The Interrelationship Between Excusionary Subdivision Control - A Second Look

Roger A. Cunningham
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Housing Law Commons, Land Use Law Commons, Property Law and Real Estate Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol6/iss2/2
THE INTERRELATIONSHIP BETWEEN EXCLUSIONARY ZONING AND EXCLUSIONARY SUBDIVISION CONTROL—A SECOND LOOK

Roger A. Cunningham*

The Winter 1972 issue of the University of Michigan Journal of Law Reform contained an interesting student article entitled "The Interrelationship Between Exclusionary Zoning and Exclusionary Subdivision Control." The author’s conclusion was as follows:

Exclusionary subdivision control practices may become more common when cities discover that zoning ordinances are subject to close scrutiny by the courts. Nevertheless ... subdivision control practices should have no more success in excluding minority groups than zoning. If the courts focus on the effect of the practice rather than the type of practice, discrimination however achieved will not be allowed. The fate of exclusionary subdivision control is inevitably tied to the fate of exclusionary zoning.

The thesis of this article is that the conclusion set out above is both oversimplified and inaccurate. Contrary to the author’s contention in his Journal article, there are “viable distinctions between zoning and subdivision control,” and consequently the major exclusionary techniques available to suburban communities through “zoning” are simply not available in connection with “subdivision control.” Dramatic attempts at racial exclusion through subdivision control are likely to be infrequent. Although subdivision regulations, like zoning ordinances and building codes, require expenditures by land developers which increase the cost of housing and thus tend to exclude the poor, the effect of subdivision regulations on the cost of housing is relatively unim-

* Professor of Law, University of Michigan Law School. S.B., 1942, J.D., 1948, Harvard University.


2 Id. at 360.

3 Id. at 356.
important. Furthermore, most subdivision regulations are more easily justified on health, safety, and environmental protection grounds than are the commonly used “exclusionary” zoning techniques. In the final analysis, reductions in the cost of housing will come about only through elimination of these exclusionary zoning techniques and effective action to cope with other factors which contribute significantly to the high cost of housing construction.

I. Functional Differences Between Zoning and Subdivision Control

In the student article referred to above, the author argues that “there are no viable distinctions between zoning and subdivision control” on the following ground:

Before an area is zoned for a particular use, the zoning board must first ascertain whether that area is physically suited for that use and whether the present or reasonably anticipated level of public services (that is, streets, utilities, fire and police protection, etc.) is adequate to meet successfully the additional demands that full use of the area might entail. Therefore, when an area is originally zoned, the zoning board will thoroughly consider most if not all of the factors later examined by a subdivision control agency. Although it is arguable that subdivision control agencies serve a distinct function in applying these standards to the current state of affairs and therefore in considering changes that may have occurred since the zoning ordinance was adopted, the frequent practice of amending zoning ordinances and granting variances should serve to rebut these arguments.4

In fact, however, zoning ordinances and subdivision regulations perform quite different, though related, functions in controlling land development. The Standard State Zoning Enabling Act (SSZEA),5 upon which a majority of the state zoning enabling acts is based, authorizes local legislative bodies

4Id. (footnotes omitted).
5The Standard State Zoning Enabling Act (hereafter cited as the SSZEA), as published by the Government Printing Office, is out of print. The 1926 version of the SSZEA is reprinted in ALI MODEL LAND DEVELOPMENT CODE, Appendix A, at 210–21 (Tent. Draft No. 1, 1968) (with original footnotes); 4 R. Anderson, AMERICAN LAW OF ZONING § 26.01 (1968); O. Browder, R. Cunningham, & J. Julin, BASIC PROPERTY LAW 958–66 (1966) (with original footnotes); 3 C. Rathkoff, ZONING AND PLANNING 100–1 to 100–6 (3d ed. 1956). The SSZEA was the original model for a majority of the state zoning statutes. Although current zoning acts often embody substantial changes from the original enabling acts, the majority of the current acts still retains the substance of the SSZEA.
to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.\(^6\)

The SSZEA further provides:

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

... Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.\(^7\)

Thus the local zoning ordinance is the principal tool for governmental allocation of land for different uses and building types throughout the municipality. The segregation of different land uses and building types and the exclusion of some land uses and building types from at least some parts of the municipality is the very essence of zoning. The principal holding in the landmark case of Village of Euclid v. Ambler Realty Co.\(^8\) was that exclusion of apartments from a one- and two-family dwelling district was valid under the fourteenth amendment. Later cases have sustained the creation of exclusively single-family residence districts;\(^9\) rath-

---

\(^6\) SSZEA § 1.
\(^7\) Id. §§ 2, 3.
\(^8\) 272 U.S. 365 (1926).
er high minimum lot-size requirements, usually on a sliding scale, for different single-family residence districts;10 and the complete exclusion of certain uses, e.g., heavy industry, from a municipality.11

Zoning regulations of the usual type assume that land has been divided into separate lots or parcels for purposes of development, and they control development of these lots or parcels essentially as indicated in the SSZEA excerpts above. Subdivision regulations, on the other hand, (1) control the spatial arrangement of land subdivisions in terms of street patterns, block sizes and shapes, and lot sizes and shapes, and (2) impose certain requirements as to construction of necessary physical improvements and dedication of land to public use within land subdivisions.12 The principal area of overlap between zoning ordinances and subdivision ordinances occurs with respect to lot sizes. Most zoning ordinances contain a schedule of minimum lot sizes in the various use districts into which the municipality is divided.13 In accor-

---

10 See cases cited in note 69 infra.
12 Section 14 of the Standard City Planning Enabling Act (hereinafter cited as the SCPEA) requires a municipal planning commission to adopt "regulations governing the subdivision of land within its jurisdiction" before it exercises its statutory power to approve or disapprove subdivision plats. This section further provides that

such regulations may provide for the proper arrangement of streets in relation to other existing or planned streets and to the master plan, for adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots. Such regulations may include provisions as to the extent to which streets and other ways shall be graded and improved and to which water and sewer and other utility mains, piping, or other facilities shall be installed as a condition precedent to the approval of the plat . . . . In lieu of the completion of such improvements and utilities prior to the final approval of the plat, the commission may accept a bond with surety to secure to the municipality the actual construction and installation of such improvements or utilities at a time and according to specifications fixed by or in accordance with the regulations of the commission.

The SCPEA, published in 1928 by the Government Printing Office, is now out of print. It is reprinted in ALI MODEL LAND DEVELOPMENT CODE, Appendix B, at 222–71 (Tent. Draft No. 1, 1968). The SCPEA is the original model for many of the current subdivision control statutes, and most of the rest are based on one of the other model acts prepared in the mid-1920s. These other model acts are all quite similar to the SCPEA. For a brief discussion of the SCPEA and the current subdivision control enabling legislation, see Cunningham, Land-Use Control—The State and Local Programs, 50 IOWA L. REV. 367, 417–24 (1965).

13 Power to specify minimum lot sizes is derived from SSZEA, supra note 5, § 1 ("the size of yards, courts, and other open spaces, [and] the density of population") and § 3 ("to provide adequate light and air; to prevent the overcrowding of land; to avoid the undue concentration of population").
dance with the specific authorization contained in most of the subdivision control enabling acts, some (though not all) subdivision regulations also contain minimum lot size requirements. Usually the minimums are identical, but occasionally they differ, in which case the higher minimum requirement is normally applicable. It is fair to say, however, that specification of minimum lot sizes is generally regarded at the present time as part of the zoning function, while specification of street patterns, block sizes and shapes, and requirements as to physical improvements and land dedications are generally regarded at the present time as the major functions of subdivision control.

There are only two situations in which a more or less complete blending of zoning and subdivision controls has been achieved. One situation is where a local zoning ordinance makes provisions for “planned unit developments” designed to permit

an entire self-contained little community . . . to be built within a zoning district, with the rules of density controlling not only the relation of private dwellings to open space, but also the relation of homes to commercial establishments such as theaters, hotels, restaurants, and quasi-commercial uses such as schools and churches.

Ordinances providing for planned unit developments usually vest authority in the local planning board or commission, which also administers the subdivision regulations, to regulate the internal development of such districts—i.e., to control the allocation of space for residential and nonresidential uses, for different types of residential uses, and for recreational and other open-space uses. Thus, in planned unit developments, the distinction between zoning and subdivision controls does in fact largely disappear. But since planned unit development is simply available as an option to the land developer where the local zoning ordinance makes provision for it, the planned unit development technique is not really capable of being used by local governments for exclusionary purposes.

14 See SCPEA, supra note 12, § 14 (“minimum width and area of lots”).
15 See SSZEA, supra note 5, § 9.
The second situation in which zoning and subdivision controls are blended is where, as in the zoning ordinance recently sustained in *Golden v. Planning Board of Town of Ramapo*, all subdivision development is prohibited except where the residential developer has secured, prior to the application for plat approval, a special permit or variance to allow "Residential Development Use" of the land in question. The standards for the issuance of special permits under the Ramapo zoning ordinance are framed in terms of the availability to the proposed subdivision of five essential facilities or services: (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) state, county or town roads—major, secondary or collector; and (5) firehouses. The ordinance further provides that no special permit shall be issued unless the proposed residential development has accumulated fifteen development points, to be computed on a sliding scale of values assigned to the specified improvements under the ordinance. Subdivision approval is thus a function of the immediate availability to the proposed plat of certain municipal improvements, the avowed purpose of the new zoning provisions being to phase residential development according to the town's ability to provide the above facilities or services.

---

19 "Residential Development Use" is defined in the Ramapo ordinance as "The erection or construction of dwellings on any vacant plots, lots or parcels of land" (§ 46-3, as amd.); and any person who acts so as to come within that definition "shall be deemed to be engaged in residential development which shall be a separate use classification under this ordinance and subject to the requirements of obtaining a special permit from the Town Board" (§ 46-3, as amd.).
Id. at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.
20 The background of this ordinance is set out as follows in the *Golden* majority opinion:

Experiencing the pressures of an increase in population and the ancillary problem of providing municipal facilities and services, the Town of Ramapo, as early as 1964, made application for grant under section 801 of the Housing Act of 1964 . . . to develop a master plan. The plan's preparation included a four-volume study of the existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends. The proposals appearing in the studies were subsequently adopted . . . and implemented by way of a master plan. The master plan was followed by the adoption of a comprehensive zoning ordinance. Additional sewage district and drainage studies were undertaken which culminated in the adoption of a capital budget, providing for the development of the improvements specified in the master plan within the next six years . . . .[A]s a supplement to the capital budget, the Town Board adopted a capital program which provides for the location and sequence of additional capital improvements for the 12 years following the life of the capital budget. The two plans, covering a period of 18 years, detail the capital improvements projected for maximum development and conform to the specifications set forth in the master plan, the official map and drainage plan.

Based upon these criteria, the Town subsequently adopted the subject
Although it is obvious that such a scheme for land use control has a considerable potential for exclusion, the majority of the New York Court of Appeals held, in the *Golden* case, that the scheme was neither unconstitutional nor ultra vires, and that,

far from being exclusionary, the present [zoning] amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land.\(^2\)

The court further said:

The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth. True other alternatives, such as off-site improvements as a prerequisite to subdivision, may be available, but the choice as how best to proceed, in view of the difficulties attending such exactions . . . , cannot be faulted.\(^2\)

II. EXCLUSIONARY ZONING PRACTICES

A. Rejection of Specific Low-Cost Housing Developments

The most dramatic cases of exclusionary zoning have been those in which there is either a refusal to rezone a specified tract of land to a classification which will permit a proposed "low-cost" housing development to proceed, or a rezoning to a classification under the terms of which a proposed low-cost housing development is prohibited. The leading case of the first type is *Dailey v. City of Lawton*,\(^2\) discussed in the *Journal* article noted previously.\(^2\) Among cases of the second type the best known are *Southern Alameda Spanish Speaking Organization v. City of*
Union City (SASSO)\textsuperscript{25} and Kennedy Park Homes Association, Inc. v. City of Lackawanna,\textsuperscript{26} both discussed by the student author,\textsuperscript{27} and two other cases which he does not discuss in that article, Ranjel v. City of Lansing\textsuperscript{28} and Park View Heights Corp. v. City of Black Jack.\textsuperscript{29} The author's summary of the holdings in Lawton, SASSO, and Kennedy Park Homes is generally accurate, but he fails to draw one important distinction. In Lawton and Kennedy Park Homes the constitutional attack on the local zoning was based on the theory that it was racially discriminatory and exclusionary. In Ranjel, the constitutional attack was also based on that theory. In SASSO, however, the basis of the constitutional attack was that the local action, in overriding by referendum the city council's decision to rezone to accommodate a low-income housing project, would deny decent housing and an integrated environment to the low-income residents of Union City. In the Black Jack case the constitutional attack on the local zoning ordinance (which prohibits construction of any new multi-family dwellings) was based on the theory that its purpose and effect was to exclude low- and moderate-income individuals "including members of the Negro race" from the city.

The decisions in Lawton and Kennedy Park Homes were certainly to be expected, given the allegations and trial court findings as to the racially exclusionary motivation and effect of the local zoning action (or inaction). In such cases, the federal courts will surely apply the "new" equal protection test and require the local unit of government to show "a compelling governmental interest in order to overcome a finding of unconstitutionality"\textsuperscript{30} where local governmental action produces a racially discriminatory effect. It should be noted, however, that in these cases the local zoning action (or inaction) did not merely make the proposed low-income housing more expensive; it absolutely prohibited construction of the type of multi-family housing proposed. It should also be noted that it is still quite uncertain whether the new equal protection standard will be applied to cases where local zoning action (or inaction) is alleged to result only in "economic ex-

\textsuperscript{25} 424 F.2d 291 (9th Cir. 1970).
\textsuperscript{27} Comment, supra note 24, at 358-60.
\textsuperscript{29} 467 F.2d 1208 (8th Cir. 1972).
\textsuperscript{30} Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d at 114. See also Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 10 (1967).
clusion” — i.e., exclusion of “the poor.” In SASSO the Court of Appeals for the Ninth Circuit suggested that,

Given the recognized importance of equal opportunities in housing, it may well be as matter of law, that it is the responsibility of a city and its planning officials to see that the city’s plan as initiated or as it develops, accommodates the needs of its low income families, who usually—if not always—are members of minority groups.\(^{31}\)

Similarly, the decision of the Court of Appeals for the Eighth Circuit in Black Jack indicates that a sponsor of a proposed low-income housing project and individuals desiring to live in the proposed housing project have standing under the fourteenth amendment to challenge a zoning ordinance which is alleged to exclude low- and moderate-income individuals “including members of the Negro race” from the area. Yet the Supreme Court’s recent decision in James v. Valtierra\(^ {32}\) strongly suggests that it is primarily classifications based on race which are banned by the fourteenth amendment’s equal protection clause, and that classifications based on economic status are not.

**B. Major Exclusionary Pre-Zoning Techniques**

Zoning frequently has the effect of excluding all but high-cost housing, although regulations have not been adopted for the spe-

---

\(^{31}\) Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, 424 F.2d at 295–96. It should be noted that in SASSO the district court initially denied plaintiff’s motion for a three-judge court and a preliminary injunction. On appeal the Court of Appeals for the Ninth Circuit affirmed, holding that the contentions that the purpose and result of the citywide referendum was to discriminate against Mexican-American residents and that the result was to perpetuate discrimination within the city against Mexican-American residents with low incomes did not require that a three-judge court be convened. The court reasoned that the validity of California law was not drawn in question and that, furthermore, the challenge was directed not at the state’s grant of power but against the manner in which the city had exercised its power. Thus the quoted statement from the opinion of Merrill, J., is truly only dictum. For the subsequent history of the SASSO case, see Memorandum of Decision filed by District Judge Sweigert on July 31, 1970 (N.D. Cal.).


If the Supreme Court had regarded [the referendum article of the California Constitution] as a racist provision, most zoning laws would have been similarly vulnerable. This is because almost all land use controls have a tendency to raise the price of some housing, thereby impinging on the claims of the poor to suburban housing, and thus adversely affecting the interests of minority people.
specific purpose of blocking low-cost housing developments. The major zoning techniques which may have this kind of exclusionary effect are: (1) total or nearly total prohibition of mobile home developments; (2) total or nearly total prohibition of multi-family housing developments; (3) imposition of high minimum living space requirements for single-family residences; (4) imposition of high minimum lot-width requirements for lots in single-family residence zones; and (5) imposition of high minimum lot-size requirements in single-family residence zones.33

1. Exclusion of Mobile Homes—Zoning ordinances which completely or largely prohibit mobile homes have the effect of excluding the only type of housing that can realistically be regarded as low-cost housing today. The mobile home is, in fact, the only kind of unsubsidized, new, low-cost housing now generally available to low-income persons, because even medium and high density multi-family dwellings are now so expensive to construct that they are only available to low-income persons with the aid of


a public subsidy of some kind.\textsuperscript{34} Judicial response to attacks on zoning ordinances which exclude mobile homes has, however, been quite varied.

In the leading case of \textit{Vickers v. Township Committee of Gloucester Township},\textsuperscript{35} the New Jersey Supreme Court sustained a zoning ordinance which entirely excluded mobile homes from a semi-rural township of about twenty-three square miles located in Camden County. The gist of the \textit{ratio decidendi} is contained in the following passage from the majority opinion:

The township has begun to feel the effects of its potential for extensive and rapid development, and has concluded that the presence of trailer camps would hamper this potential. It believes that the prohibition of trailer camps is in keeping with the orderly growth of the township and best serves the interests of the entire municipality in its development as a desirable place in which to work and live... [W]e would be flying in the face of the broad powers granted to municipalities by the Constitution and zoning statutes as interpreted by our decisions if we held that the township in the present case must, against the will of its governing body, allow the construction and operation of trailer camps in its industrial district. Accordingly, we hold the plaintiff has failed to show the township acted unreasonably in amending its zoning ordinance to exclude trailer camps from its industrial district.

Since trailer camps are not permitted in the other districts, the effect of the amending ordinance prohibiting them in the industrial district is to bar them from the entire municipality. There are no trailer camps in the township at present. Plaintiff contends that total prohibition is illegal. However, we have held that a municipality need not provide a place for every use... We do not think that a municipality must open its borders to a use which it reasonably believes should be excluded as repugnant to its planning scheme. It must be remembered that once a use is legally established, even though conditions impel a revision of the zoning ordinance and the use strikes a jarring note, it cannot be eliminated by such a revision under existing law... If through foresight a municipality is able to anticipate the adverse effects of particular uses and its resulting actions are reasonable, it should be permitted to develop without the burdens of such uses...

Our conclusion that the township had the authority to


adopt the amendment is based upon the facts presented, the circumstances of the township today and its projected development. We have noted that the township is in a state of flux. Its ultimate character remains indeterminate. . . . We are not unmindful of the reported improvements in design and rising popularity of trailers and the accompanying increased need for trailer camps. . . . It may be that circumstances will change and trailers and trailer camps will be an appropriate use in some areas of the township. If at that time the provisions of the ordinance become unreasonable they may be set aside.36

In his vigorous and now famous dissent, Justice Hall said (inter alia):

The majority decides that this particular municipality may constitutionally say, through exercise of the zoning power, that its residents may not live in trailers—or in mobile homes, to use a more descriptive term. I am convinced such a conclusion in this case is manifestly wrong. Of even greater concern is the judicial process by which it is reached and the breadth of the rationale. The import of the holding gives almost boundless freedom to developing municipalities to erect exclusionary walls on their boundaries, according to local whim or selfish desire, and to use the zoning power for aims beyond its legitimate purposes. Prohibition of mobile home parks, although an important issue in itself, becomes, in this larger aspect, somewhat a symbol.

. . . .

Townships like Gloucester, with their vast areas of vacant land, have plenty of room in which to accommodate the variety of land uses people of all income levels and individual desires may want to enjoy. Sound planning and zoning regulation by appropriate districts can easily make such uses compatible while avoiding detrimental impact on each other. The technique is to allow for differing uses by putting them in the right places and with accompanying restrictions. . . .

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

36 Id. at 248–50, 181 A.2d at 137–38 (citations omitted).
property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendancy and courts must not be hesitant to strike down purely selfish and undemocratic enactments. I am not suggesting that every such municipality must endure a plague of locusts or suffer transition to a metropolis over night. I suggest only that regulation rather than prohibition is the appropriate technique for attaining a balanced and attractive community. The opportunity to live in the open spaces in decent housing one can afford and in the manner one desires is a vital one in a democracy.

...What restrictions like minimum house size requirements, overly large lot area regulations and complete limitation of dwellings to single family units really do is bring about community-wide economic segregation. It is a proper thing to exclude factories from residential zones to conserve property values and to encourage the most appropriate use of land throughout the municipality. It is quite another and improper thing to use zoning to control who the residents of your township will be. To reiterate, all the legitimate aspects of a desirable and balanced community can be realized by proper placing and regulation of uses, as the zoning statute contemplates, without destroying the higher value of the privilege of democratic living.\(^37\)

The fact that the United States Supreme Court denied certiorari in the *Vickers* case\(^{38}\) suggests that the Court did not think the case raised any significant issue under the fourteenth amendment. In contrast to New Jersey, the courts in Michigan have consistently struck down attempts by local governments to exclude mobile homes.\(^{39}\) Most recently, in *Bristow v. City of Woodhaven*,\(^{40}\) the Michigan Court of Appeals held invalid the provisions of a zoning ordinance which allowed trailer courts only in B-3 General Business Districts upon grant of a permit by the Board of Appeals, and which the trial court found to have the practical effect of excluding all trailer parks from the city "because the amount of land zoned B-3 is small in area and already substantially developed for commercial uses which serves to increase the vacant land price to a point where mobile home parks

\(^{37}\) Id. at 252–53, 263–66, 181 A.2d at 140, 146–47 (footnote omitted).


are not an economic alternative to other commercial uses."\(^{41}\)

Accepting this trial court finding, the appellate court held that, "since mobile home parks have, by virtue of state statute coupled with judicial precedent, been afforded a protected status, there is no longer a presumption of validity of an ordinance which operates toward their exclusion," and that the defendant city had failed to show any justification for the exclusion. Of particular significance is the following language from the appellate court's opinion:

[\text{Protection of this particular land use is of increased importance in view of the massive, nationwide housing shortage which necessitates a re-defining of the term "general welfare" as applied to justify residential zoning. That term is not a mere catchword to permit the translation of narrow desires into ordinances which discriminate against or operate to exclude certain residential uses deemed beneficial. Citizens of the general community have a right to decently placed, suitable housing within their means and such right must be a consideration in assessing the reasonableness of local zoning prescribing residential requirements or prohibitions. Such zoning may never stand where its primary purpose is shown to operate for the exclusion of a certain element of residential dwellers.\ldots}]

\ldots [\text{The strictly local interests of a municipality must yield if such conflict with the overall state interests of the public at large. This is not meant to be a complete limitation on zoning powers but rather, where certain uses are concerned, a balancing must be reached between the effect of local considerations, concerns and desires against the greater public interest.\ldots}]

[\text{Particular care should be taken that an unwanted and yet necessary use is not being "pushed off" onto a neighboring community where it may be equally unwanted. Each factor must be considered in its proper perspective. Traffic patterns are valid local interests of greater concern than aesthetics or economic uniformity. The combinations of factors are unlimited and each case must finally be decided on its peculiar factual setting.}\(^{42}\)

The Illinois appellate court has also recognized that where certain land uses are concerned, the term "general welfare" must be defined to meet the exigencies of an urbanized society, and that the need for more low-cost housing is an element which must be

\(^{41}\) Id. at 220 n.9, 192 N.W.2d at 329 n.9.

\(^{42}\) Id. at 217-18, 192 N.W.2d at 327-28 (footnote omitted).
considered in determining the reasonableness of excluding mobile homes from all or major portions of a community.\textsuperscript{43}

Neither the \textit{Vickers} dissent nor the \textit{Bristow} opinion expressly articulates a fourteenth amendment equal protection basis for striking down zoning ordinances which exclude mobile homes. Justice Hall would have invalidated the Gloucester Township ordinance on the ground that exclusion of people from the community on economic or social grounds is not within either the police power, generally, or the zoning power, specifically. The same rationale is expressed in the \textit{Bristow} opinion with somewhat more emphasis on the need to redefine the general welfare component of the zoning power to include "the overall state interests of the public at large." Yet in both cases the exclusionary zoning regulations might well have been challenged under the new equal protection doctrine developed by the United States Supreme Court in cases involving racial discrimination over the past two decades.\textsuperscript{44} As Professor Lawrence Sager has pointed out,\textsuperscript{45} "[T]here is a strong [judicial] impulse towards limiting the scope of modern equal protection doctrine. The most readily available limitation is to purposeful discriminations against racial minorities." He argues, however, that recent cases demonstrate very clearly that equal access to housing is now regarded by the Supreme Court "as a matter of the most serious social and constitutional concern," and that "Given the close relationship between residential isolation and vulnerability to governmental and private discrimination, inferior housing and education, and social immobility, this concern does not seem either surprising or misplaced."\textsuperscript{46} Hence, while this concern has been manifest mainly in the context of racial discrimination,

there is reason to expect that it will be evoked on behalf of the indigent as well. The problems and values involved are almost certainly socioeconomic as well as racial. Moreover, if there is any one area that, in addition to criminal justice and the franchise, is apt to move the Court, it is the area of severe

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{43} Lakeland Bluffs, Inc. v. County of Will, 114 Ill. App. 2d 267, 252 N.E.2d 765 (1969). It is generally held, however, that a zoning ordinance is a valid exercise of the police power when its limits mobile homes to designated mobile home parks so as to facilitate police and fire protection, to regulate health conditions, and to facilitate provision of water, sewage disposal, and lighting services. See, e.g., State v. Larson, -- Minn. --, 195 N.W.2d 180 (1972). Generally, see Bartke & Gage, supra note 34, at 496-514.
\item \textsuperscript{44} See note 30 and accompanying text supra; see also Hunter v. Erickson, 393 U.S. 385, 391-92 (1969).
\item \textsuperscript{46} Id. at 790.
\end{itemize}
\end{footnotesize}
inhibitions to social mobility and opportunity, within which area open access to housing, like education, would seem to be a matter of great importance.47

2. **Exclusion of Multi-Family Dwellings**—It is clear that total prohibition of multi-family housing developments largely deprives both low-income and lower-middle-income persons of access to new suburban housing; moreover, since most of the governmentally subsidized forms of low-income housing necessarily consist of multi-family projects, total prohibition of multi-family housing developments also excludes the poor.48 Even when multi-family dwellings are permitted in suburban areas, such dwellings are often not permitted to have more than one or two bedrooms. A common zoning restriction provides that at least 80 percent of the dwelling units in a multi-family development must have only one bedroom, with up to 20 percent permitted to have two bedrooms.49 Since lower income groups, and particularly racial and ethnic minorities in the central cities, tend to have large families and normally can afford only multi-family dwelling accommodations, it seems clear that exclusion of or restrictions on multi-family dwellings tend to perpetuate both economic and racial or ethnic segregation.50

It is clear that a municipality which already has a substantial amount of apartment development may be justified in amending its zoning ordinance so as to prohibit further apartment construction within its corporate limits.51 Nevertheless the efforts of suburban communities with substantial undeveloped land areas to exclude or to limit severely the construction of apartments present a much more difficult problem.52 Until quite recently, total

47 *Id.*

48 Williams, *supra* note 34, at 93.

49 *See*, e.g., Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971).

50 Williams, *supra* note 34, at 93. The National Commission on Urban Problems stated in its 1968 Report that of the undeveloped land zoned for residential use in the New York City metropolitan area, 99.2 percent is restricted to single-family dwellings. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 215 (1968) (hereinafter cited as BUILDING THE AMERICAN CITY). Professor Anderson found that in Westchester County, New York most of the land zoned for residential use is restricted to single-family dwellings; that multi-family dwellings are zoned out of many municipalities and provided with minimal area for construction in others; that mobile homes are excluded from nearly all municipalities; and that minimal provision is made for two-family dwellings, town houses, row houses, and the like. Anderson, *Introduction to Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971).


or substantially total exclusion of apartments from a suburban town seems not to have been successfully challenged in the courts. In *Appeal of Girsh*,\(^{53}\) however, the Pennsylvania Supreme Court in a 4–3 decision invalidated a suburban Philadelphia township's zoning ordinance insofar as it totally prohibited apartment construction. The rationale of the decision is contained in the following language from the majority opinion:

This case presents a situation where ... the Township is trying to "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live." Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find "a comfortable place to live" are for someone else to worry about. That decision is unacceptable. Statistics indicate that people are attempting to move away from the urban core areas, relieving the grossly over-crowded conditions that exist in most of our major cities. Figures show that most new jobs that are being created in urban areas, including the one here in question, are in the suburbs. ... Thus the suburbs, which at one time were merely "bedrooms" for those who worked in the urban core, are now becoming active business areas in their own right. It follows that formerly "outlying," somewhat rural communities, are becoming logical areas for development and population growth.... With improvement in regional transportation systems, these areas also are now more accessible to the central city.

In light of this, Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels. Obviously, if every municipality took that view, population spread would be completely frustrated. Municipal services must be provided *somewhere*, and if Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden. Certainly it can protect its attractive character by requiring apartments to be built in accordance with (reasonable) set-back, open space, height, and other light-and-air requirements, but it cannot refuse to make any provision for apartment living. The simple fact that someone is anxious to build apartments is strong indication that the location of this township is such that people are desirous of moving in, and

we do not believe Nether Providence can close its doors to those people.\textsuperscript{54}

It should be noted that, as in the Michigan mobile home exclusion cases, \textit{Appeal of Girsh} relies on the theory that such exclusion does not promote the general welfare and is therefore not within the police power generally, nor within the zoning power delegated to local governments by zoning enabling acts. \textit{Girsh} does not refer to the fourteenth amendment or to the equal protection clause.

3. \textit{Minimum Living Space Requirements}—The exclusionary effect of large minimum living space requirements for single-family dwellings would also appear to be quite substantial. A recent study indicates that in some counties in northern New Jersey, for example, of the vacant land which is zoned for residence and can be readily developed for that purpose, about 75 percent is zoned to require houses with at least 1,200 square feet of living space, and that substantial areas are zoned to require houses with at least 1,600 square feet of living space.\textsuperscript{55} As Professor Norman Williams, Jr., has recently pointed out:

Since space enclosed by four walls (i.e., housing) is so much more expensive than land, stiff minimum-building-size requirements obviously have the most direct impact in raising the cost of housing. A twelve-hundred-square-foot house probably now costs $30,000; obviously a lot of people can’t afford that.\textsuperscript{56}

The leading case upholding the validity of substantial minimum floor space requirements for single-family dwellings is \textit{Lionshead Lake, Inc. v. Township of Wayne}.\textsuperscript{57} After citing the \textit{Lionshead Lake} case in the recent \textit{Oakwood at Madison} case, the Superior

\textsuperscript{54} Id. at 244-45, 263 A.2d at 398-99 (citation and footnotes omitted).

\textsuperscript{55} Williams, \textit{supra} note 34, at 93. According to a 1966 survey, minimum living space requirements were included in the zoning ordinances of 292 of the 496 New Jersey municipalities with zoning ordinances on file in the State Planning Office. Williams & Wacks, \textit{Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited}, 1969 Wis. L. Rev. 827, 829 n.5. A recent survey prepared by the Bureau of the Census for the National Commission on Urban Problems indicates that nationally about 45 percent of all zoned communities (and over 50 percent of all zoned communities in Standard Metropolitan Statistical Areas) have minimum living space requirements for single-family dwellings; and that, of these zoned communities, about 7 percent require 1,000 square feet or more, nearly 30 percent require between 600 and 1,000 square feet, and only about 4 percent require less than 600 square feet. \textit{Building the American City}, \textit{supra} note 50, at 216 (Table 8).

\textsuperscript{56} Williams, \textit{supra} note 34, at 94.

\textsuperscript{57} 10 N.J. 165, 89 A.2d 693 (1952), \textit{appeal dismissed}, 344 U.S. 919 (1953), for want of a substantial federal question.

Court of New Jersey simply observed that Lionshead Lake "is controlling if, in context with the entire challenged Madison Township zoning ordinance, the minimum floor spaces of 1,500 square feet in R40 and 1,600 square feet in R80 serve the valid zoning purpose of a balanced community." In other states minimum living space requirements have had a mixed reception in the courts. The Lionshead Lake decision has been vigorously criticized in the legal periodicals. One of the most recent critics, Professor Sager, observes:

The conclusion that minimum-floor-space zoning is constitutionally justifiable only in those situations where a bona fide health and safety argument can be made has been drawn before by a few scholars, and even by a number of courts, though not in equal protection terms.

---

59 Id. at 20, 283 A.2d at 358.
62 Sager, supra note 45, at 796. Professor Sager also points out that:

As regards health and safety, there ought to be a factual showing that the required minimum can in fact substantially enhance that interest. . . . [T]he burden ought to be on the municipality once the exclusionary effect is documented.

Id. at 794. For a strong argument that the Lionshead Lake space requirements are justified on health and safety grounds, see Nolan & Horack, supra note 61. Professor Sager offers the following pertinent comments on other common justifications advanced for minimum living space requirements:

The municipal-services-and-resources argument is more easily dealt with. It is, in the context of minimum-floor-space enactments, apparently based on the notion that larger houses will be more expensive and thus productive of greater tax revenues, while at the same time the richer inhabitants will place a smaller demand on municipal services—certainly on welfare programs, possibly on schools, and possibly even on police services. Though perhaps factually accurate, this argument is of dubious constitutional merit. That municipalities are creatures of the state is longstanding dogma. It therefore seems constitutionally questionable for the state to create and sustain a system of incorporation, local taxation, and provision of services that allows radical inequalities of services and tax burdens to develop within the state. To suggest in turn that exclusionary zoning can be constitutionally justified by the municipality's desire to insulate itself from expenses that others in the state will have to bear, and moreover, to constitute itself of a population that is most able to bear those very expenses, is to proceed on rather weak ground.
4. **Minimum Lot-Width Requirements**—Excessive minimum lot-width requirements, like excessive minimum lot-area requirements, may be imposed either by a zoning ordinance or by subdivision regulations. Since frontage is expensive, normally involving at least the costs of street paving and sanitary sewers, it is clear that such requirements have a substantial effect in raising the cost of single-family housing; but the exclusionary effect of such requirements is certainly not comparable to the other devices discussed above—exclusion of mobile homes and multi-family dwellings, and imposition of large minimum living space requirements for single-family dwellings. Lot-width requirements have been upheld where they were found to be reasonable in relation to the surrounding area, and have been struck down where they deprived the landowner of all reasonable use of his land.

The third justification is the preservation of land values, which is a deceptively simple way of stating one or more of a complex of claims. When courts speak of land values they may be referring to the problem of how heavily land is to be surcharged to provide for municipal services, which has a clear effect on land value. . . . Or, what may be involved is a question of aesthetics. . . . Finally, and most directly, the issue may be one of social, or less delicately, of snob values. The proposition is simple: People like to live in exclusive neighborhoods because of the status and congeniality they may expect to derive from their neighbors (and their neighbors' large houses), and they are prepared to pay for the privilege. That the poor and near poor are more apt to be black or brown may enhance the feeling. Zoning restrictions that cater to these tastes thus increase the value of the affected property.

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

The preservation of the character and beauty of the neighborhood is anchor man on the minimum-house-size relay. Assuming aesthetic zoning to be valid, attempts to dictate beauty with standards of floor space seem hopelessly crude. . . . The a priori incompatibility of heterogeneity of size and attractiveness on a neighborhood scale would seem, in any event, a difficult argument to make out. A court might well require that a more selective and less injurious device than a minimum-house-size ordinance be employed to prevent potential visual disharmony, such as a board of architectural review. Yet another version of the aesthetics argument would rely on the incapacity of the poor to maintain their premises as well as individuals with greater resources. This claim would require empirical support of a kind very hard to come by, particularly since those of lesser means have only rarely been afforded the opportunity to live in neighborhoods to which blight is not in some way endemic. It also raises serious questions of social policy.


Williams, *supra* note 34, at 94.


5. Minimum Lot-Size Requirements—Exclusionary zoning is currently one of the most controversial subjects in the field of land use controls. The subject has produced a staggering amount of legal periodical literature in the past two or three years.\(^{66}\) Strangely, “large lot zoning” has received most of the attention of the law review writers, although large lot requirements probably do not play a major role in raising the cost of housing in suburban areas. Of course, if an entire suburban town is zoned for very large lots—three, four, or five acres—this will preclude any possibility of some inexpensive housing and thus exclude low-income persons. But if a suburban town is zoned to provide for various levels of density, the fact that a portion of the town’s area is zoned for very large lot minimums may have little significance. As Professor Williams has recently observed:

> The important question, then, is not whether part of the land in a town is zoned for one acre, two or five, or even ten, but whether a substantial part of the town is zoned to permit much less expensive housing—either garden apartments at 10 to 25 per acre, or mobile homes. If provision is made for the latter, then the largest lot size required in the rest of the town is a point of rather small significance, from the viewpoint of our concern here [with respect to exclusionary zoning]. The question on acreage zoning is not thus one of principle, but rather of the extent of its mapping.\(^{67}\)

To the extent that a suburban town zones a relatively large portion of its area for large minimum lots, there is of course a substantial exclusionary effect upon low-income persons.\(^{68}\)

\(^{66}\) See articles cited in note 33 supra.

\(^{67}\) Williams, supra note 34, at 95. Williams also points out:

> First, and most obviously, land is far less expensive than enclosed space, *i.e.*, housing. Second, while the price of land varies considerably as between communities, within a given community the price of residential building lots does not vary directly according to their size; a developer can often get almost as much for a half-acre lot as for a one-acre lot. A shift to smaller lots is thus more likely to provide a windfall for the developer than to provide much help for potential purchasers of homes.

*Id.* (footnote omitted).

\(^{68}\) The National Commission on Urban Problems indicated that 90 percent of the undeveloped land in the New York metropolitan area which is zoned for residential uses is subject to minimum lot size requirements of one-quarter acre or more, and that two-thirds of this land is subject to lot minimums of at least one-half acre; that in Connecticut more than 50 percent of the vacant land zoned for residential use in the entire state is subject to minimum lot size requirements of one to two acres, with Greenwich (close to New York City) having more than 80 percent of its total undeveloped area zoned for minimum lots of one acre or more; and that in Cuyahoga County, Ohio, which contains the City of Cleveland, some 85,200 acres of vacant land are zoned for single-family dwellings, with 33 percent of this vacant land zoned for minimum lots of one-half acre or less, 50 percent zoned for minimum lots of one to two acres, and 17 percent zoned for minimum lots of two acres or more. *Building the American City*, supra note 50, at 214–15.
Until recently, large lot requirements have been judicially sustained in most states without much difficulty. The first case upholding such requirements was *Simon v. Town of Needham*, where the Massachusetts Supreme Court sustained a requirement of one acre lot minimums in a single-family district covering "nearly all of the south side of the town." The court stated:

The establishment of a neighborhood of homes in such a way as to avoid congestion in the streets, to secure safety from fire and other dangers, to prevent overcrowding of land, to obtain adequate light, air and sunshine, and to enable it to be furnished with transportation, water, light, sewer and other public necessities, which when established would tend to improve and beautify the town and would harmonize with the natural characteristics of the locality, could be materially facilitated by a regulation that prescribed a reasonable minimum area for house lots.

The advantages enjoyed by those living in one family dwellings located upon an acre lot might be thought to exceed those possessed by persons living upon a lot of ten thousand square feet. More freedom from noise and traffic might result. The danger from fire from outside sources might be reduced. A better opportunity for rest and relaxation might be afforded. Greater facilities for children to play on the premises and not in the streets would be available.

The *Simon* opinion contains a significant dictum which anticipates by three decades the objections currently being made with respect to large lot-size requirements:

The expense that might be incurred by a town in furnishing police and fire protection, the construction and maintenance of public ways, schoolhouses, water mains and sewers and other public conveniences might be considered as an element,

---


71 Id. at 563, 254 A.2d at 518, 141 A.L.R. at 691.
more or less incidentally involved, in the adoption of a zoning by-law that will promote the health, safety, convenience, morals or welfare of the inhabitants of the town without imposing any unreasonable and arbitrary burden upon the landowners. A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed, nor for the purpose of protecting the large estates already located in the district. The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large, and in such instances the interest of the "municipality would not be allowed to stand in the way." Euclid v. Ambler Realty Co., 272 U.S. 365, 390.

Most of the later cases upholding lot minimums of from one to five acres rely on justifications like those stated in the Simon case. These include protection of health and safety, the need to avoid surcharge of public services and revenues, preservation of land values, aesthetic considerations and preservation of the "character of the community." Two recent Pennsylvania cases may,

72 Id. at 565-66, 42 N.E.2d at 519, 41 A.L.R. at 692.

73 Professor Sager's comment on the conventional justifications is as follows:

The health and safety claim here relates to density of land use rather than density of building occupancy. Accordingly, it is apt to be somewhat easier to appraise the claim, and it is more likely to be found wanting. A relatively low minimum lot size can probably be demonstrated to be substantially adequate, and at some point along the way to 5-acre zoning the argument will simply be dismissible as frivolous.

On the other hand, the relationship between lot size and the surcharge on public services that may result from a great influx of urban population is quite strong. The restraint on the number of households effectuated by large-lot-size restrictions is a restraint on the total demand for services and may permit the more rational and systematic absorption of new residents. But this argument implies a planned and controlled change of the affected area, not a firm posture of opposition to change. In order to invoke it, the municipality would have to demonstrate that its exclusionary posture was temporary, a planned phase of development, and not one which by design, inertia, or establishment of land-ownership patterns would become permanent.

The property-value argument here is resolvable into very much the same components examined in the context of minimum-floor-space enactments. . . . That returns the discussion to aesthetics. It is this part of the analysis that makes the justifiability of minimum-lot-size zoning much harder to discount. Strong arguments can be made that even very large minimums, say of 5 acres, contribute substantially to the beauty of an area and may serve to preserve its distinctive character, whether it be formed of large aging estates or is essentially rural. However, this last argument can be turned against exclusionary zoning as well. The special character or beauty of a neighborhood is a kind of resource, the denial of which raises to special prominence the desirability complaint of the excluded. The response on behalf of the municipality, of course, is that without lot-size zoning the resource will be destroyed and the discussion of its distribution rendered moot.

Sager, supra note 45, at 796-97 (footnote omitted).
however, signal the beginning of a period when courts will exam-
mine more critically the usual arguments advanced in support of
large lot requirements.

In *National Land and Investment Co. v. Easttown Township
Board of Adjustment*, the Pennsylvania Supreme Court in a 5–2
decision struck down the four-acre minimums imposed by the
township ordinance as "unreasonable" and therefore uncon-
stitutional on due process grounds. The court said:

Although there was some evidence in the record that lots of
four acres or more could eventually be sold, it is clear that
there is not a readily available market for such offerings.

Against this deprivation of value, the alleged public pur-
poses cited as justification for the imposition of a four acre
minimum area requirement upon appellees' land must be ex-
amined.

In the course of this examination, the court expressly rejected the
township's arguments that (1) the four acre minimum was neces-
sary to insure proper sewage disposal in the township and to
protect township water from pollution; (2) the township roads
were inadequate to handle traffic generated by land development
on one acre lots; (3) four acre minimums were necessary to
preserve the "character" of the community.

In *Appeal of Concord Township (Kit-Mar Builders, Inc.),*
the Pennsylvania court held in a 4–3 decision that "[t]he two and
three acre minimums imposed in this case are no more reasonable
than the four acre requirement struck down in *National Land,*," and therefore were unconstitutional. The essence of the majority's
position is found in the following excerpt from the opinion:

We in effect held in *National Land* that because there were
alternative methods for dealing with nearly all the problems
that attend a growth in population, including sewage prob-
lems, zoning which had an exclusive purpose or effect could
not be allowed. . . .

. . . We once again reaffirm our past authority and refuse to
allow the township to do precisely what we have never per-
mitted—keep out people, rather than make community im-
provements.

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 adopt-

---

75 Id. at 524–25, 215 A.2d at 608.
77 Id. at 470–71, 268 A.2d at 766.
ing 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. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.

... Neither Concord Township nor Easttown Township nor any other local governing unit may retreat behind a cover of exclusive zoning. We fully realize that the overall solution to these problems lies with greater regional planning; but until the time comes that we have such a system we must confront the situation as it is. The power currently resides in the hands of each local governing unit, and we will not tolerate their abusing that power in attempting to zone out growth at the expense of neighboring communities.78

It should be noted that, whereas the National Land decision is actually based on due process grounds, Kit-Mar seems to be based more on the idea that exclusionary zoning does not promote the general welfare of the state and region, and consequently is not within the zoning power delegated to local governmental units. Neither opinion makes any overt reference to equal protection objections. The regional planning called for in Kit-Mar provided the basis for the two-acre lot minimums upheld in Norbeck Village Joint Venture v. Montgomery County Council,79 and was clearly the factor that justified the large lot minimums despite their exclusionary effect.

In Oakwood at Madison, Inc. v. Township of Madison,80 the New Jersey Superior Court recently struck down a local zoning ordinance which embodied most of the exclusionary zoning practices previously referred to—a substantially complete exclusion of apartment construction, with severe size limitations on apartments in the small areas where apartment construction was permitted; high minimum living space requirements for single-family houses; and minimum lot sizes of either one or two acres throughout most of the remaining undeveloped land which was zoned for single-family residences. Although the court rejected a challenge

78 Id. at 473–76, 268 A.2d at 768–69 (Roberts, J.) (citation and footnote omitted).
to the New Jersey zoning enabling act based on the argument that it fails explicitly to include provision of needed housing as a purpose of local zoning, the court held that the Madison Township ordinance was invalid on the following grounds:

About 8000 acres of land, apparently prime for low or moderate housing development, have been taken out of the reach of 90% of the population, prohibitive in land and construction costs. The acreage available for multi-family apartments units is miniscule. Families with more than one child are barred from multi-family apartments because of the one and two bedroom restrictions, restrictions without any guise of a health or safety purpose.

The exclusionary approach in the ordinance under attack coincides in time with desperate housing needs in the country and region and expanding programs, federal and state, for subsidized housing for low income families.

. . . .

In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned, as Madison Township has, into such minimum lot sizes and with other restrictions that regional as well as local housing needs are shunted aside.81

III. EXCLUSIONARY EFFECTS OF SUBDIVISION CONTROLS

Of the exclusionary zoning practices discussed above in part II of this article, only minimum lot-width and minimum lot-size requirements can also be imposed by means of subdivision controls. Of course, to the extent that excessive requirements of these kinds in a zoning ordinance are invalid because their exclusionary effect is incompatible with equal protection or general welfare concepts, such requirements will be equally invalid if embodied in local subdivision regulations instead of in the local zoning ordinance. Yet none of the major exclusionary zoning practices—exclusion of mobile homes and apartments and excessive minimum living space requirements for single-family dwellings—is authorized by any of the subdivision control en-

81 Id. at 20-21, 283 A.2d at 358.
abling acts; these acts do not deal at all with the basic allocation of land uses and building types within a local governmental unit. This basic allocation is controlled by the local zoning ordinance.\(^{82}\)

Thus it seems clear that subdivision controls have a substantial effect in excluding potential residents from suburban communities only to the extent that they indirectly increase the cost of suburban housing. Generally speaking, subdivision control enabling acts give local planning boards or governing bodies the power to refuse subdivision approval only where a subdivider fails to comply with requirements imposed by the local subdivision regulations,\(^{83}\) and the net effect of compliance with these regulations is simply to increase the cost of the housing constructed in the subdivision in comparison with the costs that might obtain in the absence of such regulations.

Occasionally, of course, the costs imposed upon a subdivider in order to comply with the local subdivision regulations may lead him to decide not to develop land in a particular community, and this decision will have at least a temporary exclusionary effect. Occasionally, also, local officials may refuse subdivision approval on the broad ground that subdivision development will place an undue burden upon public services generally, or upon particular public services such as sewage disposal or school facilities. If it can be shown that the refusal to approve a subdivision is truly motivated by racial prejudice rather than by the stated reason, the courts should, of course, set aside the local action as they did in Dailey v. City of Lawton\(^{84}\) and Kennedy Park Homes Association, Inc. v. City of Lackawanna,\(^{85}\) two of the zoning cases cited in the previously mentioned Journal article in support of the proposition that a municipality may "not use zoning procedures to effectuate the discriminatory goals of its residents."\(^{86}\) Even where proof of discriminatory intent is not clear, subdivision approval should be judicially compelled if the effect of a refusal to approve will clearly include racially discriminatory effects, as was arguably the situation in the Kennedy Park Homes case. Such discriminatory effect is, however, not likely to be demonstrable very often in subdivision control cases. Furthermore, the courts are likely to strike down local action in refusing to approve subdivisions on the simple ground that the enabling act does not authorize rejection of the subdivision for the reasons given by the local

\(^{82}\) See discussion in part I supra.
\(^{83}\) SCPEA, supra note 12, § 14.
\(^{84}\) 425 F.2d 1037 (10th Cir. 1970).
\(^{85}\) 436 F.2d 108 (2d Cir. 1970).
\(^{86}\) Comment, supra note 24, at 358.
Zoning and Subdivision Control

There is no doubt that the cost of housing is very high in comparison with most of the other components of the American cost of living index, and that the cost of housing has been rising more rapidly than most other items in that index. It is also true that the single most dramatic increase in the cost of a major component of new housing has occurred in site costs, which consist of the costs of land acquisition and site improvement. Site improvement costs are incurred in preparing a site for building and in providing required facilities for servicing the structure once erected. Where land is newly subdivided, site improvement costs will usually include not only the costs involved in preparing the site itself for the building—clearing, excavating, grading, landscaping, and the like—but also the costs of providing streets, curbs, sidewalks, gutters, street lighting, sewers, and a variety of other facilities required by subdivision regulations. Site improvement costs may well be larger in certain instances than land acquisition costs. Such costs vary with the geographical nature of the area and characteristics of the terrain on which the particular housing project is located. In most localities, however, more important than peculiar geographical conditions are the requirements of local subdivision regulations which prescribe standards for streets, curbs, and other physical improvements, and which may also require that land be dedicated to public use, or fees be paid in lieu of dedication, to provide open space for playgrounds, parks, or school sites. Site improvement costs also depend to some extent on the size of lots, and more particularly on the width

87 See SCPEA, supra note 12, § 14.
88 Useful data on housing costs are surprisingly scarce. In part, this is attributable to the difficulties of comparing figures for different builders and different projects and to the fact that most builders produce only a small number of units each year. In addition, there is no central source which attempts to collect and disseminate detailed cost statistics.

BUILDING THE AMERICAN CITY, supra note 50, at 418.
89 Id. at 422.
90 Id. at 423.
91 Id. at 424.
of lots. Lot width determines the number of linear feet of street improvements required to service one house, and each additional foot results in added costs.

Having said all this, however, it still remains true that in most parts of the United States all site costs, including site improvement costs and land acquisition costs, represent a relatively small percentage of the total cost of new housing. The average total site cost including land acquisition costs for single-family houses insured under Section 203 of the National Housing Act in 1966 was not quite 20 percent of total cost, and ranged from 11.1 percent in Idaho to 26.1 percent in California. Yet in 1966-67 site improvement costs in selected single-family developments averaged only 8 percent of the total selling price of such houses in California, 9.8 percent in the Midwest, and 12.9 percent in the Northeast. In multi-family developments assisted by the U.S. Department of Housing and Urban Development (HUD) and begun in 1966, total site costs per unit constituted only 18 percent of the total development expenses of the highest cost project, 14 percent of the total development expenses of the median cost project, and 3 percent of the total development expenses of the lowest cost project. During the period from 1962 to 1966, site improvement costs for eighty-seven selected HUD-assisted multi-family projects ranged from a high of 17.1 percent of total development expenses, to a low of 0.1 percent of total development expenses, with a median site improvement cost of 5.9 percent of total development expenses.

Since only a portion of the site improvement expense can be attributed to subdivision regulations, which in many instances are not applicable to apartment developments, it is apparent that the total impact of subdivision regulations upon housing costs is relatively minor. It would therefore seem clear that the usual types of subdivision regulations requiring the subdivider to make various physical improvements on the land and to dedicate land for streets (and perhaps for other public uses) cannot be regarded as having a serious exclusionary effect with respect to low-income and lower-middle-income persons who would like to move into subur-

---

94 BUILDING THE AMERICAN CITY, supra note 50, at 422 (1968).
95 Id. at 418 (Table 1).
96 Id. at 420 (Table 5).
97 Id. at 421 (Table 7).
98 Subdivision regulations will not be applicable to apartment developments unless (a) the developer prefers to subdivide his tract into several lots, or (b) the zoning ordinance requires each apartment building to be on a separate lot, so that the developer is compelled to subdivide in order to comply with the zoning ordinance.
ban areas. Moreover, most of the addition to the cost of housing attributable to subdivision regulations is clearly justifiable on the basis of health, safety and environmental considerations and only a small portion thereof can be assumed to represent excessive subdivision requirements. Even if subdivision regulations did not usually require the subdivider to pay initially for required improvements in the subdivision, these would still be needed, and the purchasers of subdivision lots would normally be required to pay for such improvements by means of special assessments. Indeed, the trend in the state courts is now clearly in favor of upholding even the more burdensome subdivision exactions of land, or money payments in lieu of land, to provide for playgrounds, parks, and school sites, although such facilities have not traditionally been financed on a special assessment basis. 99

IV. STATE AND REGIONAL LAND USE CONTROL

Exclusion of the poor, white or nonwhite, from the suburban areas of metropolitan regions where most of the presently undeveloped land is located and most of the new job opportunities exist, is a serious national problem. There is, however, no evidence that subdivision controls have played a substantial role in bringing about this exclusion. There is considerable evidence, on the other hand, that exclusionary zoning practices of the types discussed in this article have played a major part in excluding the poor from the suburbs. It is nevertheless unlikely that sporadic federal court action in striking down particular zoning ordinance provisions in cases like *Dailey v. City of Lawton* 100 and *Kennedy Park Homes Association v. City of Lackawanna*, 101 where racially dis-

---

99 See cases cited in note 92 supra. In Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642, the California Supreme Court stated:

It may come to pass, as Associated states, that subdividers will transfer the cost of the dedicated land or the in-lieu fee to the consumers who ultimately purchase homes in the subdivision, thereby to some extent increasing the price of houses to newcomers. While we recognize the ominous possibility that the contributions required by a city can be deliberately set unreasonably high in order to prevent the influx of economically depressed persons into the community, a circumstance which would present serious social and legal problems, there is nothing to indicate that the enactments of Walnut Creek in the present case raise such a spectre. The desirability of encouraging developers to build low-cost housing cannot be denied and unreasonable exactions could defeat this object, but these considerations must be balanced against the phenomenon of the appallingly rapid disappearance of open areas in and around our cities.

100 425 F.2d 1037 (10th Cir. 1970).
101 436 F.2d 108 (2d Cir. 1970).
criminatory motivation was alleged and proved, will provide an effective solution to the problem of exclusionary zoning. It also seems unlikely that the United States Supreme Court will extend its new equal protection doctrines to cases where exclusionary zoning brings about segregation on an economic basis rather than on a racial or ethnic basis. In any case, judicial action, whether by the federal courts on an equal protection theory or by the state courts on the basis of a redefinition of general welfare, cannot deal effectively with the massive effects of suburban zoning which largely excludes the only types of housing within the financial reach of poor people. As the Pennsylvania Supreme Court recognized in Appeal of Concord Township (Kit-Mar Builders, Inc.), "the overall solution to these problems lies with greater regional planning"—and, it should be added, regional planning with a stronger basis in state law and with stronger tools for the implementation of plans than now exist in most states.

The need for land-use control machinery at the regional or state level has frequently been mentioned by the courts. The Standard State Zoning Enabling Act conferred zoning power only on "cities and incorporated villages," with the comment that this "includes those municipalities which ordinarily will find it advantageous to be given zoning powers." The enormous growth of urban population since World War II makes it clear, however, that the municipality is no longer an appropriate territorial unit for making certain major land-use decisions. In 1960 some 125 million Americans—some 73 percent of the total population—lived in "urban" areas, and 113 million of them—some 63 percent of the total population—lived in 121 Standard Metropolitan Statistical Areas which contained 225 central cities, 310 counties, and the staggering total of 4,142 municipalities. Of these 4,142 separate municipalities, 2,548 were located in the central part of their respective Standard Metropolitan Statistical Areas and 1,594 were located in the outlying portions thereof. Since 1960 the concentration of population in metropolitan areas has, of course, increased. It is obvious that with the existing fragmentation of local governmental power in metropolitan areas, land-use planning and

104 SSZEA, supra note 5, § 1 & n.5.
zoning on a purely municipal basis cannot achieve anything more than a haphazard and uncoordinated pattern of land use within the metropolitan areas.

In theory, the county offers a greater opportunity for unified and rational planning and zoning of urban areas. Some thirty-seven states currently have county zoning enabling acts;\(^{107}\) most states have county planning enabling legislation; and at least nineteen states have county subdivision control enabling acts.\(^{108}\) The county, however, is generally unable to perform urban land-use control functions effectively in metropolitan areas because: (1) it cannot zone areas within municipal boundaries; (2) many metropolitan areas contain two or more counties or parts of counties; and (3) the administrations of most counties are not adequately organized to perform urban planning and zoning functions.\(^{109}\)

Extraterritorial zoning by municipal governing bodies has been relatively little used and is impossible where, as in many metropolitan areas, most of the land within the areas is already within the corporate limits of one municipality or another. Moreover, extraterritorial zoning raises the fundamental question whether constitutional theory permits a municipality's imposition of legislative land-use policies outside its municipal limits upon citizens who have no voice in determining such policies.\(^{110}\)

An apparently obvious solution of the problem is the establishment of metropolitan regional governments with comprehensive land-use planning and zoning powers. At the present time, however, only three such governments exist in the United States,\(^{111}\) and the prospects for establishment of others are not encouraging.\(^{112}\) Nevertheless much could be done to rationalize and improve land-use controls in metropolitan areas if enabling legislation were revised to make the creation of metropolitan regional planning agencies mandatory, if such agencies were adequately staffed and funded, and if all municipal zoning regulations were required by law to conform to a comprehensive regional land-use plan. In some states, statewide land-use plans might be necessary, with all municipal and county zoning regulations required to be in accordance therewith.

---

107 Cunningham, supra note 12, at 369 n.3.
108 Id. at 419 n.247.
109 Id. at 406 n.195.
110 Id. at 406 nn.196, 197.
111 Miami-Dade County, Florida; Nashville-Davidson County, Tennessee; and Indianapolis-Marion County, Indiana.
112 Cunningham, supra note 12, at 407 n.199.
In response to pressure for movement of land-use planning and zoning powers to a higher level of government, several states recently either have established comprehensive statewide land-use controls or have given state agencies power to control certain critical types of land use. Hawaii undertook the first and most far-reaching change in the traditional pattern of local land-use control. In 1961 statewide zoning power was given to Hawaii's State Land Use Commission.\footnote{Hawaii Rev. Stat. ch. 205 (1968), as amended, (Supp. 1971).} Under the 1961 legislation the Commission has divided the entire state into four zones: urban, rural, agricultural, and conservation. County agencies have substantial authority to delineate permissible uses within the boundaries of some zones, subject to the general regulatory power of the Commission. Enforcement of the zoning regulations in all zones is the responsibility of the counties, since the Commission has no enforcement powers.

Responding to pressures from a second-home boom and several major industrial developments in recent years, Vermont has created a state board which, with the help of nine District Commissions, will ultimately administer a statewide land-use plan.\footnote{VT. Stat. Ann. tit. 10, §§ 6001–6091 (Supp. 1971).} Residential, commercial, and industrial developments on sites of more than ten acres must obtain state permits under the Vermont legislation; if a municipality having jurisdiction of the site has not adopted permanent zoning and subdivision control regulations, a permit must be obtained from the state for any development on a site of one acre or more.

A proposed revision of the New Jersey land-use control enabling legislation, introduced in 1969 but never enacted,\footnote{N.J. Sen. No. 803 (1969).} contains significant provisions for state-level planning and development controls and would provide for creation of regional planning boards and zoning boards of adjustment. Similar proposals are embodied in the New York State Planning Law Revision Study (1969),\footnote{new York Office of Planning Coordination, New York State Planning Law Revision Study (1970).} some or all of which has been put into bill form and introduced for study purposes in recent legislative sessions.\footnote{The proposed bill is noted in Golden v. Planning Bd., 30 N.Y.2d at 379–80, 285 N.E.2d at 302–03, 334 N.Y.S.2d at 153.} And in response to the 1972 Report of the Governor of Michigan's Special Commission on Land Use,\footnote{Governor's Special Commission on Land Use, Report (1972).} there now exists in
preliminary draft form an Omnibus Land Use and Development Act which would create in Michigan a state land-use commission, a state land-use plan, regional land-use commissions, and county land development plans. The state land-use commission would control any "development of state impact," including "development for housing for persons of low and moderate income by any person receiving state or federal aid for such development."¹¹⁹

Another approach to the problems of exclusionary zoning and providing housing for the poor in suburban areas is New York's recent creation of its Urban Development Corporation (NYUDC).¹²⁰ NYUDC has the power to plan, fund, and execute housing projects and, if necessary in order to accomplish its purposes, to override local zoning ordinances, building codes, and other local land-use controls.¹²¹ NYUDC also has the power of eminent domain¹²² and the power to relocate persons displaced by its housing developments.¹²³ It is exempt from local property taxes on the increased valuation of land after acquisition but is liable for assessments to fund local improvements.¹²⁴ Additionally NYUDC is empowered to sue and be sued, to create subsidiaries, to lend or give funds to subsidiaries, to enter into contracts, and to issue general revenue bonds.¹²⁵

Although NYUDC has the power to override local zoning regulations and to condemn land for its projects, in the first three years of operation it has attempted to play down the "bully with a big stick" image by cooperating with local governments and citizen groups in order to develop local commitment to each project.¹²⁶ NYUDC President Edward Logue has recommended that generally no more than 5 percent of a suburban community's housing be housing for persons with low incomes, in order to reduce the burden on municipal facilities and revenues.¹²⁷ Nevertheless, not everyone has been satisfied with this cautious approach. Demonstrations have been held at the NYUDC offices by urban activists charging that NYUDC is impeding, rather than

¹¹⁹ The revised preliminary draft of the bill, dated Nov. 9, 1972, is unpublished. A copy of the bill is on file with the author.
¹²¹ Id. § 6266(3).
¹²² Id. § 6255(7).
¹²³ Id. § 6260(e).
¹²⁴ Id. § 6272.
¹²⁵ Id. §§ 6255, 6262, 6268.
¹²⁷ Logue, Are Cities a Bust?, LOOK MAGAZINE, Apr. 1, 1969, at 70.
promoting, the growth of low- and middle-income housing by its cautious policies.\textsuperscript{128} Very recently, however, suburban opposition to proposed low- and middle-income housing projects in Westchester County has become quite intense, and Governor Rockefeller imposed a temporary moratorium on these projects.\textsuperscript{129}

The 1972 \textit{Report of the Governor of Michigan's Special Commission on Land Use} recommended, \textit{inter alia}, that the State Housing Development Authority should be expanded to function as a "community development corporation . . . designed to facilitate large-scale community development projects, including housing, schools, and commercial and industrial facilities . . . ."\textsuperscript{130} It would appear that the New York Urban Development Corporation is the model for the proposed expansion of the powers of the existing Michigan Housing Development Authority.

\section*{V. Other Considerations}

Even if a state could eliminate all exclusionary zoning practices by means of state or regional land-use control agencies or development agencies, the problem of providing truly low-cost housing would still remain unsolved. Much of the current excessive cost of housing construction is a result of the inability of the construction industry to develop effective mass production techniques, the retention in most communities of local building codes which prevent the use of less costly materials and improved construction techniques, and the restrictive practices of the construction trade unions. These factors certainly contribute very substantially to the "structure costs" which, in the case of selected single-family developments in 1966-67 averaged 41.8 percent of the total selling price of houses in California, 58.6 percent in the Midwest, 51 percent in the Northeast, and 61.7 percent in the South.\textsuperscript{131} A study of eighty-seven selected HUD-assisted multi-family projects during the period from 1962 to 1966 revealed that structure costs ranged from a high of 80.2 percent to a low of 49.5 percent of the total project expenses, with a median of 68.4 percent.\textsuperscript{132}

The primitive "handicraft" technology of the American home-

\textsuperscript{129} Greenhouse, \textit{State Low-Income Housing Plan is at a Standstill in Westchester}, N.Y. Times, Nov. 6, 1972, at 24, col. 1.
\textsuperscript{130} \textit{GOVERNOR'S SPECIAL COMMISSION ON LAND USE, REPORT 6 (Recommendation 11)} (1972).
\textsuperscript{131} \textit{BUILDING THE AMERICAN CITY, supra} note 50, at 418 (Table 1).
\textsuperscript{132} \textit{Id.} at 421 (Table 7).
building industry is partly a result of the nature of the industry itself. The building industry is a loose conglomeration of small participants who come together on a project-by-project basis. The initiator of the construction process brings together architects, engineers, and a general contractor for a given building development. In the past almost all private residential building was initiated by a merchant-builder, who built a small number of units for sale, or by an individual lot owner, who contracted for the construction of a single house for his own use. Although this pattern continues to predominate, the construction function in recent years has often been separated from the development function. The developer buys land, plans its development, and subdivides it where necessary; he then calls in builders to perform the construction function. The typical building contractor still builds only a few houses each year and farms out a large part of the work to specialized subcontractors. Generally speaking, the contractor’s organization is assembled for one project only. Moreover, the building industry is composed of thousands of small firms, a majority of which consists of sole proprietorships with few full-time employees. The volatility of the industry is reflected by its extraordinarily high rate of business failures.

The nature of the American homebuilding industry, as outlined above, precludes the expenditure of substantial sums of money for research on improved construction technology. In any case, obsolete and widely varying building codes in most localities preclude easy and rapid shifts to new methods of construction utilizing specialized structural and mechanical components assembled at offsite locations, as well as offsite construction of most elements of the frame or shell of buildings, or offsite construction of entire houses in large sections. Reductions in costs through offsite construction techniques are possible for several reasons: (1) labor costs per unit of output are usually reduced; (2) since a much larger proportion of the work is done under cover, less time is lost and less cost incurred because of bad weather; and (3) the prefabrication process itself can save a great deal of time.

One of the major reasons for high costs in the traditional onsite construction process is the high cost of labor. The labor force consists of skilled craftsmen, usually members of construction trade unions. The onsite nature of the construction process makes employment subject to substantial seasonal variation and to in-
terruptions at almost any time because of weather conditions. And the nature of the construction industry itself—highly fragmented and organized on a project-by-project basis—makes for much uncertainty as to the amount and duration of employment. As a result, hourly wage rates are very high compared to prevailing rates in many of the more "industrialized" industries. Moreover, the construction trade unions have generally been vigorously opposed to adoption of offsite construction techniques and have often prevented cost savings through the use of such techniques by refusing to handle prefabricated units or by insisting that they be torn apart and reassembled onsite by union members.\footnote{See Woodwork Manufacturers v. NLRB, 386 U.S. 612 (1967).}

The factors discussed in the preceding three paragraphs clearly constitute much more significant obstacles to production of true low-cost housing than the housing costs resulting from local subdivision regulations. Any serious attempt to deal with the problem of housing the poor must, therefore, include efforts to eliminate these factors, as well as efforts to eliminate the exclusionary zoning practices discussed in detail in an earlier portion of this article.