OPENING THE SUBURBS: TOWARD INCLUSIONARY LAND USE CONTROLS

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INTRODUCTION

Affluent, powerful America has an ugly side—racial and class hatred, violence, systematic injustice, and political repression. In the suburban residential communities of our metropolitan areas, the affluent and powerful segment of society is enthroned; in slums and ghettos of our aging cities live the powerless—the poor, the black, and the aged. (See Table I)

To an extent previously undreamed of in America, the wall which separates slum and suburb has become thick, high and impenetrable. Legal institutions have been devised so that the laws of suburban communities which control the use of the community's land and resources have become the servants of race and class separatism. In the 1960's, the term "apartheid" began to be used to describe the *de jure*, as well as the *de facto* methods employed to separate rich communities from poor, to protect rich Americans and their children from contact with poor and even middle-class Americans and their children; and to separate black Americans from white Americans. In the 1960's and 1970's suburban America has become the dominant community style of our nation. From an urban nation we have become predominantly a suburban one,[1] and this shift of population and of life style has helped to sharpen the race and class cleavages among us.

Will the suburbs remain an exclusive preserve for middle- and upper-middle-income families, or will they become open and available for citizens of all incomes and races? The answer to this question is of interest to residents of both the suburbs and the slums. Inherent in this dilemma is whether minority citizens, as well as moderate- and-low income families, will be allowed to enjoy the attractive qualities which are characteristic of suburbia. Furthermore, and perhaps more importantly, will our society destroy the existing barriers which separate our citizenry, or will a garrison state emerge wherein force will be

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1. 1960 CENSUS OF POPULATION AND PRELIMINARY 1970 REPORTS.

TABLE I

Comparison of Population, Poverty, and Housing Between Central Cities and Areas Outside Central Cities in Metropolitan Areas of United States

Distribution by Per Cent	Central Cities	Outside Central Cities
Population		
1970	46	54
1960	50	50
Population by Race		
1967		
Negro	78	22
White	41	59
Poverty Population		
1967	63	37
Families with Incomes $15,000 and over		
1968	36	64
Substandard Housing		
1966	63	37
Median Income in $'s		
1967	7,810	9,370

Sources: 1. *1970 Census of Population,* "Population of Standard Metropolitan Statistical Areas, Preliminary Reports, United States," Series PC (P3-3, U.S. Dept. of Commerce, Bureau of Census, 1970).

2. *Changes in Urban America,* U.S. Dept. of Labor, Bureau of Labor Statistics, Tables B-1, D-1, D-3, 1969.

3. "Income in 1968 of Families and Persons in the United States, U.S. Bureau of the Census, *Current Population Reports,* Series p-60, No. 66, 1969.

exerted in order to repress any revolt by the black and the poor?

The question whether the suburbs will be open or will remain exclusive preserves is also the precondition to the question: Can our cities be saved from decay? In the overcrowded central city ghettos, no significant progress toward providing jobs, erasing social pathology, or tearing down decayed buildings and replacing them with new ones can be achieved until the pressure of overcrowding in the city ghettos can be relieved. This is the lesson of 15 years of urban renewal.

America's suburbs contain almost all of the vacant developable residential land within metropolitan areas.[2] Housing mobility must be increased in order to relieve central cities of the impossible burden of providing adequate housing with the limited available resources. This may be accomplished through changes in local land use controls combined with the infusion of new funds and new forms of aid from the federal government to permit the construction of vast amounts of moderate-income housing outside the central cities.

The bulk of the new jobs being created in the nation are located in the suburbs; this is particularly true of blue collar jobs.[3] The suggested construction of large scale development in the suburbs for moderate- and low-income families is not a recommendation for the demise of cities or for the dispersal of central city populations. Rather, it reflects a belief that only through the development of housing opportunities near the jobs in the suburbs, will it be possible to relieve the central cities of the pressures which prevent the successful rehabilitation and rebuilding of neighborhoods and structures.

The purpose of the suggested development of suburban resources is not to concentrate jobs and housing solely in the suburbs. Rather, it is an endeavor in accord with the recommendations of the Kerner Commission,[4] to offer opportunities throughout metropolitan areas which would present to residents of ghetto communities a choice—either to remain where they are or to move to other locations.

The ghetto is a condition created by social, political, and economic limitations on the opportunities of a class of the population; it is not a

2. REPORT OF PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME, 139-40 (The Kaiser Report 1969).

3. NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, THE IMPACT OF HOUSING PATTERNS ON JOB OPPORTUNITIES 21 *et seq.* (1968).

4. REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS (1968).

place, but a social condition. It should be possible to conceive programs which would end the limits to opportunities for ghetto residents and allow for the redevelopment of the place now called the ghetto to meet the needs of its residents. But in the absence of such programs, which could exploit suburban resources, it would be impossible to enable present ghetto populations wishing to remain where they now live to rebuild their communities according to acceptable standards.

Therefore, the future of our society as a whole, and of our cities in particular, rests with the suburbs. As long as our nation continues to show large-scale population movement from the countryside to the metropolitan areas, the exclusionary policies of the suburbs will continue to bottle up larger and larger concentrations of our poor people and minority-group families in the central cities. As long as this division between rich and poor, black and white, is perpetuated in the geographic divisions of our metropolitan areas, social tensions in our nation will continue to mount.

EXPLORATION OF THE PROBLEM

Regional Economies and Exclusionary Practices

Perhaps it is not necessary to look at the issue of *de jure* residential segregation in terms of its larger national implications for solving urban problems. Use of the public law to achieve segregation may well be an evil in itself and the attack on such practices need not be surrounded with discussions of the economic consequences of the practice of segregation. Nonetheless, it should be understood that exclusionary zoning practices have serious consequences for the growth of both metropolitan and national economies; inclusionary laws might well foster the economic health of regions and the nation.

Zoning and the Homebuilding Industry

Opening the suburbs to low- and moderate-income families would create a wider market for the homebuilding industry and result in a healthier industry. This would be true despite the present conditions of tight money and economic recession; it would be especially true if these conditions were corrected.[5] Since the home construction industry is one of the key elements in metropolitan and national economies, the new

5. *See* REPORT OF THE NATIONAL COMM'N ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. 213-14 (1969) for a discussion of the economic impact of large-lot zoning.

activity generated through a loosening of zoning would have beneficial effects throughout the economy. The new jobs which could be made available would be particularly important in terms of meeting the employment needs of those presently unemployed or underemployed, both inside and outside the central cities.

Zoning and the Suburban Labor Market

Inclusionary zoning could also have important positive effects on the labor market for existing suburban jobs. Presently, large numbers, employed at suburban sites, are denied the opportunity to live near their jobs. As a result they must spend considerable amounts of time and money in traveling to and from work. A case in point is the Ford assembly plant in Mahwah, New Jersey. The average commuting distance in that plant is about 30 to 35 miles in each direction.[6] It has been estimated that the cost of that commute runs about $1,000 a year.[7] Despite the relatively high wages earned by these workers, $1,000 represents a tremendous burden. In broader terms, the social costs of the workers' added usage of the highways, and the environmental strain caused by the excess consumption of gasoline required by the elongated journey to and from work must be added to the personal costs to the worker of the commute. Because of the costs inherent in the long commutes, inner city dwellers are either denied access to the growing number of suburban jobs or are forced to compete for them only at a tremendous economic disadvantage.[8] This exclusion of black workers from suburban jobs may help prevent blacks from achieving equality in job opportunity with white workers, who have more open access to suburban housing.

Job discrimination through residential exclusion has recently been the subject of warnings from the Chairman of the Federal Equal Employment Opportunity Commission and the General Counsel to the United States Civil Rights Commission. Both men attacked the employment discrimination implicit in industrial moves from inner cities—with their racially integrated labor markets—to restrictive suburbs where blacks are denied residence through laws preventing the construction of moderate-cost housing.

It just may be that the physical removal of jobs beyond the reach of

6. N.Y. Times, Jan. 29, 1971, at 1, col. 1.

7. *Id.*

8. *See* U.S. CIVIL RIGHTS COMM'N STUDY FEDERAL INSTALLATIONS AND EQUAL HOUSING OPPORTUNITIES (1970), for detail of costly effects to non-white employees of federal agencies that have moved their offices to the suburbs.

> minority workers is . . . a violation of Title VII (of the 1964 Civl Rights Act), by bringing about a foreseeable discriminatory effect.[9]
>
> The Commission believes that corporations must assume certain responsibilities when deciding to relocate to suburban areas. First, they must cease engaging in any discriminatory housing acts and cease being passive in the face of discrimination. Second, they must consider the difficulties which their minority employees face by the prospect of relocation, and take these problems into consideration when selecting the appropriate site. . . . Corporations should use their economic leverage to force communities in which they locate to undertake housing programs that would attract minority families.[10]

Zoning's Social History

How did suburban communities throughout the nation become engaged in *de jure* residential segregation? How is it that the courts of the United States have for so long tolerated the *legally enforced* banning of economic classes and racial groups from suburban municipalities?

As with other legal devices the nature of land use controls employed by a society reveals much about the values it affirms. Clear manifestations of attitudes about race and class may be found within the legislative standards, as well as within the administration of those standards. Recognition of public responsibility to regulate the nature, quality and quantity of urban development was slow to develop in the United States. The greatest obstacle was, of course, resistance to increased public control over private property rights. The sweeping introduction of zoning laws, as compared with nuisance laws, was seen as enabling local government to severely diminish property values without any compelling reasons related to the police power. Typical of this thinking was the decision in *Goldman v. Crowther,*[11] in which the Court of Appeals of Maryland stated:

> [A]s the ordinance itself is based upon the theory that its prescriptions are in the interest of the public welfare, it is not clear how any departure from them can be justified on that ground; for if the restrictions are not necessary to the public welfare, there can be no justification for them at all, and in fact there is none. Their only apparent purpose was to prevent the encroachment of business establishments of any kind upon

9. Speech by William H. Brown, III, Chairman, U.S. Equal Employment Opportunity Commission, Suburban Action Conference, New York City, Dec. 17, 1970.

10. Address by John H. Powell, Jr., General Counsel, United States Comm'n on Civil Rights, Suburban Action Conference, New York City, Dec. 17, 1970.

11. 147 Md. 282, 128 A. 50 (1925).

> residential territory, regardless of whether they affected in any degree the public health, morals, safety, or welfare. In effecting that purpose they take from the property owner the right to use his property for any purpose not sanctioned by the letter of the ordinance or allowed by the practically unfettered discretion of the board of zoning appeals, and deprive him of privileges guaranteed by Article 23 of the Maryland Bill of Rights.[12]

The jump from nuisance law to zoning law is a long one. The distance covered was justified by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[13] Since that time, despite occasional outcries, zoning has become the pervasive form of urban regulation of the use and intensity of land development.

Zoning laws, from their beginning, have responded to many different needs of America's communities. In part they have been in response to chaotic community conditions created during the industrial development of our cities and to the rapid growth of residential communities in the late 19th and early 20th centuries. Thus, such laws have been used to prevent the undesired results of the proximate location of various disharmonious land activities, *e.g.*, traffic-generating commercial activities in residentially developed areas. Nevertheless these same laws have also been vigorously applied in the separation of economic and racial groups within a community.

One author, surveying the history of the development of zoning, observed, in 1930, that the first use of zoning as a means to classify land use activities occurred in the 1880's in a small city in California, where laundries were required to be located on a certain side of the town.[14] "Laundry" was the first of many euphemisms employed to deal with classes of the population who were considered undesirable. The law limited the (Chinese-American) proprietors of laundries, if they wished to remain within the community at all, to certain geographic sectors of the community. In *Yick Wo v. Hopkins*,[15] the administration of such laws was found to be discriminatory as applied against Chinese-Americans and violative of the fourteenth amendment.

The early development of zoning in New York City as it existed in 1916 was aptly described by Seymour Toll, in his fine study, *Zoned America*, as clearly related to the desire of owners of luxury commercial

12. *Id.* at ___, 128 A. at 60.
13. 272 U.S. 365 (1926).
14. Whitnall, *History of Zoning*, 155 ANNALS 1, 9 (1931).
15. 118 U.S. 356 (1886).

establishments to prevent the encroachment of lower-class garment workers from the adjoining loft district.[16]

The original decision in zoning's leading case, *Village of Euclid v. Ambler Realty Co.*, by District Court Judge Westenhaver, overturned the entire zoning ordinance of the Village of Euclid, Ohio, because it unconstitutionally deprived the developer, Ambler Realty Company, from carrying out its intention to build industrial, apartment, or other prohibited uses on parts of a tract zoned in accordance with the village's overall scheme. Predictably, Judge Westenhaver cited the then recent *Pennsylvania Coal Co. v. Mahon*[18] decision in which Justice Holmes stated: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change."[19] This means that a public body may not use the police power to inhibit the right of private individuals to use their property as they choose; the public must condemn the property and pay for it in order to control activity on the land. Westenhaver went on to say that the separation of social classes, which he believed was *itself clearly a good thing for the community,* falls into the class of actions which may not be regulated by police power but which must be paid for through the condemnation power. Westenhaver cited the 1917 decision of *Buchanan v. Warley,*[20] which struck down a municipal law establishing what was in effect racial zoning. He commented that the Supreme Court had decided against racial zoning even though "[t]he blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance."[21]

In Westenhaver's opinion, the Village of Euclid's zoning ordinance was clearly intended to establish economic class zoning:

> The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit [the tract in question] . . . . In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reasons why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family

16. S. TOLL, ZONED AMERICA 170 *et seq.* (1969).
17. *Supra* note 13.
18. 260 U.S. 393 (1922).
19. *Id.* at 416.
20. 245 U.S. 60 (1917).
21. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 313 (N.D. Ohio 1924).

> dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well kept apartment and others in a tenement, is primarily economic.[22]

Since racial zoning had been found unconstitutional, Judge Westenhaver concluded that economic class zoning must also be unconstitutional, having, if anything, a somewhat lesser relationship to the preservation of property values. Thus, Judge Westenhaver's decision, while recognizing that zoning was a tool to benefit the public by separating economic classes from each other, struck down the practice as an unconstitutional taking.

The Supreme Court reversed the district court's holding and found that the blighting influence of one form of residence on another was so severe as to justify exercise of the police power. Speaking for the Court, Justice Sutherland cited zoning studies which showed that:

> [T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.[23]

Such language as "destroying the entire section," "mere parasite," and "take advantage" follows other language from an opinion of the Supreme Court of Louisiana in justifying the separation of residential and commercial uses:

> A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate. . . .[A]ny business establishment is likely to be a genuine nuisance in the neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc.[24]

In summarizing the arguments for protection of residential areas from apartment houses and businesses, Justice Sutherland concluded in a famous phrase:

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question

22. *Id.* at 316.

23. *Supra* note 13, at 394.

24. *Id.* at 393, *quoting* State v. City of New Orleans, 154 La. 271, 282-83, 97 So. 440, 444 (1923).

> whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstances and locality. . . . A nuisance may merely be the right thing in a wrong place, like a pig in the parlor instead of the barnyard.[25]

Thus, both Judge Westenhaver and Justice Sutherland seemed to feel that the separation of land uses was related to the prevention of encroachment of certain undesirable persons onto the turf of decent citizens: the difference was that Westenhaver saw the encroachment as a minor irritation, perhaps, but to be borne in the interest of the freeplay of economic forces in land development; while Justice Sutherland saw encroachment as so severe a threat to the order of the community that it must be regulated—even though regulation, in his view, was not to be lightly instituted.

Until recently Justice Sutherland's remarks about a "pig in a parlor" have been understood to refer to the admixture of disharmonious land uses. A more modern and cynical analysis suggests that Sutherland's concern with the invasion of apartment houses into areas of single-family development was an early version of the now common practice of anthropomorphization of the pig.

Legitimate and Illegitimate Goals of Zoning

In its present form zoning operates to achieve four basic objectives: first, "zoning is essentially a means of insuring that the land uses of a community are properly situated in relation to one another, providing adequate space for each type of development."[26]

Secondly, "[o]f major importance for the individual citizen is the part zoning plays in stabilizing and preserving property values."[27]

Thirdly, zoning is employed to enhance the possibilities for efficient municipal development. "It allows the control of development density in each area so that property can be adequately serviced by such governmental facilities as the street, school, recreation and utilities systems."[28] The increasing acceptance of conscious control over public development, as seen in the willingness of communities to employ city planning and zoning, has evolved in part from awareness of the

25. *Supra* note 13, at 388.

26. INTERNATIONAL CITY MANAGERS' ASS'N, PRINCIPLES AND PRACTICE OF URBAN PLANNING 403 (1968).

27. *Id.*

28. *Id.*

usefulness of rational consideration of the location and timing of new developments, eliminating the most costly patterns of growth. Related to this objective of conserving municipal expenditures or making municipal expenditures more efficient through the regulation of land development is the common practice of fiscal zoning. Fiscal zoning was defined by the National Commission on Urban Problems (the Douglas Commission) as the set of practices employed by zoning jurisdictions "to exclude from a jurisdiction any proposed development that might create a net financial burden and to encourage development which promises a net financial gain."[29] In essence, this means that jurisdictions are influenced to seek industrial and commercial uses and luxury housing and to discourage or prohibit uses, such as housing for low- and moderate-income persons. A further refinement is the desire to include housing for families with no children or with as few as possible, in order to avoid the most significant expenditure item of local government—educational expenditures. Low-income housing is undesirable from a purely fiscal perspective because it does not add the same amount of assessed value as luxury housing to the tax rolls; and because it often brings large families into the community. In addition, it is widely believed that the families occupying such housing may require welfare payments or greater amounts of other services from the local government than higher income families require. Finally, the fourth objective of zoning is to exclude undesirable portions of the population.

Exclusionary Devices: Definition

Exclusionary zoning may be defined as the complex of zoning practices which results in closing suburban housing and land markets to low- and moderate-income families. All regulations are, in a sense, exclusionary. For example, they are exclusionary in that they restrict degrees of individual freedom. Regulations controlling land development or building styles, limiting what can be built and where, may tend to exclude from communities people with strongly individualistic tastes in home construction. The concern here is with the regulations which, by excluding certain relatively low-cost forms of development, tend to raise house prices above the level at which low- and moderate-income families can afford to buy them.

In order to recognize the exclusionary consequences of certain regulations, it is important to understand the nature of income

29. *Supra* note 5, at 19.

distribution in the United States. Where regulations have the effect of driving the cost of a single dwelling unit above $20,000, then about half of the population is left out of the new housing market in the area in which such controls are used. This is because, in the current housing market, the rule of thumb for the relationship between family income and the purchase price of housing is that the price should not exceed two times the income. At that rate, a family whose income is $10,000 a year can buy a house costing $20,000. The median income in the United States is now about $8,700;[30] the median-income family can therefore afford a house costing approximately $17,400. Poor families, of course, are not in the home-purchase market. At the Social Security Administration's bedrock definition of poverty ($3,835 or less for a family of four) 13.3 percent or 26 million of the American people were poor in 1967.[31] Above the poverty line, but below the median-income level, are "moderate" income families, few of whom are in the homebuying market under current cost conditions.

The cost of construction and the cost of land, by themselves, prevent significant numbers of families from purchasing new housing; exclusionary regulations have the effect of increasing the cost of development still further, and excluding more families from the market. In addition to zoning laws, subdivision regulations or building codes may contain regulations which have the same exclusionary effects. Examples of such regulations are those which require expensive materials to be used in housing construction or those which require exceptionally large lot frontages.[32]

Exclusionary Devices: Types

Exclusionary practices include:

(a) the zoning of vacant residential land for large minimum lot sizes, thereby reducing the total supply of developable lots and increasing the overall cost of land in a metropolitan region. Excessive minimum lot size is a relative concept (a quarter acre may be a large lot in New York City); the excessively large minimum sizes referred to here are those of one acre, two acres, four acres, five acres, and in rare instances, ten acres. Under such requirements, fewer houses can be built on a given tract of land; building lots are kept relatively scarce and

30. 1970 CENSUS PRELIMINARY REPORTS.

31. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, 324 (89th ed. 1968); *supra* note 5, at 44.

32. *Supra* note 5, at 215-16.

expensive; and in order to justify the high land cost, each unit of housing built on the sites must sell for a high price.[33] The present practice of exclusionary zoning has, in many metropolitan areas, driven up the cost of a building lot so high that the market for houses built on such sites includes only a tiny fraction of the potential homebuyers of a region. The two houses that can be legally built on a ten-acre tract in Bedminster, New Jersey, for example, will be built only if the demand for houses selling for more than $40,000, the current minimum new house price, is high. But the one hundred housing units that could be built on the same tract under looser zoning provisions would sell for closer to $28,000 or less (with reduced land costs and possible federal aids to development) and would be offered to a far wider market of potential purchasers.

(b) the requirement of excessively large minimum house sizes, unrelated to the size of the family occupying the house and unrelated to generally accepted minimum health and safety standards for interior floor area. A particularly flagrant case is the employment of a number of different interior floor area minimums within one town. Thus, in a high density zone, a minimum of 900 square feet may be required; but in a lower density zone, 1,300 square feet may be required. Clearly if the lesser area is satisfactory for purposes for which the police power is employed in one zone, then it should suffice in another zone.[34]

(c) the prohibition against all forms of multi-family housing and any forms of single-family housing other than detached structures. In many cases the regulation prohibits apartments totally. In other cases only a small fraction of vacant residential land is zoned for anything other than single-family detached structures. The effect of these regulations is to prevent less expensive forms of housing from being constructed and to prevent families who prefer these forms of housing from finding them in the community.

(d) spot zoning of small parcels of land for multi-family housing. This is often accompanied by the use of additional restrictions on multi-family construction which have the effect of increasing the cost of units permitted and reducing the likelihood that families with children will reside within them. For example, restrictions are placed on the number of bedrooms permitted in each dwelling unit.

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33. *Id.* at 214-15.

34. *See* Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan & Horack, *How Small A House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954).

(e) the use of discretionary devices such as special exceptions, special permits or variances. They are used to promote high-cost forms of development.[35]

One of the more absurd practices in the suburbs is the public request frequently made of developers seeking special permits to construct multi-family units which will guarantee to the community that not a single school age child will be permitted to live in his proposed development. Communities which consciously seek to prohibit developments which will include school age children have been identified as practicing zoning for the "nearly dead and newly wed."

TOWARD INCLUSIONARY LAND USE CONTROLS

The objective of revising land use regulations is to assure that community health, safety, and amenity requirements can be achieved without producing the racial and social class isolation that has resulted from present practices, especially zoning. It is proper for a civilized urban community to seek to separate disharmonious land activities. It also seems appropriate for intelligent citizens to try to conserve scarce municipal expenditures and to plan for efficient forms of urban growth. However, the propriety of continued employment of the police power to regulate private behavior for the well-being of the local government must be questioned. Of greatest urgency is ending the use of the police power through zoning to achieve economic and racial segregation.

There is presently a period of growing public recognition of the abuses that have been perpetrated in the name of community planning and amenity through zoning and other land use controls. Within a year or two the United States Supreme Court will be asked to review the constitutionality of zoning devices which prevent large numbers of the population from gaining access to residence within suburban communities. The Supreme Court may be asked to review not only the specific exclusionary zoning practices but also to reconsider the general approval of zoning which it granted more than 40 years ago in the *Village of Euclid v. Ambler Realty Co.*[36] decision.

This article will leave open the question of whether zoning should be replaced entirely or only altered significantly. What is quite clear is that this very powerful mechanism of land development control must cease

35. URBAN RESEARCH CENTER, HUNTER COLLEGE, THE RELATIONSHIP OF ZONING TO HOUSING ADEQUACY AND AVAILABILITY FOR THOSE OF LOW AND MODERATE INCOMES, July 1968 (unpublished Study for the National Commission on Urban Problems).

36. *Supra* note 13.

operating to deprive large portions of the population of the opportunity to share in the development of decent suburban environments. The standard that should guide a rethinking of zoning, and land use control in general, is that of *inclusion.*

Inclusionary Controls: Objectives and Questions

The objectives toward which land development policies should strive are:

1) To guarantee to residents of a state—or the nation—that local law derived from state police powers will not be employed to deny them access to residences within all parts of residential areas of local government units.

2) To maximize local control over those aspects of land development that affect primarily the locality and its citizens.

Access to All Residential Land

The theory that all parts of a municipality's residential land must be available to all sectors of the population is premised on the belief that public laws cannot be used to create race or income class zones either by direction or indirection, except upon the finding of a special need by a particular class.[37] In the discussions concerning both housing and land development policy, special treatment for low-, moderate-, middle-, and upper-income classes has been propounded. The law has recognized for some time the propriety of setting aside land to meet the housing needs of low-, moderate-, and middle-income families. Housing for such classes has been authorized by the public when the private sector cannot meet the demand. A more difficult case arises when discussion turns to whether the public should sponsor upper-income housing, because the need for public intervention to assist the class is significantly less apparent. Nevertheless, some students of American housing subsidies have shown that the upper-income classes are the major beneficiaries of public resource distribution. For example, the Secretary of the Department of Housing and Urban Development, George Romney, has been among a host of critics who have observed that the internal revenue system, with its income tax credits for mortgage interest payments and for local real estate taxes, bestows considerably greater rewards upon

37. *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767 (1969) for a discussion of "substantive equal protection."

upper-income homeowners than the public's many housing programs bestow on low- and moderate-income families.[38]

The federal urban renewal program has also been castigated for its strong tendencies to provide new housing units for middle- and upper-income families while at the same time forcing residents of slums to be relocated in other slums in order to make way for the development of luxury housing.[39] In a society more attuned to social equity than to preservation of property investments, stronger attacks upon this particular form of redistribution might be successful. Some have justified the fact that certain areas of metropolitan regions have been limited to families which could afford housing on large tracts, on the ground that upper-income families have the same right as other income groups to secure a portion of the residential turf.

Even if one were to accept the notion that upper-income groups deserve a special domain protected by the public, it might, nevertheless, seem equitable to propose that the land set aside for an income group should be proportional to their representation in the population. Today, very large proportions (in the New York region, 90 percent of all vacant land is zoned for single-family residential use) of vacant land is reserved for building lots of relatively large size.[40] In eight counties of New Jersey, 82 percent of developable vacant land is zoned for lots of one-half acre or more.[41] In a portion of Connecticut close to New York City (the Southwestern region), 77.6 percent of vacant residential land is zoned for lots of one acre or more.[42] Houses built on lots of one-fourth acre or

38. Transcript of remarks made by Secretary of Housing and Urban Development Romney at the dedication of a new Federal National Mortgage Association building, Oct. 23, 1969:

> The (middle income) people had public policy helping them and meeting their housing needs, both from the standpoint of mortgage policy as well as tax policy—the ability of those who have a mortgage to deduct their interest payments from their income tax return has resulted in the middle income families of this country meeting their housing needs without being aware of the fact that they were the beneficiaries of public policies which to an extent subsidized them in meeting their housing needs.
>
> . . .The people who have benefited by national housing policies in the main are not even aware that they had any help from public sources and that they tend to resent the idea that public money is being used, their tax money—and I hear the rattling of taxpayers here—being used to help the disadvantaged and the minority groups to meet their housing needs.

39. *See* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 291 *et seq.* (J. WILSON ed. 1966) for a classic discussion of relocation in urban renewal.

40. *Supra* note 5, at 214-15.

41. These figures were developed by the Division of State and Regional Planning, Department of Community Affairs, New Jersey and quoted in *A Blueprint for Housing in New Jersey*, Special Message by Governor William T. Cahill, Dec. 7, 1970.

42. SOUTH WESTERN REGIONAL PLANNING AGENCY, ZONING: TECHNICAL REPORT 3, at 22 (1967).

more are selling for a minimum of $25,000 in the New York region today; houses built on lots of one-half acre or more are selling for more than $30,000 in New Jersey; houses built on lots of an acre or more are selling for over $45,000 in Southwestern Connecticut. At these prices, perhaps 25 percent of the population, earning $12,500 or more, can afford to buy houses built on this land.[43] Therefore, under current zoning practices, public law is being used to preserve perhaps 80 percent of the vacant residential land in metropolitan areas for the use of perhaps 25 percent of the population. And, if in fact most of this housing is available to families with incomes above $20,000, then less than 10 percent of all families can compete for it.[44] Our proposal is to create a policy that is explicit in rejecting the notion that zoning should be based on income considerations except on a finding of special need. It would provide that communities have the obligation to demonstrate in their comprehensive plans, and in their use of police power, that all classes of the population might find housing or land on which housing could be constructed in all sectors of the community.

Existing Legislation to Counter Exclusionary Zoning

Legislation to counter the effects of exclusionary zoning has already been passed in two states, Massachusetts and New York, and is being considered in a number of others. It is interesting to note, however, that both the Massachusetts and the New York statutes leave intact the underlying structure of exclusionary zoning, while providing that certain specific tracts of land in suburban areas can be exempted from the exclusionary pattern.

The Massachusetts approach—The "Anti-Snob Zoning" law of Massachusetts,[45] enacted in 1969, provides that at least 0.3 percent of the vacant residential land of a community must be made available for development each year for a period of five years upon application by eligible nonprofit or limited-profit housing sponsors for zoning changes. The law creates a special state zoning board of appeals which rules on the propriety of refusals by local jurisdictions to permit nonprofit or limited-profit sponsors to proceed with development plans. Where the commission finds that a local jurisdiction has failed to make land available under the law, it is empowered to issue a state permit, overriding local authorities, for the construction to proceed.

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43. *See* text at 525 for discussion of income and housing prices.

44. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-60, No. 66 (1969).

45. MASS. ANN. LAWS ch. 40B, § 20 (1970 Supp.).

Aside from difficulties with the enforcement of the statute, the fundamental problem with the Massachusetts law is its tacit approval of the continuation of exclusionary practices in the 98.5 percent of vacant developable land which will be unaffected by the statute. (After five years, a maximum of 1.5 percent of a community's land could be developed for low- and moderate-cost housing under the statute's provisions.) The law does not come to grips with the constitutional questions raised by exclusionary practices, and it does nothing to reduce the inflation of land prices in the suburbs that is caused by the reservation of most vacant land for high-cost development. The practical effects of the Massachusetts law are still to be determined; preliminary assessments of its effectiveness require caution in following its example.[46]

The New York approach—The Urban Development Corporation of New York [hereinafter referred to as UDC], created by the legislature in April, 1968 (in the urgent atmosphere that followed the death of Martin Luther King, Jr.), was granted the power to override local zoning and subdivision laws where they conflicted with UDC findings that a certain site was appropriate for low- or moderate-cost housing.[47] In the more than two years since its creation, however, the political constraints operating within the State Legislature have reasserted themselves, and the UDC has not acted to override exclusionary local zoning. Instead, it has worked with local governments, almost entirely in central-city jurisdictions, to undertake housing and renewal programs to benefit the citizens of those jurisdictions.[48] If the UDC would join in a case attacking the discriminatory aspects of zoning empowered by the state zoning enabling legislation, overriding local zoning could be made unnecessary. It might be argued that where the UDC uses its powers to override local zoning, the state agency is in fact accepting discriminatory zoning within a town and merely setting it aside on a particular tract of land. If successful in a constitutional attack against exclusionary practices, the UDC could make possible a situation in New York in which the purposes for which it was created could be achieved, not only through its efforts, but with the assistance of all the public and private entities concerned with the rapid development of decent housing for all residents of the state.

46. E. SEE, MASSACHUSETTS ZONING APPEALS ACT: CURRENT STATUS, Aug. 3, 1970 (unpublished memorandum prepared in connection with a research and development project undertaken by Ross, Hardies, O'Keefe, Babcock, McDougald, and Parsons, for the Dep't of Housing and Urban Development).

47. N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney 1968).

48. For a preliminary assessment of U.D.C.'s role, *see* Reilly & Schulman, *The State Urban Development Corp.: New York's Innovation*, 1 THE URBAN LAWYER 129-46 (1969).

Neither the Massachusetts nor the New York advances in coping with local reluctance to participate in solutions to state housing problems are sufficient. They fail to create means for the private market to participate fully in the construction of housing for moderate as well as higher income groups. Further, they make it difficult for sponsors of publicly assisted low- and moderate-income housing to freely choose the locations in a community where they wish to construct housing units.

Both the New York and Massachusetts approaches are tolerant of the existing structure of private-interest control of public law; they do little more than create possibilities for small islands of exception to the general rule. These exceptions are the 0.3 percent of vacant land made available for low- and modernate-income housing under the Massachusetts Act and the thus far unused power of the Urban Development Corporation to override local zoning on particular tracts of land. The only acceptable correctives to the patterns of segregation created by public law are those that entirely eliminate them. In order to solve the housing problem and to create housing choices for all classes in all areas of a state or region, it is necessary to maximize the choices open to housing consumers and developers within statewide safeguards.

Local Home Rule

Many of those who argue for maintenance of the present system of zoning assert that any diminution of the power of a locality to determine the proper density of residential development, or the type of housing units permitted, would represent a serious invasion of home rule powers. Local government is important. The growth of public demand for community participation in urban decision-making, and the popularity of the notion of federal revenue sharing, indicate that decentralization and local control should be bolstered, not weakened, in the area of land use controls. The important point to be made here is that it is possible to create a system of land use controls which enables communities to determine their own land development patterns, *provided they meet the standards of inclusiveness.* Having met such standards and having demonstrated that the community provides opportunity throughout its area for all segments of the population, there need be no outside forces threatening to regulate local land use. These threats do exist under the UDC formula and under the state appeals board created by the Massachusetts "Anti-Snob" Zoning Act.

Proposals for Inclusionary Policies

The following proposals are directed toward creating local communities open to members of all classes and races who seek entry to them.[49]

1. Comprehensive Planning is Inclusionary Planning.

Throughout almost the entire history of zoning, local zoning ordinances have been required by statute to be "in accordance with a comprehensive plan." In one of the most interesting decisions dealing with that language, Justice Weintraub of the New Jersey Supreme Court stated that the minimum elements of such a plan connote "an integrated product of a rational process and [that] 'comprehensive' requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the physical facts and the purposes authorized [by the New Jersey planning statutes]."[50]

The difficulty with this definition is that zoning comporting with this standard has permitted comprehensive racial and economic segregation to be practiced in New Jersey as well as in most of the other states. If the state is to prohibit local zoning from creating racial segregation, it must directly mandate a new form of behavior. The requirements for this are specific demands for *inclusionary* practices, to be included in the language of state planning and zoning enabling laws.

The comprehensive plan for zoning should be defined to mean a plan which makes provisions throughout residential zones and non-residential zones (in which residences are permitted) for housing types and densities which will not prohibit the development of low- and moderate-income housing. This provision should specifically prohibit zoning practices which would segregate income or racial groups to specific zones or specific parts of a community.

Similar requirements should be established for comprehensive or master planning to be carried out by public planning agencies. A burden of analysis and evaluation should be placed on local planning agencies to assure that they have explicitly found that their community, in its public actions, will provide adequate shelter and environment for all economic classes and races. A plan for the fulfillment of such an "open

49. The proposals set forth in general terms here have been introduced in greater detail in the New York Assembly by Assemblyman Franz Leichter. A. 4947 N.Y. LEG. REG. SESS. (1971).

50. Kozesnik v. Township of Montgomery, 24 N.J. 154, 166, 131 A.2d 1, 7 (1957). *See also* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

community standard" should be as important a part of the planning process as is the transportation plan or the land use plan.

2. Termination of Specific Discriminatory Devices.

a. It should be a matter of state policy that no locality can exclude multi-family development from any of the zones in which it permits residential development. Such a conclusion is based upon findings that multi-family housing (housing including two or more dwelling units) represents a relatively inexpensive form of housing,[51] and upon the recognition that many families prefer multi-family occupancy to single-family occupancy, as well as upon the recognition that multi-family structures can be constructed to the highest standards of contemporary aesthetic judgment, as in Reston, Virginia and Columbia, Maryland.

b. It should also be a matter of state public policy that no locality can establish a minimum habitable floor area requirement for a dwelling unit which sets a standard higher than the minimum established for the state by a state public health director. Variations in local minimum floor areas have no possible justification on health or safety grounds.

c. The next policy proposal is, perhaps, the most difficult to enact. It seems quite clear that there is no basis in police power concepts for distinguishing among types of residential uses. If that particular power to discriminate among types of residential uses is removed, then distinctions between residential zones must be based on factors related to the intensity of development, *e.g.*, population density, floor area development, or percentage of lot covered by the structure. Regardless of the standard selected, it must be employed in a non-discriminatory fashion. This will have the greatest impact, today, on suburban residential lot area requirements. (But it should be noted, tangentially, that it would also affect city zoning where high density zoning is employed to attract luxury builders and to exclude low-income families.)

The minimum lot size requirements for purposes of assuring public health and safety should be established by state health and building officials. In all probability this would lead to a situation in which no lot size greater than one acre would be required. One of the most apparently well-justified excuses which exclusionary towns have used in rejecting pleas for higher density residential development has been the claimed absence of public water and sewer facilities. There is a good deal of what common law lawyers refer to as *chutzpah* behind this argument. Towns

51. *Supra* note 5, at 215.

which have the obligation to serve the needs of citizens have effectively prohibited citizens from entering their communities by arguing a lack of facilities. To circumvent this, developers should be permitted, with state health and building officials' approval, to build at higher densities where they can reasonably construct adequate water and sewer facilities to meet the needs of the future residents of their developments. It would be useful to have a state urban growth fund available to assist in the payment of required facilities in circumstances where the proposed development was to provide publicly assisted low- and moderate-income housing.

3. Conservation of Municipal Expenditures.

As a matter of policy it should be within the police power to zone for purposes of conserving municipal expenditures, provided that the purpose may be achieved only in circumstances where the effect of the controls employed is to enlarge, rather than limit, economic access to residence within the community. Efficiency in government should result in reduced taxes and reduced costs of living within a community.

4. Housing for Industrial Workers.

It should also be a matter of public policy that no land within a community may be rezoned for industrial or commercial expansion without there first being made a finding that sufficient vacant housing at moderate cost and rental levels, or vacant residential land upon which such housing could be constructed, is available for housing all of the workers associated with the proposed new industrial or commercial development. In the absence of a positive finding, a locality should be required to rezone sufficient residential land to meet the housing needs of the potential workers as a precondition to rezoning for the industrial or commercial development. The housing to be provided for the workers must be constructed at prices within the economic means of the expected labor force.

5. The Right of Regional Residents to Sue and to be Heard.

The State of New Jersey a year ago enacted legislation empowering nonresidents of a community to have standing to litigate against local zoning restrictions injurious to them.[52] This important action granted to excluded persons, such as central city residents, a right to contest

52. N.J. CODE ANN. Tit. 40, § 55-47 (Supp. 1970).

suburban communities' discriminatory policies. In addition to this right, it should also be a matter of public policy that nonresidents who are affected by the issue should have a right to be heard at local zoning hearings.

6. Urban Growth Fund.

Taking away communities' rights to exclude low- and moderate-income families will produce a potential for increased fiscal burdens on the affected communities. For this reason, and because the provision of housing for low- and moderate-income families will greatly assist states in solving their housing problems, states should create "urban growth funds" which could contribute toward the development of suburban services and facilities for which low- and moderate-income families' real estate taxes are incapable of paying for fully.

7. Government Facilities Location.

It should be a matter of policy that government facilities, federal, state, or local, should be located in areas that have an adequate supply of housing for all of the people employed at that facility. Such state policies could be modeled after the "Federal Government Facilities Location Act" introduced by Senator Ribicoff in December, 1970.[53] Adoption of such a policy would make it impossible for communities to construct state-supported hospitals or schools, for example, where those who teach or work at the school would be unable to find housing within their means in the community where they work.

A Concluding Note on Prescriptions

The proposals offered in this section deal directly with the conditions which create, by public law, patterns of economic and racial segregation. It is suggested that legislative bodies must either voluntarily adopt standards to prevent continuation of these discriminatory practices, or they will be required to do so as a result of judicial decisions.[54]

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53. S. 4546, 91st Cong., 2nd Sess. (1970).

54. We believe that the developing case law in this area supports our view that the courts will strike down the exclusionary practices we have identified. For an excellent discussion of recent cases and the prospects for judicial action in the future, *see* CITY, Jan./Feb. 1971, at 58. We are particularly impressed with the implications of Governor Cahill's warning to the New Jersey Legislature. After reviewing the developing case law and the nature of restrictive zoning practices in New Jersey, the Governor told the Legislature:

> These decisions and other cases presently pending in the courts of this State and

However, the proposals which have just been offered are really only deterrents to present abuses; they do not speak to the important issue of which kind of controls are needed to assure high standards of amenity in open communities. Planners, lawyers, urbanists and others are confronted with an important task. They must reconsider the propriety of maintaining zoning as the primary control over land development. It may be that zoning is the best land use control possible and that, without its discriminatory features, it could operate effectively to protect the quality of urban development. But zoning has also shown great weaknesses as a legal and planning device. It may be time to ask if there is not a better means.

It is also necessary to consider the fact that the very worst features of exclusionary zoning blossomed after racially restrictive covenants were struck down in *Shelley v. Kraemer.*[55] Those of us who oppose efforts to exclude minorities from developing areas would be well advised to think of the new game the discriminators will think up after exclusionary zoning is knocked down.

A Special Note on Those Now Residing in Acreage Zones

Many of the fears expressed by suburbanites when discussing the issue of eliminating exclusionary zoning revolve about the protection which would be offered to residents of already developed tracts of land. Thus, families living on lots of one or two acres fear new land use controls would permit neighbors to subdivide their acreage parcels into plots of one-fourth acres or less.

An analysis of the suburban land supply reveals that it would be unnecessary to require that existing developed land be made subject to re-subdivision at much higher densities. This is the case because of the existence of vast amounts of vacant land in the suburbs. At least for the foreseeable future, families residing in developed tracts can be provided with the protection they seek. Where land has been developed at a certain density under an existing zoning regulation, that density should be maintained in the future, until good reasons for changing it are asserted.

Nation have led knowledgeable attorneys to freely predict that large acreage and large square foot requirements, along with absolute prohibition against apartment construction, will soon be held violative of the Constitution and outside the scope of planning and zoning officials. It seems to me, therefore, that the message should be loud and clear. We must undertake corrective measures now if we are to insure the maintenance of controls in the hands of local officials.

Special Message, *supra* note 41, at 15.

55. 334 U.S. 1 (1948).

Thus, if a tract of land is now zoned for two-acre development and divided into two-acre parcels, and if exclusionary zoning, including two-acre zoning, is struck down or prohibited by legislation, existing development should still be protected as a permitted non-conforming use. However, in a developed tract containing a parcel of vacant land three or four times as large as the minimum lot size under the old zoning, that vacant parcel should be developable in conformance with the new zoning standard.

A Note About a Non-zoning Factor Contributing Strongly to Exclusionary Practices

A discussion of the changes required to stop local exclusionary practices would be incomplete if it failed to consider the impact of the local fiscal system on suburban behavior. A significant motivation for employing devices which deny moderate- and low-income families access to the suburbs is the operation of a local tax—in almost all communities, a real property tax. Many suburbanites are caught in the game of exclusion, not because of hatred of, or prejudice against the excluded, but out of a real economic self-interest in preserving a relatively low local tax rate. (This reason also provides a screen for those who do hate or fear the excluded.) The present system of raising revenues for local services relies heavily upon a local system which taxes real property. There are two major problems with such a system. The first is that wealth in real property is an outmoded system for judging one's ability to pay. For persons with steady or declining incomes, the real property tax can be grossly unrelated to their ability to pay. Recent studies suggest that such a tax is often highly regressive.[56] The second problem with the system is that it is local. It automatically requires local residents to judge potential residents in terms of their ability to pay their own way. This is particularly true where, as in most suburbs, the costs of providing new services and facilities in order to meet the needs of growing populations are extremely high. In fact, it would not matter whether the local tax was one based upon property, sales, or income: local residents would, for their own financial purposes, seek out newcomers who could pay at least as much to the community as it costs the community to service them.

"Fiscal zoning" is an outgrowth of a system requiring localities to rely heavily upon their own property wealth for revenue purposes. Its use

56. R. NETZER, ECONOMICS OF THE PROPERTY TAX (1966).

has been in assisting communities with increasing their relative taxing wealth by zoning out undesirable uses and people; nevertheless, it has not eliminated the significant differences which exist between the taxing abilities of rich and poor communities.

Local real property taxation has resulted in significant differences in the ability of local government units to provide services for their residents. This situation has been felt most strongly in the area of education. Children having the misfortune to be raised in communities with small tax bases have been unable to receive amounts of educational dollars compared to those given to children fortunate enough to reside in wealthy communities. In a democracy, this is a poor way to determine educational expenditures.

> The evil in the system is clearly the State's reliance upon school districts of unequal ability (wealth) to carry out the uniform responsibility of running public schools. (Ability—or wealth—is defined by the State as the assessed valuation per public school pupil of the taxable property in the district.) Above the minimum level of spending guaranteed by the State to the districts, spending is tied directly to the accident of the local property base per pupil. This insures that, regardless of how committed poorer districts are to education, and regardless of how heavily they tax themselves, there will always be richer districts which can and do continually provide costlier schooling despite far lower tax effort by their residents. For example, in Beverly Hills the tax rate per $100 in assessed valuation in1968-69 was $2.38 and it was able to spend $1,231.72 per pupil; in West Covina the tax rate in 1968-69 was $5.24, and it was able to spend $621.26 per pupil. What is the cause of this disparity? In that year Beverly Hills property assessed valuation was $87,066 per elementary pupil and $122,452 per high school pupil, while in West Covina it was $7,688 per elementary school pupil and $15,651 per high school pupil. *California Public Schools Selected Statistics, 1968-69* (California State Department of Education, Sacramento, 1970). The problem is endemic. Wealth ranges from less than $1,000 per pupil to over $1,000,000: spending ranges from about $350 per pupil to $3,000.[57]

Any realistic study of the means for eliminating segregationist tendencies in the suburban use of public law must recognize the need for reform of the local tax system. So long as men are measured as good neighbors by their ability to pay for municipal services, progress toward a more open suburban society may well be doomed. There is a solution that is receiving increasing popularity—shift the responsibility for

57. Brief for Stephen D. Sugarman, *et al.* as Amici Curiae at ____, Serrano v. Priest, 10 Cal. App. 3d 1110, 89 Cal. Rptr. 345 (2d Dist. 1970).

raising revenues for local education and welfare to the state level. This would relieve local governments of their most burdensome fiscal responsibilities; make possible a more equitable distribution of educational funds throughout the state; and would, at the same time, eliminate the most crucial forces dictating fiscal policies against low- and moderate-income families.

To enable a local school district to provide a level of education above the figure established by the state in its redistribution on a per student basis, permission might be granted to localities to tax themselves up to a fixed amount in order to provide a higher expenditure per student. This permission might, to some extent, militate against the social benefits achieved through such a shift in taxing powers. However, that would be more than compensated for by the practical fact that it would make such a shift more acceptable to wealthier communities and would enable localities to retain some degree of freedom in determininng school expenditures.

Professor George Raymond, in a perceptive article dealing with these issues, made the following points:

> Under its Constitution the State is responsible for the provision of adequate education of quality to every one of its citizens. There is no argument with the proposition that the *educational program* in each school system should be decided by that level of government which is closest to the provision of the service and which is most closely attuned to the needs of its users; i.e., the local board of education. But the delegation of *fiscal responsibility* to local boards of education is optional with the state. At the present time, there is already at least one state in the union—Hawaii—wherein a single board of education serves the state as a whole. The fragmentation of local units results in a totally chaotic pattern: it brings pressure on zoning practices and on industrial promotion activities; it has a nefarious impact on the ability of any level of government to produce a rational transportation system; and it precludes any chance of our being able to achieve conservation objectives in areas where development should be discouraged. All of these, combined with the fact that there is almost general agreement that the financial burden of the tax on real property greatly exceeds its ability to pay, amply justify the assumption by the state of substantially full responsibility for the support of the educational system throughout the state out of the proceeds of broadly based taxes.[58]

Movements for inclusionary land use controls and for reform of the

58. *Relieving Real Estate of School Tax Burdens in New York State*, PRATT PLANNING PAPERS, 8 (Sept. 1970).

tax system must develop simultaneously. There are many potential allies in the movement for more equitable land use controls once the tax system is changed.

It may well be that those who assert a belief in change, subject to the condition that the tax system be altered, would find another excuse if the tax system did change. It is certainly the case that there are opponents of a broadening of the social mix of their communities. But one of the advantages of ridding the debate about land controls of the fiscal issue is that it would rob discrimination of a cloak to hide behind. New disguises may be found, but it does seem better to isolate and explicate the discriminatory practices in the law in order to eliminate them.

Advocates of inclusionary practices are sometimes told that they should wait until the tax system is changed before they start pressing their fight to end zoning segregation. That would be a mistake. The racial and economic practices carried out through local zoning have great harmful effects on the excluded population and on the social and economic health of metopolitan regions and the nation. The struggle to dissolve exclusionary practices should not be made dependent upon the possible outcome of other issues; it should be carried forward now.