renter and owner) and other forms of ownership, such as cooperatives and condominiums. It should also consider the extent to which it has made available subsidized and public housing.

5. Providing for Future Development

A community must consider its ability to sustain additional residential development and should make provision for the housing it needs in order to provide a balanced housing supply and meet its share of the regional needs that exist. In its capital programming efforts, the administration of its zoning ordinance, and other land use management decisions, a community must be sure that it makes possible the construction of housing that would be available to low and moderate income households. In the review of proposed residential developments, a community must be sure that appropriate housing available to low and moderate income households is included in sufficient quantity to meet its obligations and provide a balanced housing supply.

FOOTNOTES

1. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 728 (1975).

2. Mitchell Berenson et. al. v. The Town of New Castle, 38 N.Y. 2d 102, 341, N.E. 2d 236 (1975) on remand (Supreme Court of the State of New York., Dec. 6, 1977).

3. Id., at 241.

4. 336 A.2d at 724.

5. 341 N.E. 2d at 241.

6. Id.

7. Id., at 241-242.

8. Id., at 243.

9. Slip. op. p. 5.

10. 336 A.2d at 723.

11. Herbert M. Franklin, David Falk, and Arthur J. Levin, In-Zoning--A Guide for Policy-Makers on Inclusionary Land Use Programs (Washington, D.C.: The Potomac Institute, Inc., 1974), p. 30.

12. See 336 A.2d; Oakwood at Madison, Inc. v. Township of Madison, 320 A.2d 223 (N.J. 1974) aff'd,---N.J.---,371 A.2d 1192; Pascack Ass'n, Ltd. v. Washington Tp., 329 A.2d 89 (N.J. 1974) Nos. A-3790-72, A-1841-73 (N.J. Super. Ct. App. Div., June 23, 1975); Urban League v. Carteret, 142 N.J. Super. 11, 359 A.2d 526 (1976); Robert B. Surrick v. Zoning Board of the Township of Upper Providence, (Penn., 1974) No. 541-71 (Supreme Court of Penn. Eastern District, Dec. 24, 1977); 38 N.Y. 2d102, 341 N.E. 2d 236.

13. American Bar Association Advisory Commission on Housing and Urban Growth, Housing for All Under Law--New Directions in Housing, Land Use, and Planning Law, Richard P. Fishman, ed. (Cambridge, Massachusetts; Ballinger Publishing Co., 1978), p. 358.

14. Ibid., p. 358-359.

15. Ibid., p. 365.

16. Ibid., p. 226.

17. Ibid., p. 448.

18. Ibid.

19. Ibid.

20. Mary E. Brooks, Lower Income Housing: the Planners' Response (Chicago, Illinois: The American Society of Planning Officials, 1972, p. 13.

21. Housing for All Under Law, p. 448.

22. Ibid., p. 448.

23. Lower Income Housing, p. 14.

24. In-Zoning, p. 103.

25. Housing for All Under the Law, p. 448.

26. Ibid.

27. In-Zoning, pp. 102-103.

28.

29. Board of County Supervisors of Fairfax County v. Carper, 200 Va. 635, 107 S.E. 2d at 396.

30. National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A 2d 597 (1965) .

31. Id., at 612.

32. "Comments - A survey of the Judicial Responses to Exclusionary Zoning," Syracuse Law Review (Vol. 22, No. 2, 1971), pp. 566-67.

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

34. 439 Pa. at 471, 268 A. 2d at 767.

35. 439, Pa. 466, 268 A. 2d at 767.

36. "Comments....", p. 568.

37. Ibid., p. 569.

38. Ibid., p. 554.

39. Ibid.

40. Appeal of Girsh, 437 Pa. 237, 263 A 2d 395 (1970).

41. "Summary of Recent Court Challenges to Exclusionary Land-Use Practices," National Committee Against Discrimination in Housing, Inc., September 1972.

42. 437 Pa. 237, 263 A.2d at 397.

43. Id. at 399.

44. Township of Williston v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A 2d 466 (1975).

45. Id. at 448-449.

46. Id. at 468.

47. Slip. op. p. 10.

48. 38 N.Y. 2d 102, 341 N.E. 2d 236.

49. Vickers v. Gloucester Township, 37 N.J. 232, 181, A2d 129, appeal dismissed, 371 U.S. 233 (1963).

50. Vickers v. Gloucester Tp., 37 N.J. 232, 260, 181 A2d 129, 144 (1962).

51. Derry Borough v. Shomo, 5 Pa. Cmwlth. 216, 289 A.2d 513 (1972).

52. Beaver Gasoline Co. v. Osborne Borough, 445 Pa. 571, 285 A.2d 501.

53. Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W. 2d 322 (191).

54. Green v. Township of Lima, 40 Mich. App. 655, 199 N.W. 2d 243 (1972).

55. Lionshead Lake, Inc. v. Wayne Township, 10 N.J. 165, 89 A2d 693 (1952).

56. "Comments...", pp. 549-550.

57. 10 N.J. 165, 89 A. 2d 693 at 701.

58. "Comments...", pp. 551-552.

59. Medinger v. Springfield Township, 337 Pa. 217, 104 A. 2d 118 (1954).

60. Id. at 122.

61.

62. Slip op. pp. 14-15.

63. Molino v. Mayor and Council of the Borough of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (1971).

64. Lawrence G. Sager, "Exclusionary Zoning: Constitutional Limitations on the Power of Municipalities to Restrict the Use of Land," American Civil Liberties Union, p. 19.

65. In-Zoning, pp. 102-103.

66. Ibid. pp. 130-131.

67. Housing for All Under Law, p. 252.

68. In-Zoning, p. 132.

69. Ibid., p. 134.

70. Thomas Kleven, "Inclusionary Ordinances--Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing," 21 UCLA Law Review, 1432 (1974), pp. 1474-90.

71. Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E. 2d 600 (1973).

72. In-Zoning, pp. 138-139.

73. Housing for All Under Law, p. 259.

74. Ibid., p. 261.

75. Ibid.

76. Ibid., p. 262.

77. David Falk and Herbert M. Franklin, Equal Housing Opportunity: the Unfinished Federal Agenda, (Washington, D.C.: The Potomac Institute, Inc. 1976), p. 128.

78. Ibid.

79. 341 N.E. 2d at 243.

80. Supreme Court of Pennsylvania, Eastern District, No. 541-74, December 24, 1977, slip. op. p. 7.

81. 67 N.J. 151, 174.

82. Oakwood at Madison v. Township of Madison, 72 N.J. 481, 541 (1977).

83. Oakwood at Madison, supra at 543.

84. In-Zoning, pp. 94-99; Housing for All Under Law, pp. 178-181.

85. In-Zoning, pp. 116-124; Housing for All Under Law, pp. 232-262.

86. Housing for All Under Law, pp. 219-222.

87. DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428, 269 A.2d 31, 38-39 (1970).

88. In-Zoning, pp. 117-118.

89. Cameron v. Zoning Agent of Bellingham, 357 Mass. 757, 260 N.E. 2d 143 (1970).

90. Housing for All Under Law, p. 243.

91. Ibid., p. 248.

92. Ibid., p. 244.

93. Ibid.

94. Ibid., p. 245.

95. In-Zoning, p. 120.

96. Ibid.

97. Equal Housing Opportunity, p. 82.

98. California Gov. Code §65302.

99. California Gov. Code §65008.

100. Equal Housing Opportunity, pp. 121-122.

101. State of New Jersey, Executive Department, Executive Order No. 35, April 2, 1976.

102. New York State Senate, "An Act to amend the general municipal law, the general city law, the town law, the public health law and the village law, in relation to prohibiting discrimination by zoning regulations and providing procedures for comprehensive regulations with respect to the use of land area in a municipality," Bill No. 4681, March 22, 1977.

103. Oregon REv. Stats. §197.005.

104. Florida Local Government Comprehensive Planning Act of 1975, Fla. Stat. Ann. §§163.3161-.3211.

105. Equal Housing Opportunity, p. 122, fN 97.

106. Vermont Laws 251, April 23, 1973, No. 85, §7(a)(8).

107. Mass. Zoning Appeals Act, Mass. Ann. Laws, ch. 40B, §§20-23.

108. Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 294 N.E. 2d 393 (1973).

109. Equal Housing Opportunity, p. 123.

110. Ibid., p. 124.

111. New York Unconsolidated Laws §§ 6251-6285.

112. In-Zoning, p. 88.

113. American Law Institute, A Model Land Development Code (adopted May 21, 1975 (1976), article 6, at §7-304(2)).

114. Housing for All Under Law, p. 581.

115. American Land Institute Code, at §7-305 .