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NOTES

The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning

Cases of alleged exclusionary zoning\(^1\) have prompted much discussion of numerous issues of substance\(^2\) and procedure.\(^3\) Until recently, though, little attention has been directed toward the problems that a court may encounter when it must fashion an appropriate remedy for a plaintiff who successfully demonstrates the existence of unlawful zoning. When a plaintiff's aim is to build low- or moderate-income housing upon a specific plot of land and he seeks, as a first step, to have restrictions on that land invalidated on exclusionary zoning grounds, courts have little difficulty framing a remedial decree with reference to the particular plot.\(^4\) In the past few years, however,

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1. No precise definition of “exclusionary zoning” will be attempted. The term refers, in general, to schemes of zoning that have either the purpose or effect of excluding or sharply limiting low- and moderate-priced housing from the municipality in question, and thus that exclude persons of low or moderate income. See generally Burns, Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor, 2 HAST. CONST. L.Q. 179 (1975).

2. Successful attacks have been made on a number of zoning ordinance features, including minimum acreage requirements, minimum floor-space requirements, minimum frontage requirements, and total exclusion of certain uses (for instance, apartments or mobile homes) from the municipality. See generally E. Berman, Eliminating Exclusionary Zoning (1974). In many cases an equal protection argument has been advanced. See Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 STAN. L. REV. 767 (1969); Note, Exclusionary Zoning and Equal Protection, 84 HARV. L. REV. 1645 (1971); Note, The Equal Protection Clause and Exclusionary Zoning After Valierra and Dandridge, 81 YALE L.J. 61 (1971). In a few cases, plaintiffs have alleged an infringement on their right to travel. See, e.g., Construction Indus. Assn. of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975). See generally Fielding, The Right To Travel: Another Constitutional Standard for Local Land Use Regulation?, 39 U. CIN. L. REV. 612 (1972). In other cases, a state constitutional provision has been advanced as a basis for decision. See, e.g., Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), appeal dismissed, 423 U.S. 808 (1975). For a compilation of cases decided on these and other grounds, see Annot., 48 A.L.R.3d 1210 (1973).

3. The most important issue of procedure that has affected exclusionary zoning cases is a recent Supreme Court decision, Warth v. Seldin, 422 U.S. 490 (1975), which may have sharply limited access to federal courts for nonresident plaintiffs charging a municipality with exclusionary zoning, by mandating that a plaintiff challenging exclusionary zoning practices must allege facts demonstrating that the challenged practices personally harmed the plaintiff. See text at notes 91-99 infra.

4. The remedial question in most cases has been confined to a consideration of whether to make limited adjustments for specific proposed uses. See cases cited in notes 19-28 infra. Most articles that discuss remedies in such cases have done so in what amount to postscripts to arguments for finding exclusionary zoning unconstitutional. See sources cited in note 114 infra. Nevertheless, a few recent discussions...
plaintiffs such as the N.A.A.C.P., who act on behalf of individuals of below-average means have sought to "open" a municipality by having its zoning ordinance judicially altered to permit multi-unit housing projects. Because such plaintiffs often have no property interests in the community, or at least have no plans to build on any particular plots, courts attempting to fashion remedies have confronted the possibility of rezoning entire municipalities.

One court that recently faced this situation intimated a willingness to afford community-wide relief to plaintiffs who successfully challenge entire zoning ordinances on exclusionary grounds. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, the New Jersey supreme court considered a challenge to a township ordinance that effectively excluded low- and moderate-income families by (1) allocating excessive amounts of land to industrial use, (2) limiting all residential areas to single family dwellings, and (3) imposing either minimum acreage, floor area and lot width requirements or cluster-development density limitations on the residential areas. The court determined that Mount Laurel's conduct was occasioned by a desire to attract only high tax ratables to the area, to hold down the cost of municipal services, and, in general, to exclude from the community those persons who lacked the income and resources necessary to purchase relatively large, single-family homes. The court found the township's exclusionary efforts unlawful as a matter of state constitutional law and thus had no call to consider the federal constitutional grounds urged by the plaintiffs. In the court's view, the New Jersey constitution required that all municipal zoning practices promote the public health, safety, morals, or general welfare, with "general" welfare broadly defined: "[T]he universal and constant need

have criticized judicial practices in fashioning remedies. *See, e.g., Note, A Wrong Without a Remedy: Judicial Approaches to Exclusionary Zoning, 6 Rutgers-Camden L.J. 727 (1975); Note, Beyond Invalida#on: The Judicial Power To Zone, 9 Urb. L. Annual 159 (1975).*


6. The court noted that while 4,121 acres, 30 per cent of the total municipal acreage, were zoned for industry, only about 100 acres were actually being used for industrial purposes; the balance remained vacant. 67 N.J. at 162-63, 336 A.2d at 719.

7. 67 N.J. at 163, 336 A.2d at 719. One apartment complex had been approved by the town, but it was limited to persons over the age of 52, with no more than three residents permitted in any one unit. 67 N.J. at 168-69, 336 A.2d at 722.

8. New Jersey has no state income tax; hence, local real-estate taxes bear most of the burden of local governmental and educational costs. 67 N.J. at 171, 336 A.2d at 723.

9. The New Jersey constitution allows the enactment of zoning laws as a function of the police power, N.J. Const. art. 4, § VI, para. 2, but it says nothing about
for [low- and moderate-income] housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. Each developing municipality, the court stated, "must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." The amount of land devoted to a particular type of housing was to be determined by the municipality's "fair share" of regional needs.

The trial court in Mount Laurel had invalidated the entire ordinance and ordered the township to formulate a plan of affirmative action to encourage the satisfaction of low- and moderate-income housing needs. The New Jersey supreme court modified this remedial decree in two respects. First, it declared that the zoning ordinance was invalid "only to the extent and in the particulars set forth in this opinion," a declaration of uncertain effect because, in the course of its opinion, the court mentioned most of the ordinance's features. Second, the court vacated the lower court's order for preparation and submission of a rezoning plan and, instead, offered the township an opportunity to remedy the defects in the ordinance without "judicial supervision." The court concluded by warning that "should Mount Laurel not perform as we expect, further judicial action may be sought by supplemental pleading in this cause." This final caveat suggests that, if the township does not respond to judicial exhortations to rezone for low- and moderate-income dwellings, the court itself will play a more active role in directing broad-based rezoning. However, the court's vague admonition contains no hint of the specific actions that it will take in these circumstances.

the "general welfare." Justice Hall, however, asserted that this requirement could be found in paragraph 1 of article 1, which demands that all police power regulation conform to substantive due process and equal protection guidelines. The requirement of general welfare is explicitly stated in the enabling legislation, N.J. STAT. ANN. § 40:55-32 (1964), but Justice Hall took pains to emphasize a constitutional basis for his decision. 67 N.J. at 174-75, 336 A.2d at 725. Justice Mountain, concurring, relied solely upon the statutory requirement, finding resort to the constitution unnecessary.

11. 67 NJ. at 187, 336 A.2d at 731-32.
12. The court recognized that a determination of the region might vary from situation to situation. However, in this case it had no difficulty defining the appropriate region as those portions of three counties within twenty miles of Camden City. 67 NJ. at 189-90, 336 A.2d at 733.
14. 67 NJ. at 191, 336 A.2d at 734.
15. 67 NJ. at 192, 336 A.2d at 734.
16. 67 NJ. at 192, 336 A.2d at 734.
This Note presents and evaluates the possible judicial responses to cases, like *Mount Laurel*, that involve challenges to entire zoning ordinances on exclusionary grounds. It argues that pragmatic and legal difficulties militate against any judicial imposition of affirmative relief not tailored to specific tracts of land and suggests that the most effective resolution of the problems confronted by low-income housing advocates lies in comprehensive legislative programs.

I. THE TRADITIONAL JUDICIAL ROLE IN ZONING CASES

The cases in which plaintiffs have sought relief with respect to specific tracts of land provide little direct legal precedent for shaping appropriate remedies in cases where plaintiffs seek community-wide relief. However, because these prior cases compelled many courts consciously to consider and articulate the judiciary's proper role in zoning controversies, they do provide useful guidance for courts faced with more complex, *Mount Laurel*-type situations. Specifically, after evaluating their own technical competence and the propriety of judicial zoning, most courts faced with challenges to particular tracts have followed one of two basic approaches in concluding that they should not dictate specific zoning classifications. The first approach has been to acknowledge the presence of unreasonable zoning but to grant no affirmative remedy beyond invalidating the arbitrary and capricious classifications. Courts taking this position have asserted that more far-reaching remedies would require judicial consideration of such matters as future growth and development, the availability of public facilities, and population density. Because these are problems that call for significant expertise and necessitate difficult judgments of public policy for their resolution, they are viewed as falling within an area of peculiarly legislative competence. Courts have, in fact, concluded that the judiciary is barred by the doctrine of separation of powers from ordering that tracts of land be granted particular zoning classifications. In the words of one court: "As tempting as it
sometimes may be, a court is without power to substitute its zoning philosophy for that of the zoning body.”

A second judicial approach has been to make limited adjustments to a zoning pattern in order to permit a particular proposed use on a specific plot of land when a municipality's refusal to rezone has been unreasonable. Courts adopting this approach have also recognized that zoning is a legislative function and have thus tried to shape narrow decrees that permit the use contemplated by the plaintiff but do not actually rezone the land. For example, a recent decision of the Virginia supreme court instructs courts of that state to suspend any adjudication of invalidity for a specified period in order to give the municipality an opportunity to enact amendments rectifying the offensive provision or classification. The adjudication becomes operative, and an injunction forbidding the municipality from interfering with the proposed use takes effect, only if the municipality fails to comply within the specified period. Similarly, Pennsylvania courts may, pursuant to statute, order that proposed uses be allowed in full or in part if the local zoning appeals board has unreasonably refused to do so. Interestingly enough, the Pennsylvania judiciary has accepted this power with great reluctance, and, indeed, has maintained in at least one case that the function properly belongs to the legislature.

Although the tendency to defer to the legislature is the prevailing one among the courts, a recent case in which plaintiffs' interests focused on particular tracts of land does evidence some judicial property. It substituted its judgment for that of the administrative or legislative body, and contrary to its authorized function.” See also Herzog v. City of Pocatello, 363 P.2d 188 (Idaho 1961). Some courts, without explicitly referring to separation of powers doctrines, have nonetheless invalidated a portion of an ordinance without ordering specific property rezoned in any way. See, e.g., Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970).


While the courts possess the authority to pass upon the validity of a zoning ordinance, this authority does not include the power to determine the ultimate classification. . . . Since the practical effect of declaring an existing zoning ordinance void in regard to a particular piece of property is to leave that piece of property in an unzoned condition, the court may frame its order in reference to a specific proposal before it and find that the contemplated use would be a reasonable one. . . . However, the court must exercise this authority with extreme care to avoid any encroachment into the legislative function of zoning. The Illinois courts have consistently adhered to this position. See, e.g., Stalzer v. Village of Matteson, 14 Ill. App. 3d 891, 303 N.E.2d 489 (1973); First Natl. Bank of Lake Forest v. Village of Northbrook, 2 Ill. App. 3d 1082, 278 N.E.2d 533 (1971).


24. 215 Va. at . . ., 211 S.E.2d at 62.


willingness to play a more activist role in zoning controversies. Thus, in *Pascack Association v. Mayor and Council of the Township of Washington*, the owner and contract purchaser of specific lands in Washington township appealed from the denial of their request for a variance to build garden apartments. While the plaintiffs principally sought relief with respect to their particular lands, they buttressed their position by challenging the township's basic zoning ordinance on exclusionary grounds.

In its initial decision, the court sustained the exclusionary challenge, but instead of shaping a decree with reference to the plaintiffs' land, it remanded to the township for rezoning to permit multi-family housing and for reformation of the township's minimum lot size, depth, and frontage requirements. The resulting amendments did not satisfy the plaintiffs, whose property was not reclassified, and they requested further judicial relief. The court then concluded that little of the rezoned land was actually available for the construction of multi-unit housing and ordered changes within sixty days. When changes were not forthcoming, the court engaged the services of urban planning experts who determined that a need existed for rental apartments and recommended both rezoning of certain lands and modification of restrictive building requirements. Despite objections by the township that the judiciary lacked the power to rezone, the court invoked the examples of school desegregation and reapportionment cases and rezoned plaintiffs' lands in a detailed manner. Thus, while it continued to recognize the need for judicial restraint, the *Pascack* court ultimately acted on the premise that "the judiciary has historically and necessarily exercised its power to compel coordinate branches of government to fulfill their obligations as defined by the courts."20

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27. 131 N.J. Super. 195, 329 A.2d 89 (L. Div. 1974). In at least one other case, a court admitted the possibility that it would rezone. In *Southern Alameda Spanish Speaking Organization v. City of Union City*, 357 F. Supp. 1188, 1199 (N.D. Cal. 1970), the court denied a request for an injunction that would have rezoned a particular site. The court, however, went on to order the city to take whatever steps were necessary to accommodate the needs of its low-income residents. The court retained jurisdiction in the matter, implying that it might act should the city fail to do so. Apparently, however, an accommodation was reached, for no further opinions in the case have been reported.

28. 131 N.J. Super. at 203, 329 A.2d at 94. Cf. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir.), cert. granted, 44 U.S.L.W. 3358 (U.S. Dec. 15, 1975) (directing rezoning of property for multi-unit dwelling development after finding village's refusal to do so a perpetuation of segregated housing patterns); *City of Louisville v. Kavanaugh*, 495 S.W.2d 502 (Ky. Ct. App. 1973) (directing that respondent's property be rezoned multi-family residential where comprehensive plan and planning commission recommended such a use and city board of aldermen could adduce no evidence suggesting that another use was more appropriate); *Daraban v. Township of Bedford*, 383 Mich. 497, 176 N.W.2d 598 (1970) (granting plaintiff authorization to start R-3 construction when township agreed R-1 classification was unreasonable with respect to property and when township has neither requested time to enact an amendment nor made such an amendment part of the record).

29. 131 N.J. Super. at 203, 309 A.2d at 94 (emphasis added).
Pascack is a deviation from the dominant view of the proper role for the courts in zoning controversies—a view that has emphasized the impropriety of courts operating as “superzoning” bodies. Indeed, even when reversing unreasonable acts by zoning bodies, courts have tried to minimize their interference with the classification policies established by the local authorities. This traditional refusal of courts to implement their own zoning philosophies in limited settings involving specific tracts of land counsels other courts, in deciding zoning cases of all sorts, to ask whether the decisions to be made are better left to legislative bodies. When an entire municipality, rather than a single plot of land, is involved, this question can be answered only with reference to the judiciary’s technical planning competence and its capacity to solicit and absorb expert advice, as well as the more abstract consideration of whether the policies at issue should be established by the elected representatives of the people. These factors provide a basis for evaluating the possible judicial responses to a zoning ordinance that is exclusionary in its total effect.

II. POSSIBLE JUDICIAL RESPONSES TO EXCLUSIONARY ZONING SCHEMES

This section evaluates the three courses of action available to courts faced with zoning ordinance challenges by plaintiffs whose interests transcend specific tracts of land: simple invalidation of offensive features of the ordinance, implementation of a new zoning scheme, and the withholding of all affirmative relief. By remanding for action by the local zoning board, the Mount Laurel court has delayed having to choose a final course of action for either the Mount Laurel litigation, should the board prove recalcitrant, or for future New Jersey cases. Of course, future action by local authorities may render additional judicial effort unnecessary. But, as the following discussion suggests, such a remand may well be inconsistent with the most appropriate judicial role in such zoning controversies, as well as costly to the parties.

A. Simple Invalidation

One remedy a court might adopt in response to proof that a zoning ordinance is unlawfully exclusionary is to invalidate the offensive features of the zoning ordinance without itself participating in the rezoning process.30 Thus, the court might strike down minimum acreage, minimum frontage, and minimum floor-space requirements as they apply to the entire community, rather than to a particular tract, as in

30. This approach was used in National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965), the first case in which a state supreme court held a minimum-acreage requirement invalid.
the more traditional case. Similarly, a zoning ordinance could be held unconstitutional because it excludes a particular type of dwelling, such as apartment buildings. This kind of "negative" remedy has the merit of permitting courts to grant relief to plaintiffs without dictating a final zoning pattern to the municipality; thus, undue judicial encroachment upon legislative functions is avoided.

This approach of simple invalidation may be effective in some instances, either in itself or as a catalyst for further remedial action by the municipality, but it is subject to at least two significant shortcomings. First, in many challenges to an entire ordinance, as in Mount Laurel, no single feature can be identified as responsible for the pattern of exclusionary zoning. To remedy the unlawful exclusion in such a case, a court following this approach would be required to invalidate most features of the ordinance. Broad-based invalidation would leave the municipality virtually without land-use regulations and would give developers a chance to build industrial plants in heretofore residential areas, or to construct high-rise apartments in areas environmentally unsuited for high-density population. Invalidation, in short, might lead to the type of haphazard development that zoning was designed to prevent.

The second major shortcoming of simple invalidation is that it does not compel a municipality to remedy the features of its zoning scheme that the court found objectionable. The local authorities are free to adopt a scheme as unsatisfactory as that which was struck down. Such an attempt to circumvent the court's decision may either be admitted openly or rationalized as an attempt to avoid uncontrolled development while the zoning board devises a new zoning scheme. The likelihood that the rezoning would be unacceptable and that it would stimulate new lawsuits prompted the Virginia supreme court to reject simple invalidation. Moreover, the danger of such a reaction by

32. See generally cases cited in notes 20-24 supra.
33. See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 392-93 (1926). Many have argued that zoning is an ineffective means of land-use control and have proposed alternatives. See, e.g., B. Siegan, Land Use Without Zoning (1972); Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681 (1973); McDougal, Performance Standards: A Viable Alternative to Euclidian Zoning?, 47 TUL. L. REV. 255 (1973); Siegan, Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulation, 5 ENV. L. 385 (1975). Professor Siegan has argued, in the two sources cited above and elsewhere, that zoning impedes the functioning of the free market by limiting the available land. The constricted supply drives up prices, and makes housing more expensive and less available than it would otherwise have been. Siegan points to Houston as proof that the absence of zoning need not necessarily result in haphazard development. But cf. Comment, Houston's Invention of Necessity—An Unconstitutional Substitute for Zoning?, 21 BAYLOR L. REV. 307 (1969). Regardless of the merits of these proposals, they are not available to a court in an exclusionary zoning case since, presumably, the court will not develop its own method of land-use control to replace that enacted by the legislature.
local zoning authorities is not merely speculative. After the Pennsylvania supreme court, in *Girsh Appeal*, invalidates a local ordinance because it excluded all apartments, defendant Nether Providence Township rezoned a quarry for apartment use; Girsh continued his struggle for a time, but finally desisted without erecting the apartments. It seems, then, that the efficaciousness of simple invalidation will often turn on the municipality's willingness to cooperate with courts in making land available for low- and moderate-income housing. Given the antagonism of many communities to this kind of development, the judiciary cannot rely on invalidation as the principal approach to remedy exclusionary zoning.

**B. Implementation of a New Zoning Scheme**

A far more activist judicial response is to proceed beyond invalidation and to implement, directly or indirectly, a new zoning scheme. At first glance this approach appears to embrace at least three distinct judicial options. First, the court could declare the zoning scheme unconstitutional, explain its reasons, and instruct the defendant municipality to implement a new scheme that conforms to the court's general requirements. Second, the court could itself decide how much land should be allocated to low- and moderate-income housing, but allow the municipality to decide which portions of the town to include in that allocation. Third, the court could bypass entirely the decision-making bodies of the municipality by imposing its own zoning scheme.

A court that seeks to go beyond simple invalidation while maintaining some deference toward local zoning boards must realize that success of the first two options depends largely on the municipality's cooperation—a dubious prospect in light of the original need for a lawsuit and the apparent failure of invalidation to break up exclusionary zoning patterns. Accordingly, a court that is considering adoption of the less drastic options must be prepared to adopt the third, more far-reaching approach of judicial zoning in the wake of a municipality's intransigence.

Thus, a court might adopt the first option of simply instructing the municipality to formulate a plan consistent with the court's opinion in order to adhere to the traditional principle, expressed in *Mount Laurel*, that "[t]he municipality should first have full opportunity to itself act without judicial supervision." This option accords with the

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37. *See generally Rose, supra* note 5. A specific example of this antagonism is related in the newspaper article cited in note 42 infra.
38. This is, in effect, the remedy provided by the *Mount Laurel* court. *See 67 N.J.* at 191, 336 A.2d at 734.
39. 67 N.J. at 192, 336 A.2d at 734.
normal restraint of federal courts in devising remedies for cases arising under the equal protection clause, but it concurrently suffers from a weakness demonstrated in school desegregation and public housing site selection cases. Popular resistance to a court decision can lead to municipal inaction, which in turn forces additional, more assertive judicial intervention. It seems likely that in a significant number of zoning cases community resistance to the prospect of low- and moderate-income housing will be sufficient to engender an uncooperative attitude on the part of the municipality and will force the court either repeatedly to invalidate local regulations or to undertake rezoning on its own. This problem will certainly confront the New Jersey supreme court if the township of Mount Laurel fails to offer a satisfactory plan.

The second option—determining the amount of land that the municipality must make available for low- and moderate-income housing, but allowing the municipality to decide which lands to rezone—requires a determination of the municipality’s “fair share” of regional housing needs. Even if a court is able to overcome the formidable difficulties involved in making a fair share determination, its efforts may easily be frustrated by the familiar problem of the intransigence of local officials. The zoning commission or other appropriate body could either refuse to rezone sufficient land to implement the “fair share” decision or rezone in a patently unsatisfactory manner.

Conceivably, the court could respond with its contempt power and jail the town officials until they agreed to comply. Yet, courts have been understandably hesitant to use the contempt power when local officials fail to comply with decrees ordering significant nonministerial action. The contempt power was occasionally brought to bear

41. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 7-11 (1971); Comment, The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief, 122 U. PA. L. REV. 1330 (1974). In Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974), the court was moved to provide standards for Madison, since the town’s revised zoning ordinance was deemed unsatisfactory. Initially, the court had simply invalidated the ordinance. 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971).
42. The desire of many suburban communities to limit the availability of such housing within their boundaries is, of course, the very genesis of the exclusionary zoning problem. An example of strident opposition to a housing project is presented in N.Y. Times, Sept. 25, 1975, at 27, col. 1 (city ed.), which describes a town meeting in Westport, Connecticut. The proposal defeated at the meeting was modest, the erection of 400 garden apartment units with a maximum density of eight units per acre, but still met considerable opposition.
43. Articles written from both legal and land-use planning perspectives have spoken in terms of a municipality’s “fair share” of the housing needs of the region in which it is located. See generally D. LISTOKIN, FAIR SHARE HOUSING ALLOCATION (1975).
44. These difficulties are considered in the text at notes 59-68 infra.
against uncooperative school officials in the early stages of desegregation efforts in the South, but few judges in the last decade have found it productive in desegregation actions to hold such officials in contempt. The reasons for this reluctance may vary. In some cases it may spring from concern that an incarcerated local official will become a rallying point for community opposition; in other cases the reluctance may be due to the difficulty inherent in identifying all culpable officials, or in measuring their noncompliance. A particularly difficult problem arises when zoning officials are more subtle in their defiance and comply in a literal way with the court order but effectively nullify it. This could be accomplished by rezoning unfavorable industrial areas or marshes unfit for the development of dwellings, for example. Even a municipal governing body that makes a good-faith effort may fail to comply with the court's order because of an inability to reach a consensus as to where the "fair share" should be placed. This possibility of municipal inaction is of course enhanced if there is significant pressure from residents of the municipality who seek to keep their neighborhoods from being rezoned.

In short, a court is apt to encounter significant problems and frustrations if it seeks to effect far-reaching rezoning while allowing municipal officials to retain primary responsibility for the formulation and implementation of an acceptable rezoning plan. Because of these problems, a court may be compelled to bypass completely the unaccommodating local governing bodies and to rezone the municipality itself. Such a court must first determine the amount of land within the municipality that should be allotted to low- and moderate-income housing. It must next select those portions of the municipality that should be rezoned to satisfy the allotment. Presumably, these decisions would be made on the basis of testimony received during the trial and advice proffered by court-appointed urban planners.


46. For a critique of the use of the contempt power see Comment, supra note 41, at 1343-44. This piece also discusses the failure of judges to hold noncomplying local officials in contempt. Id. at 1340-41. The court in Pascack Assn. v. Mayor & Council, 131 N.J. Super. 195, 206, 329 A.2d 89, 96 (L. Div. 1974) recognized the inappropriateness of contempt as a tool in implementing a zoning decree. In the course of the Boston desegregation litigation, federal Judge Garrity threatened three Boston School Committee members with civil contempt if they persisted in their refusals to approve a city-wide desegregation plan suitable to the court. N.Y. Times, Dec. 28, 1974, at 1, col. 1 (city ed.). Judge Garrity dropped the threat before any penalties were meted out, however, after token compliance by the defendants. N.Y. Times, Jan. 9, 1975, at 16, col. 1 (city ed.).

47. See text at note 37 supra.

48. This procedure was followed in Pascack Assn. v. Mayor & Council, 131 N.J. Super. 195, 329 A.2d 89 (L. Div. 1974), discussed in text at note 27 supra. The Pascack court had tried court-supervised rezoning by the municipality but found the response of the town unsatisfactory and moved on to an affirmative remedy despite this earlier statement:
nally, of course, the court must either order the municipality to rezone
the land according to the plan or simply declare the land rezoned.

This process of judicial rezoning clearly violates the oft-repeated
principle of judicial restraint in zoning matters. Yet, as the Pass-
cack court noted, there are areas in which courts will fashion affirm-
ative remedies to vindicate constitutional rights. The Supreme Court
has approved temporary judicial reapportionment to rectify state
apportionment schemes that fail to weigh the votes of all residents
equally. Courts have also blocked the construction of public hous-
ing that would exacerbate rather than alleviate patterns of residential
segregation. In so doing, they have shorn housing agencies of certain
powers and provided their own standards for future site selection.
The most extensive judicial activism has occurred in school desegre-
gation cases where courts have employed such affirmative tech-
niques as busing and placing a public high school into receiver-
ship in an attempt to provide an equal education for Black children
victimized by segregated school systems. Thus, these judicial innova-
tions provide some precedent for far-reaching relief in exclusionary
zoning cases.

Yet exclusionary zoning can be distinguished from these other
areas of litigation in ways that counsel against any judicial attempt to
rezone. One possible ground for distinction is based upon the Con-
stitutional rights at stake and upon the strength and fundamental
nature of those rights. Although a comprehensive weighing of the
various rights in these areas is beyond the scope of this Note, it is at
least arguable that the right to education free of racial discrimina-
tion is more compelling than the right to low- or middle-income housing

In holding the zoning ordinance under review invalid it must be noted that
the court is not directing the municipality to rezone plaintiffs' property for multi-
family use... It is not the province of the court to specify zoning densities
or to exercise any other control at this juncture... Obviously, in view of
the township's state of development, the range of choices available to it is
limited, but these choices are properly a function of the legislative power which it
must exercise with reasonable promptness and in accordance with the require-
ments of the statute.

131 N.J. Super. at 198, 329 A.2d at 91.
49. See notes 19-25 supra.
50. 131 N.J. Super. at 202-03, 329 A.2d at 94.
52. See, e.g., Gantreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D.
Ill. 1969), aff'd, 436 F.2d 306 (7th Cir. 1970), application for stay denied, 401 U.S.
953, cert. denied, 402 U.S. 922 (1971) discussed in Comment, note 41 supra. For
the Supreme Court's disposition of a closely related case, see note 116 infra.
53. See generally Fiss, The Fate of an Idea Whose Time Has Come: Antidiscrimi-
L. Rev. 742, 753-56 (1974).
wherein the Supreme Court validated lower court use of busing to remedy patterns of
segregation that resulted from past state action.
included in this order instructions that the headmaster, football coach, and other
administrators of South Boston High School be transferred.
in a particular community. Yet even if the rights at stake are of equal force, numerous practical considerations may differentiate, in kind and in degree, the task of rezoning from the tasks of student assignment and reapportionment. First, there is considerable doubt as to the availability of “judicially discoverable and manageable standards” for making zoning decisions. Perhaps even more important are problems concerning the effectiveness of any judicial remedy. The dominant consideration in this regard is the fact that exclusionary zoning plaintiffs seek judicial relief as but an intermediate goal in a quest for the construction of new housing, while desegregation and reapportionment plaintiffs seek judicial relief as an end in itself. Finally, there is the fundamental question of whether any court should make the policy choices required in the zoning process. The remainder of this section considers the problems peculiar to judicial rezoning of a municipality. The extent to which judicial activism in other areas suffers from analogous problems and limitations will be considered in an effort to determine the relevance of these precedents for judicial rezoning.

One multi-faceted problem underlying broad-based judicial rezoning is the need for a court to discover standards for determining a particular municipality’s fair share of regional low- and moderate-income housing. The majority opinion in Mount Laurel addressed this problem, but could suggest only that courts must look to the regional housing needs of persons with low and moderate incomes. In a concurring opinion, Justice Pashman advanced without elaboration a four-step process for shaping a remedy: (1) identify the relevant region; (2) determine the present and future housing needs...
of the region; (3) allocate these needs among the various municipalities of the region; and (4) shape a remedial order.

Justice Pashman's framework for addressing the fair share problem is analytically sound, but it neither addresses nor proposes solutions to the problems raised at each of the steps. Thus, no manageable standards exist to determine the housing region of which the defendant municipality is a part. Factors such as transportation facilities and employment opportunities are important considerations, but even when known they yield no ready answers. Once a relevant region has been defined, an intelligent determination of regional housing needs cannot be made by a court without substantial data and expert testimony and advice. The validity of any housing-needs determination, moreover, depends upon the accuracy of the experts in predicting population trends, future job opportunities, “turnover” dwellings from persons moving into new housing, and other factors. Once a court has calculated regional housing needs, it faces the problem of allocating those needs among the municipalities within the particular region. The court might allocate on the basis of factors such as population, total area, or amount of undeveloped land. Yet these criteria fail to provide a realistic basis for allocation of housing needs, since municipalities may vary in characteristics that are less easily quantified than population and area. The various proposals of more elaborate schemes to effect equitable housing-need allocations may provide some guidance, but, predictably, they require the accumulation of even more data and the exercise of considerable judicial and expert discretion.

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61. 67 N.J. at 215-16, 336 A.2d at 747.
62. Indeed, the majority in Mt. Laurel admits that “[P]robably no hard and fast rule will serve to furnish the answer [to the question of the applicable region] in every case...” 67 N.J. at 189, 336 A.2d at 733.
64. Some of these complicating factors are described in E. BERGMAN, supra note 2, at 34:
Economic forces result in a general gradient of economic site-intensity usage for land in the metropolitan area, where inner locations are better suited to dense development and locations farther out are usually less densely developed. Urban land market forces also determine, in part, the structure and tenure characteristics of the residential stock and its array of prices and rents. Closely related to the localized specialization of housing is the uneven distribution of employment opportunities over the metropolitan area. That is, if somehow all areas were to overcome locational specialization of housing and provide a metropolitan cross section, there is good reason to believe that employment might not be available for all workers near their “cross section” of residential opportunities. These two facts alone strongly suggest that since some municipalities are, by virtue of their unique locations, better suited to certain types and mixes of residential and economic development than to others, requiring each municipality to adopt a cross section of metropolitan housing opportunities is not the best course to follow.
65. These considerations are mentioned in Rahenkamp, Fair Share Housing for Managed Growth, 27 LAND USE L. & ZONING DIGEST, No. 6, at 30 (1975). The author provides an allocation model based on developable land, a category that includes all undeveloped land except publicly encumbered and environmentally sensi-
In sum, there are few "judicially discoverable and manageable standards" for determining fair share allocations of low- and moderate-income housing. If trial courts are required to make such determinations, they will be guided only by generalities found in appellate court decisions and by the ad hoc determinations of court-appointed experts. The ambiguities inherent in fair share determinations have already surfaced in one court's decision as to whether a community had failed to provide for its fair share of low-income housing. A court may be able to avoid making a fair share determination in the course of ascertaining whether a community is practicing exclusionary zoning, but the issue and its myriad problems are inescapable for a court that intends to rezone the excluding community.

A court that manages to determine a community's "fair share" of housing needs next encounters the numerous problems associated with actually rezoning the municipality to provide the appropriate areas. He modifies this standard by using five adjustment factors: fiscal capacity to absorb growth, accessibility of the municipality to existing transportation systems, employment opportunities in and near each municipality, existing population density, and existing housing stock. He then recommends a basis for determining per year allocation. Without evaluating the validity of the proposal, one can recognize its complexity and anticipate the difficulty that a court (as opposed, for instance, to an administrative body) would have in applying it. Another scheme is proposed in more detail in E. BERGMAN, supra note 2. The complexity of the "performance standard" which he has devised is such that the bulk of this book of nearly three hundred pages consists of a description of the plan, a few examples of its application, and appendices of the kinds of data needed to apply it.

66. In Township of Williston v. Chesterdale Farms, Inc., __ Pa. ___, 341 A.2d 466 (1975), a property owner had twice submitted a plan to build apartments in the township. Twice the plan was rejected because the zoning scheme did not allow any apartments. After Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970), the property owner again applied for a building permit and sought a writ of mandamus to order the town to issue the permit. Upon the filing of the mandamus action the town passed an ordinance allowing 80 of the town's 11,589 acres to be used for apartments. The property owner alleged that rezoning of only 80 acres constituted "mere tokenism." A majority of the Pennsylvania supreme court agreed, without enunciating standards for deciding what would constitute a fair share. The dissenter, advancing population and housing statistics to buttress his argument, concluded that 80 acres was a permissible first step in providing for apartments in an orderly fashion. __ Pa. at ___, 341 A.2d at 466. The opinion demonstrates how the determination of fair share becomes simply a matter of opinion in the absence of well-formulated standards. This case is discussed in Strong, Reporters Comment, 27 Land Use L. & Zoning Digest, No. 10, 13 (1975).

67. See note 59 supra.

68. Despite some recent deviations from a strict application of its formula, see Mahan v. Howell, 410 U.S. 315 (1973), the Supreme Court has provided a clear standard of one-person, one-vote to be applied in reapportionment cases. See Reynolds v. Sims, 377 U.S. 533 (1964). In school desegregation cases the standards have been somewhat muddled. The requirement of past or present state action provides a starting point for deciding the case, but standards for busing decrees remain imprecise. See generally Read, supra note 45, at 33-38. In the initial Boston desegregation litigation, the court speculated that having the same ratio of Blacks to Whites in each school that existed in the whole school system might be desirable. The court noted, however, that such a solution was highly impractical. See Morgan v. Hennigan, 379 F. Supp. 410, 483 (1974), affd. sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975).
acreage for low- and moderate-income housing. There are no clear standards for determining what tracts should be zoned for housing needs, but the court must certainly consider a number of factors. These include existing drainage capacity and the cost of any required new sewerage systems, present traffic patterns and the capacity of existing roads to satisfy the needs of relatively high-density developments, ecological or landscape considerations, future demands for public services, and the location and capacity of existing schools, fire departments, and other municipal services. The most difficult task for a court is to capitalize on investments previously made by the community. Although not essential for a decision as to the location of new housing, this task must be accomplished with some success if a court is not to undermine the sound financial structure of the municipality.

The court that rezones a municipality to accommodate low- and moderate-income housing must also consider whether it will retain jurisdiction to hear pleas for variances from the scheme it has mandated. A developer might, for instance, wish to build a pharmacy in an area that the court has designated for high-density, multi-unit dwellings. If a court itself decides upon the request, there will be little left of the principle that courts should not function as superzoning bodies. Moreover, the court will be burdened with administrative duties until the land that it has rezoned is totally developed. On the

69. The discussion of "fair share" problems in the context of a total judicial rezoning is equally applicable to the difficulties inherent in a court's selection of the second "option," as detailed in the text at notes 43-48 supra. The remainder of the discussion in this section is applicable only to a decision of a court to rezone, i.e., if the difficulties inherent in the first and second options have become apparent.

70. See generally Environment: A New Focus for Land-Use Planning (D. McAllister ed. 1973); Urban Planning Guide (W. Claire ed. 1969). But for the view that suburban municipalities seldom deviate from a uniform plan for locating residential, commercial and industrial uses, see B. Siegan, supra note 33, at 5. Even if this is an accurate observation, one may argue that the municipality has at least had the opportunity to choose this pattern, whereas court-imposed zoning removes all choice.

71. For example, one should be aware of the inefficiency that results from overcrowding one school with children from newly constructed dwellings, while a school in another portion of the town has an excess capacity. At the very least, money must be expended to transport some of the children. Similar considerations attach to the utilization of existing sewerage systems. No single factor will be dispositive of the question of where to place new homes, but all such existing investments should be evaluated. See generally Handbook on Urban Planning 79-81 (W. Claire ed. 1973).


73. Courts have retained jurisdiction in desegregation cases for extended periods. See generally Read, supra note 45, at 18. In the Boston litigation, discussed in note 68 supra, for example, the court has retained jurisdiction since its initial decision in June 1974. Since that time the court has reformulated a busing plan, N.Y. Times, May 11, 1975, at 1, col. 3 (late city ed.), placed a high school into federal receivership, N.Y. Times, Dec. 10, 1975, at 1, col. 1 (city ed.), transferred school officials, id., and formulated a safety plan, N.Y. Times, Sept. 7, 1975, at 44, col. 3 (late city ed.). At the time of publication of this Note, the court had not relinquished its jurisdiction.
other hand, if the court does not retain this role, the municipality might liberally grant variances for uses other than low-income housing on the land that the court has rezoned. In this way the municipality could effectively "rezone" the land once again, thereby circumventing the court's decree and precluding the development of low-income housing.

Thus, there are significant difficulties in formulating and implementing standards in exclusionary zoning cases. Whether this task is more difficult than the analogous process in school desegregation cases is a matter for subjective judgment. Certainly it is not a significantly easier undertaking. While the drawing of district lines in reapportionment cases is attended with some degree of complexity, the over-all difficulty of fashioning a remedy in such cases is lessened by the absence of any problem of implementation similar to that encountered in desegregation and zoning suits. In short, the problems of devising standards in zoning controversies are significant even when compared to the similar difficulties that arise in other areas of judicial activism. Their magnitude and complexity caution courts to avoid broad-based rezoning if abstention is not incompatible with their constitutional obligations.

The propriety of broad-based judicial rezoning is also influenced by factors relating to the effectiveness of the remedy and by considerations of the desirable role of the judiciary. Obviously these factors are enmeshed with the problems of discovering manageable standards, but some can indeed be isolated and evaluated to demonstrate that court-imposed rezoning would require a departure from the principles that have guided judicial activism in other areas.

The desirability of a judicial remedy cannot be assessed without considering, for example, the potential for undesirable permanent alteration of the municipality that is inherent in any decision to rezone. A court that concludes it has unwisely ordered busing to desegregate a school system can easily correct its error by withdrawing or altering its order.74 If a court finds that a court-ordered reapportionment scheme was ill-advised, it can modify the districts or allow the legislature to modify them.75 In both of these areas, unwise decrees of the judiciary pertaining to complex or potentially inflammatory situations can usually be altered with a minimum of permanent harm.76 When a court rezones, however, buildings may be erected and development plans previously under consideration may be abandoned. Thus,

74. In the Boston litigation, the court revised its initial order on a number of occasions. See N.Y. Times, March 22, 1975, at 1, col. 4 (late city ed.); N.Y. Times, May 11, 1975, at 1, col. 3 (late city ed.).
75. Indeed, the Supreme Court, in Reynolds v. Sims, 377 U.S. 533, 586-87 (1964), explicitly framed its order as a temporary measure.
76. Although the student assignment and busing plans can be changed with relative ease, it is not being suggested that the violence resulting from some desegregation decrees has been insignificant.
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unlike courts that reapportion to secure an effective political process or employ busing as a temporary measure to desegregate schools until society develops integrated and equal school facilities, the court that rezones makes a decision for the community that may not be subject to effective revision.

Complementing this problem is the possibility that low-income housing will not be erected after court rezing. The plaintiff's ultimate goal in exclusionary zoning cases is the construction of housing, but as the Mount Laurel court itself recognized, "[r]eapportion to secure a court process or employ busing as a temporary measure to desegregate schools until society develops integrated and equal school facilities, the court that rezones makes a decision for the community that may not be subject to effective revision."

A court that weighs the benefits and costs of judicial initiative in this area should bear in mind that the benefit ultimately to be gained is speculative and beyond the court's control. One possible complication is that developers will construct luxury apartments or condominiums on land that has been rezoned for multi-family use. While a court might avert this possibility by placing a ceiling upon the cost of any dwellings constructed on the land, such restrictions are not permissible in all states. The most likely complication, however, is that no low-income housing will be built regardless of permissive zoning patterns and the availability of land. Indeed, some commentators argue that costs of construction make it impossible for private developers to profit from building and selling dwellings within the financial grasp of low- and moderate-income families. A busing decree remedies the inherently unequal patterns of school segregation and directly vindicates the rights of the plaintiffs. An intelligent judicial reappraisal

77. 67 N.J. at 192, 336 A.2d at 734.
78. New Jersey may be one such state. See Mallach, Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation, 6 Rutgers-Camden L.J. 653, 668 (1975).
79. One observer has concluded land economics to be such that smaller lots, for example, will cause land prices to rise: "The landowner or owners whose land is the subject of a rezoning will, in almost every instance, attempt to realize a greater sale price on the total acreage (since more building lots will obtain) than they would have sought (or received) on the land as formerly zoned." Slade, supra note 5, at 16.
80. See, e.g., Abeles, Madison Township: Twenty Years Too Late, in New Dimensions of Urban Planning: Growth Controls 160 (J. Hughes ed. 1974). The author of this article examines the results of a liberalized zoning ordinance in Madison, New Jersey, a suburb that was subjected to a suit for its exclusionary zoning practices. In the two years following passage of the new ordinance, the only two applications for multi-unit dwellings were for housing for the elderly, at conventional prices. The author concludes that it would have been more productive to serve a "complaint upon a non-existing defendant—a national housing policy." Id. at 164.
81. See Gershen, Exclusionary Zoning: Where the Argument Fails, in New Dimensions of Urban Planning: Growth Controls 242, 246 (J. Hughes ed. 1974). Support for this view is found in a distressing report that construction of all types of apartment units in 1975 dropped to its lowest level since 1959. Although this may be partially due to the severe recession, building costs have risen so high that no large-scale reversal of this trend is likely. See N.Y. Times, Jan. 1, 1976, at 1, col. 4 (city ed.); Wall St. J., Feb. 5, 1976, at 28, col. 1 (midwest ed.).
82. This was the Supreme Court's conclusion in Brown v. Board of Educ., 347 U.S. 483, 495 (1954).
 tionment achieves precisely what was desired—equal electoral strength for each voter. Even the most sagacious rezoning decree, however, gives no assurance of curing the ill at which the plaintiff’s efforts were doubtless directed.

Another characteristic of judicial rezoning that undercuts its attractiveness is the inability of a court to hear from all affected parties in deciding upon a plan. Issues of housing and land-use control affect the interests of environmentalists, commercial developers, housing builders, the poor, federal and state officials, the central city (if the municipality is a suburb), and, of course, the municipality whose zoning practices fall under attack. In the average case, not more than two or three of these groups are apt to be participants, yet all are bound in a sense by the decree. A court might ameliorate the problem by seeking amicus briefs or allowing intervention by one or more of these interested groups, but at some point the case will become unwieldy under the weight of so many opposing factions. While this problem could conceivably arise in any zoning case, it is particularly acute when the zoning pattern of the entire municipality is at issue and the court is faced not with a relatively clear choice between two distinct results, but with a panoply of competing interests, values, and possible results.

Related to the inability of courts to provide a forum for all concerned segments of society is the fact that a rezoning court must inevitably make fundamental policy decisions of a sort generally left to the democratically selected branches of government. One author has analogized a court decision in another area of the law to pulling a strand of a spider web: “Pull a strand here, and a complex pattern of adjustments run through the whole web. Pull another strand from a different angle, and another complex pattern results.” The ramifications of any court decision in the context of zoning cannot be narrowly confined. Whatever land the court eventually rezones for multi-family residential use will be unavailable for commercial, business-office or industrial uses; this restriction on permissible uses becomes increasingly significant as the amount of a town’s land suitable for development diminishes. By deciding where population growth can be expected, the court in effect dictates that municipal services in a particular area are to be increased. Most importantly,

82. See Haar v. Iatridis, Housing the Poor: Exclusion and the Courts, in 1 MANAGEMENT & CONTROL OF GROWTH 492, 496 (R. Scott ed. 1975).

83. In the first decade of school desegregation cases the adversary interests were well defined. In the last decade, however, the occasional opposition of concerned groups of Black citizens to busing and integration decrees has made these interests more difficult to identify clearly. See Norwalk CORE v. Norwalk Bd. of Educ., 423 F.2d 121 (2d Cir. 1970); Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968). Should similar sentiments proliferate, courts may find themselves unable to decide cases that have become political questions in the most literal sense of the phrase.

judicial rezoning reduces municipal prerogatives for planned growth. By rezoning, a court preempts, or at least limits, the exercise of the municipality's judicially recognized right to place reasonable limitations on its rate of growth. 85

Judicial rezoning forecloses municipal policy making in so many areas principally because land-use planning often entails a choice among competing, mutually exclusive uses. 86 Advocates of land-use planning, as vocal today as ever, may often be motivated by concerns far more legitimate than the ignoble desire to exclude individuals because they are Black or poor. 87 Accordingly, opposition to a proposal for a high-density housing development might well be based upon a sincere concern for environmental factors or upon a belief that the housing should be built elsewhere. Judicial rezoning may indeed challenge a municipality's parochialism, but it can also interfere in a legitimate political debate over how the limited supply of land in a metropolitan area should be regulated. In other contexts, courts traditionally have tried to limit their interference with policy decisions. 88 Thus, the possibility of several "legitimate" perspectives on a zoning question suggests that conflicts among these views should be resolved in a forum more democratic than a courtroom. 89

C. Withhold Affirmative Relief

The final possible response for a court confronted with a challenge to an entire zoning ordinance is to withhold all affirmative relief and

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85. See, e.g., Construction Indus. Assn. of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (zoning plan that limits population increase to substantially less than market would demand in order to avoid uncontrolled growth not an impermissible burden on interstate commerce); Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, cert. denied, 409 U.S. 1003 (1972) (upholding scheme of sequential development). Large lot zones have been upheld when the zoning authority has demonstrated that it established these zones in accordance with a comprehensive regional plan which was adopted with a good faith view to all the needs of the region. See, e.g., Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969).


87. See generally Burns, supra note 1; Sager, supra note 2.


89. One might argue that certain school desegregation decisions have compelled the creation of particular patterns of municipal services: busing, increased police protection, etc. However, these effects are quite clearly tied to enforcement of the decree. Police protection is not qualitatively different from enforcement of any judicial mandate by the executive branch of the government. Moreover, one hopes that the police presence will be temporary. Busing itself is a fairly limited area of infringement on municipal prerogatives, at least in comparison with alteration of the character of an entire town or city. Moreover, even some strong supporters of busing have recognized that once Blacks have achieved significant political representation, extensive judicial involvement in result-oriented antidiscrimination activities becomes more difficult to reconcile with democratic traditions. This, of course, is not to say that such judicial activism must therefore cease, but rather that reevaluation is necessary. See Fiss, supra note 53, at 772-73.
A court can achieve this result by avoiding a decision on the merits, either by denying the plaintiffs standing or by holding that challenges unrelated to specific tracts of land are nonjusticiable. An alternative and preferable path is for the court to hear the case and to issue findings of fact and conclusions of law, but to withhold all affirmative relief unless and until a group gains specific property interests in the community.

The Supreme Court chose the first path in *Warth v. Seldin*, a recent case in which standing was denied to several groups of plaintiffs, and in so doing erected a formidable barrier to the litigation of exclusionary zoning cases in federal courts. The *Warth* action was commenced by a variety of plaintiffs: persons allegedly excluded from the defendant municipality, persons within the neighboring city of Rochester who allegedly suffered higher tax rates because of the defendant suburb's exclusionary practices, and builders who allegedly suffered economic loss because they were barred by the exclusionary zoning from constructing multi-unit housing in the municipality. Justice Powell, writing for the majority, concluded that each group of plaintiffs had failed to allege an injury that was sufficiently demonstrable and concrete to confer standing. Regrettably and somewhat remarkably, the Court failed to specify what interest or injury a plaintiff must aver in order to satisfy the constitutional and prudential considerations upon which the standing requirement is based. The Court's opinion does suggest, however, that standing to challenge a zoning ordinance will be granted plaintiffs who either (1) own land in the municipality and have the resources and specific intent to construct low-income housing, or (2) have interests focused on particular lands within the municipality and have the resources and clear desire to purchase the lands for construction, or (3) are intended residents of a particular planned project that is obstructed by the zoning ordinance. By limiting standing in this manner, the Supreme Court has in effect precluded all persons from challenging zoning schemes in federal courts unless they are associated with specific projects planned for specific lands.  

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90. Since the *Mount Laurel* court has already mandated that the town's zoning pattern be altered, either through the municipality's own initiatives or through some form of judicial remedy, it cannot be expected to back down in the event the township of Mount Laurel fails to act. See 67 N.J. at 191-92, 336 A.2d at 734.

91. 422 U.S. 490 (1975).

92. The Supreme Court's decision on the standing issue does not, of course, bind state courts. Other avenues may be open to plaintiffs seeking a federal forum who are unable to allege sufficient personal harm. They could challenge the grant of federal funds to municipalities that do not provide for low income housing, since many of these programs make the funds contingent on certain fair housing practices. The Housing and Community Development Act of 1974, 42 U.S.C.A. §§ 5301-5317 (Supp. 1976) is one such program. Standing in federal court to challenge the disbursement of federal funds by the appropriate agencies when they do not monitor
A Pennsylvania court, in Commonwealth v. Bucks County, also followed this first path of refusing to adjudicate on the merits by holding that requests for general rezoning made on behalf of low-income persons excluded from a county constituted nonjusticiable questions. The Bucks County litigation was initiated by a variety of plaintiffs (two of whom owned no land in Bucks County) who, without focusing their complaint on a particular plot of land, sought sweeping equitable relief against the county and the fifty-four municipalities that it embraces. In a per curiam opinion, the commonwealth court adopted the opinion of the court of common pleas, which had unambiguously rejected judicial rezoning on both practical and theoretical grounds:

In order to meet and resolve the problems imposed by plaintiffs in their presently hypothetical, far-ranging and totally unparticularized context, the Court itself, directly, or indirectly through the requested mandates to and oversight of the County planning commission and . . . the fifty-four separate municipalities, would be required to assume the awesome task of becoming a superplanning agency, with no expertise in the field; and as such the Court would be required to make immediate and basic "initial policy determinations of a kind clearly for nonjudicial discretion," and to carry out this tremendous responsibility with an entire "lack of judicially discoverable and manageable standards for resolving it," in the language of the Baker v. Carr opinion . . . . This responsibility we do not believe we are required to assume, and we therefore decline to do so. 94

Yet even as it dismissed the action, the Pennsylvania court reaffirmed the principles of National Land and Investment Co. v. Easttown Township Board of Adjustment and Girsh Appeal, which had authorized judicial invalidation of zoning ordinance features that were unnecessarily exclusionary. The court distinguished these earlier cases on the ground that the plaintiffs involved there had possessed specific property interests. By relying on this distinction, the court was able to employ the rationale of nonjusticiability to impose constructive standing requirements similar to those later established in Warth.

The approaches in Warth and Bucks County certainly avoid the problems inherent in judicial rezoning, but they also make it very difficult for persons excluded by a zoning scheme to vindicate their rights, for individuals who do not have land in a given community are

94. 22 Bucks Co. L. Rep. at 188, 302 A.2d at 904-05.
97. 22 Bucks Co. L. Rep. at 187, 302 A.2d at 904.
made dependent on convincing a builder to participate in a lawsuit against the municipality. However, builders of low- and moderate-income housing, particularly in large metropolitan areas, can channel their resources into a number of different communities. In deciding upon housing sites, they doubtless consider whether they must expend time and resources to obtain an exemption from an exclusionary zoning ordinance. Many builders are presumably willing to make the effort necessary to apply for a variance, permit, or amendment to an unfavorable zoning scheme, but fewer are likely to view as worthwhile the funding of a full-scale court attack on an exclusionary ordinance. Rather than fund such lengthy and complex litigation, a builder will probably turn his efforts to a community that has already allocated land to low-and moderate-income housing and that contains a high proportion of low-income families. The result of this understandable tendency of builders is that low- and moderate-income families who seek housing within their means are channeled into certain communities and effectively excluded from others.

Successful attacks on a zoning ordinance can "open up" a municipality to low- and moderate-income housing and thereby make it more attractive to potential builders. The problem, however, is that the Warth and Bucks County decisions make it extremely difficult for a plaintiff to challenge an ordinance in the first place unless a willing builder has already been located. And as indicated, it seems likely that a local organization that espouses the rights of low-income persons will be unable to attract a builder until it has successfully attacked the ordinance. As one of the Warth dissenters asserted:

The rights of low-income minority plaintiffs who desire to live in a locality... seem to turn on the willingness of a third party to litigate the legality of preclusion of a particular project, despite the fact that the third party may have no economic incentive to incur the costs of litigation with regard to one project, and despite the fact that the low-income minority plaintiffs' interest is not to live in a

98 Evidence of such a sentiment on the part of developers may be found in Cornelius v. City of Parma, 374 F. Supp. 730 (N.D. Ohio 1974), vacated and remanded to district court, 506 F.2d 1400 (6th Cir. 1975), appeals court decision vacated and remanded to that court for further consideration, 422 U.S. 1052 (1975), remanded, 521 F.2d 1401 (6th Cir. 1975), cert. denied, 44 U.S.L.W. 3499 (U.S. March 8, 1976). In that case, the court held that a challenge to a municipal ordinance that excluded low-rent housing projects unless approved by a majority of electors presented a nonjusticiable question. The court rested this conclusion on the accurate observation that a declaration of invalidity would not lead to housing construction because no present plans for such construction were offered. Ironically, a company had intended to erect a federally subsidized, low-rent project but it had desisted, even after a $50,000 expenditure, because of the likelihood of expensive and time-consuming litigation. 374 F. Supp. at 736 n.4. The case travelled up and down the appellate ladder for two years and is now to be dismissed on the basis of Warth v. Seldin. See 44 U.S.L.W. 3499 (U.S. March 8, 1976). Nonetheless, it presents a striking example of the need to allow activist plaintiffs without plans for housing construction to achieve some sort of victory in court with which to lure potential developers to previously "closed" municipalities.
particular project but to live somewhere in the town in a dwelling they can afford.99

The Warth and Bucks County decisions can perhaps be explained as attempts to exclude from the courts both controversies that are insufficiently crystallized to warrant judicial intervention and cases in which the courts cannot reasonably fashion an adequate remedy. Yet the courts can further these generally valid objectives without completely denying a forum to organizational and class-action plaintiffs who are unable to find an interested builder prior to a successful attack upon the zoning ordinance.

Courts should feel compelled to seek less drastic means of screening these cases in light of the substantial public benefits that may sometimes be generated by successful challenges to exclusionary zoning schemes. Therefore, in determining whether such a case is sufficiently developed to warrant judicial consideration, a court might beneficially loosen the rigid requirements of ripeness and concreteness that are applied to screen cases in other contexts. This would not open the floodgates to premature zoning challenges. Because exclusionary zoning litigation is complex, time-consuming, and costly, many cases that are not ripe or concrete are voluntarily withheld from the courts, since a plaintiff is not apt to engage in such litigation unless it has a reasonable chance of later locating a willing builder. A court could rely on this high cost to filter out adequately those cases that do not warrant the expenditure of judicial effort. Thus, the need to bar from the courts those controversies that are insufficiently crystallized fails to justify the overly restrictive approaches of the Warth and Bucks County courts.

It is also clearly important to keep from the courts those controversies for which the judiciary cannot fashion an adequate remedy. And, as explained above, numerous practical and prudential factors support the conclusion that judicial rezoning is an inappropriate remedy. There is little reason, however, why courts cannot devise a remedy that avoids the problems of judicial rezoning and yet satisfies the needs of plaintiffs seeking to "open" an entire community to low cost housing. The following alternative, unavailable to federal courts because of the Supreme Court's decision in Warth, exemplifies the flexibility that the judiciary can exercise in fashioning an adequate and minimally intrusive remedy.

A court can withhold affirmative relief and yet still make findings of fact and conclusions of law after allowing the plaintiffs an opportunity to prove that the defendant municipality has engaged in systematic exclusion of low- and moderate-income persons. While this course of action contemplates no rezoning, it may be distinguished

99. 490 U.S. at 522 (Brennan, J., dissenting) (emphasis original).
from a simple dismissal in at least three respects: First, the thorough airing of a municipality's exclusionary practices informs agencies, legislators, and the public, and thus may trigger greater external pressure for change in the zoning practices of the municipality; second, the court's findings might attract to the community developers who, without some proof of judicial sympathy, would be unwilling to try to penetrate the exclusionary scheme; finally, a judicial declaration that a town is practicing exclusionary zoning might prompt the town to change its ordinance in an attempt to stave off further litigation.

In order to avoid being purely advisory and to satisfy fully the needs of nonpropertied plaintiffs excluded from a community, a judgment that a municipality has unlawfully practiced exclusionary zoning should be binding in suits subsequently brought by the same or other plaintiffs seeking injunctive relief with respect to specific plots of land. This would enable the original plaintiffs to assure potential developers of a favorable judicial reception if the municipality attempted to block a planned housing project. Until a significant number of low- and moderate-income dwellings had been erected in the area, later litigation would be limited to issues concerning the appropriateness of the particular site for the planned project. A municipality that triumphed in the initial suit could expect to be finished with the matter, because other plaintiffs, even though not technically bound, would be unlikely to expend resources to challenge

100. The authority to withhold injunctive relief even if a wrong is discovered derives from general equitable principles. Virtually every discussion of a court's equity powers emphasizes that an injunction is granted only at the reasonable discretion of the court. See, e.g., City of Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); City of San Diego v. AFSCME Local 127, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1972). Courts have been particularly responsive to the public interests that might be adversely affected by an injunction. See, e.g., Pennsylvania v. Williams, 294 U.S. 176 (1934); Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443 (1970); Nielson v. Corbo, 35 App. Div. 2d 580, 313 N.Y.S.2d 452 (1970). The disruptive effects of injunctive relief or interference with other governmental bodies could offset even the need for protection of constitutional rights. See generally Developments in the Law—Injunctions, 78 HARV. L. REV. 994 (1965).

In an appropriate case, a court in a jurisdiction permitting declaratory judgments might construe the request for general injunctive relief as a request for declaratory judgment relief and proceed accordingly. This construction is apparently permissible for a federal court. See Gallagher v. Quinn, 363 F.2d 301, 304 & n.8 (D.C. Cir.), cert. denied, 385 U.S. 881 (1966).

101. A commentator who doubts the efficacy of most exclusionary zoning litigation nonetheless concludes that the real benefit from the New Jersey judiciary's activism has been the "gradual creation of a climate for legislative land use reform." Mallach, supra note 78, at 685. Such a "climate" might be created by the judiciary's denunciations of specific exclusionary patterns and implicit promises to act whenever an appropriate, narrowly drawn case is presented.

102. At some point, a court might decide that the judgment should no longer be implemented because rough estimates of a municipality's "fair share" of low-income housing have at least arguably been attained.
anew the entire zoning scheme so long as the original plaintiffs had been adequately represented.

This response is obviously a type of declaratory judgment, a remedy that one federal court refused to grant nonresident plaintiffs who were not connected with any particular planned housing project.\textsuperscript{103} Although the case is probably not good authority,\textsuperscript{104} it may indicate that some courts will view an opinion of this sort as more advisory than declaratory. But this seems inappropriate, because the grievance of nonpropertied plaintiffs does constitute "an actual controversy that has not reached the stage at which either party may seek a coercive remedy."\textsuperscript{105} A formula with which to test the appropriateness of a declaratory judgment in a given situation has been offered by Justice Murphy: "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."\textsuperscript{106} This formulation has been augmented by Wright and Miller, who assert that "[t]here is little difficulty in finding an actual controversy if all of the acts that are alleged to create liability already have occurred."\textsuperscript{107} These guidelines support the use of a declaratory judgment in exclusionary zoning situations so long as courts recognize that the important question is not whether a plaintiff has been denied a building permit, but whether a plaintiff has been injured because a municipality's exclusionary practices deter developers from seeking such a permit.\textsuperscript{108}

There is one important distinction between this proposed judicial response and the normal declaratory judgment remedy. Under the proposed remedy, but not under a declaratory judgment, the individual who later seeks a coercive remedy need not have been a plaintiff in the original action. As discussed above,\textsuperscript{109} this extension of the use of a declaratory judgment may be very important if those persons who are being excluded are to receive any judicial protection; it thus seems warranted.

\textsuperscript{104} The decision was vacated on the basis of Warth v. Seldin, 422 U.S. 490 (1975). See note 98 supra.
\textsuperscript{105} \textit{C. Wright, Law of Federal Courts} § 100 (2d ed. 1970).
\textsuperscript{106} Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).
\textsuperscript{107} \textit{10 C. Wright & A. Miller, Federal Practice and Procedure} § 2757 (1973).
\textsuperscript{108} These guidelines for the use of declaratory judgments refer to \textit{federal} judicial actions. State courts are governed by state constitutions in deciding whether a given controversy is suitable for exercise of the court's jurisdiction. As Professor Wright has noted, most states have declaratory judgment acts similar to the federal statute. \textit{C. Wright, supra} note 105, § 100. A state court should consider satisfaction of the federal guidelines as persuasive evidence that an appropriate case for a declaratory judgment has been presented.
\textsuperscript{109} See notes 98 & 99 supra and accompanying text.
Because courts consider the appropriateness of a declaratory judgment in light of the particular circumstances, they obviously would retain much discretion in deciding whether to hear a case on the merits. Thus, for example, if a suit is brought against a municipality that has allowed some low-income housing but that currently seeks to restrict its rate of growth, the court may simply refuse to decide the case or, if it wishes, may find for the municipality on the basis of the zoning ordinance's presumptive validity. By deferring to a municipality's reasonable determination of housing needs in borderline cases, a court can thereby avoid involving itself with the development of "fair share" or other standards that are necessary for rezoning. The proposed remedy is obviously most appropriate in an extreme case, such as Mount Laurel, where there is no low-income housing and a clear record of systematic exclusion. In such a case a court can afford relief and avoid devising exact standards unless and until the number of plaintiffs who seek to implement the court's judgment approaches a range in which the municipality's fair share is arguably satisfied.110

This course of action permits the judiciary to intervene in some cases on behalf of unlawfully excluded persons. More generally, it permits the courts to retain their prestige as a haven for those who have suffered legal injury. Yet, the remedy is appropriately limited to the more obvious instances of exclusion, since judicial involvement in less clearly defined land-use controversies requires the same expertise and policy decisions that rezoning demands.111

110. See note 102 supra and accompanying text.

111. One critic has suggested another judicial response that is potentially more far-reaching than widespread judicial rezoning. This commentator proposes that courts invalidate the zoning enabling legislation that has improperly delegated to the municipalities the authority to decide matters of statewide concern (i.e., housing for lower income groups). The proposal also contemplates that courts will require any delegation of land-use authority to be made in such a way that substantial inequality will not result. The author asserts that if this safeguard is not possible, the courts should not allow the delegation. Note, 6 RUTGERS-CAMDEN L.J. 727, supra note 4, at 735-41. Such an approach in the area of state delegation of its fiscal responsibility was taken by the New Jersey supreme court in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973). A remedy was delayed in order to give the legislature time to act. After two years, however, there was no appreciable response. Accordingly, a sharply divided court ordered the use of a system of disbursement of funds that it had devised to alleviate inequities. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975).

Even the New Jersey supreme court may balk at such an approach in the area of zoning, for the New Jersey constitution specifically authorizes delegation to municipalities. N.J. CONST. art. 4, § VI, para. 2. Even if this hurdle could be overcome, one might still question this course of action, for recalcitrance on the part of the legislature could lead to a judicial system of land-use planning. This result would not only clash with the principle of separation of powers, it would also lead courts into an area in which they are hardly competent. See Note, 6 RUTGERS-CAMDEN L.J. 727, supra note 4, at 738. Finally, this proposed solution cannot guarantee the construction of housing to any greater extent than the other suggested responses.
III. EVALUATION OF THE POSSIBLE APPROACHES AND SOME LEGISLATIVE ALTERNATIVES

Each of the activist judicial responses to an exclusionary zoning challenge has serious shortcomings. Although the use of invalidation alone, or of court-supervised rezoning by the municipality may, at times, produce satisfactory results, an uncooperative municipality can easily thwart a court that relies upon one of these restrained approaches and thereby compel judicial rezoning. But rezoning is fraught with burdensome administrative complexities and with the danger that the court will preempt policy decisions that belong to the elective branches of government. The proposed response, which couples a refusal to take affirmative steps with a declaration that the municipality's zoning scheme is unlawful, tries to balance the right of low-income persons not to be excluded with the limitations on judicial activism. In reality, of course, this response preserves the status quo and makes it likely that subsequent legal action by potential developers will be necessary to open the municipality to persons of below-average means. Moreover, the proposed remedy is likely to be effective only where the facts leave no doubt as to the existence of an exclusionary scheme.

The elusiveness of an appropriate remedy is at least partially explained by the fact that victory in an exclusionary zoning suit is but an intermediate goal of the plaintiffs. At issue in such cases is the plaintiffs' right not to be excluded from the municipality, yet without the construction of relatively inexpensive housing in the municipality, a judgment affirming this right is merely academic. The prospects for private development are, in general, not bright, nor have federally subsidized housing programs been particularly successful in the past. While the Housing and Community Development

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112. See notes 41 & 48 supra.
113. See notes 84-89 supra and accompanying text.
114. The commentators who have argued most strongly for judicial activism in remedying patterns of exclusionary zoning have assumed the existence of a far-reaching constitutional right without fully examining the problems that a court will face in upholding these "rights." See, e.g., Burns, supra note 2; Rubinowitz, Exclusionary Zoning: A Wrong in Search of a Remedy, 6 U. Mich. J.L. Rev. 625 (1973). Indeed, one author has even concluded that the courts are the best suited of any governmental body to decide complex questions of land use in metropolitan areas. Feiler, Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude, 69 Mich. L. Rev. 655 (1971). On the basis of an examination of the possible remedies, this Note simply disagrees with that conclusion.
115. See notes 80 & 81 supra and authorities cited therein.
116. See generally H. Aaron, Shelter and Subsidies (1972).
Act of 1974\textsuperscript{117} conditions block grants to municipalities on local acceptance of housing for persons who work, but do not reside, in the community, it is premature to evaluate the program's success.\textsuperscript{118}

Thus, not only is the right not to be excluded through zoning essentially an abstract one when considered alone, but the Supreme Court has, in \textit{Lindsey v. Normet},\textsuperscript{119} explicitly declared that there is no federal constitutional right to housing. Not even the New Jersey supreme court has suggested that the constitution of that state confers such a right. Therefore, plaintiffs who successfully demonstrate exclusionary zoning cannot return to court to convert their "intermediate" right into low-income housing.

The difficulties in formulating satisfactory remedies in exclusionary zoning cases are best understood by examining them in the context of the judicial role as it has evolved over the past twenty years. Since \textit{Brown v. Board of Education},\textsuperscript{120} the Supreme Court has demonstrated for several reasons: first, the Court rested heavily upon the fact that HUD had assisted the discriminatory housing policy of the Chicago Housing Authority; second, the Court assured municipalities that a "remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land use laws." 44 U.S.L.W. at 4487. Thus, while the decision may profoundly influence the kinds of efforts to construct housing that HUD makes in metropolitan areas, it does not affect the amount of housing that is actually built or the zoning of suburban communities.


\textsuperscript{118} The opposition of suburbs to low-income housing has emerged in this context as well. Two Chicago suburbs have each turned down over 2 million dollars in federal funds in order to forestall such housing. 27 LAND USE L. & ZONING DIGEST, No. 7, at 2 (1975). One heartening development is the recent decision of a federal court to block the transfer of 4 million dollars in community development funds to seven Hartford, Conn., suburbs. City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976). The court decided the case on the relatively narrow ground that the communities had not submitted the required projections of future housing needs for low-income residents. It also indicated, however, that the Department of Housing and Urban Development must give weight to these projections and other sources of information in considering reapplications from the municipalities involved. 408 F. Supp. at 903. Thus there remains the possibility of keeping funds from suburbs which do not act in good faith to meet projected needs.

\textsuperscript{119} 405 U.S. 56 (1972). The Court sustained two Oregon provisions for rather summary eviction for nonpayment of rent. In the course of the majority opinion, Justice White stated: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality. . . ." 405 U.S. at 74. This principle has been applied by a Court of Appeals in considering section 1415(7) of the United States Housing Act of 1937, 42 U.S.C. §§ 1401-1450 (1970). That section provides that no loans can be made for any planned low-rent projects unless the local governing authority has consented. Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974). In upholding the statute, the court commented: "In \textit{Lindsey v. Normet} . . . the Court held that no one has a constitutional right to adequate housing. . . . \textsuperscript{[i]}t follows that he has no such right in a municipality in which he does not reside." 500 F.2d at 1093.

\textsuperscript{120} 347 U.S. 483 (1954).
strated a willingness to confront some of the social problems that legislatures and executives have too long neglected. The civil rights movement of the 1950's and 1960's relied heavily upon the activism of the federal judiciary in halting discriminatory practices.\textsuperscript{121} Advocates of other social and political changes also turned increasingly to the courts to the point where opposition to a war developed into a series of unsuccessful lawsuits.\textsuperscript{122} Thus, exclusionary zoning is only one among many social conflicts that have been brought to the courts for resolution. In this area, though, the judiciary is confronted with a situation that is simply not conducive to judicial solution. Although the judiciary, in confronting racial, ethnic, and sex-based discrimination, has been both an effective agent of some reform, and a catalyst to other changes, it is incapable of negating the effects of parochial zoning and legislative neglect of low-income housing needs. Judicial incapacity and legislative unwillingness to remedy zoning and housing patterns combine to present an unwelcome prospect of future inaction.

There are, however, a few indications that some states will attempt legislative solutions to the problems raised in exclusionary zoning controversies.\textsuperscript{123} A legislative scheme mandates social policies and standards that have been determined through the political process and hence, presumably, have significant popular support. In addition, legislatures can establish administrative agencies to oversee the implementation of the standards enacted. Finally, legislative action can coordinate efforts to counteract exclusionary zoning with the construction of needed housing. Legislative programs have not proliferated, but a few states have enacted laws designed to "open up" suburbs to low- and moderate-income housing. In addition, the American Law Institute has completed a Model Land Development Code, which provides for state controls upon a municipality's regulation of proposed low- and moderate-income housing.\textsuperscript{124} It is inter-


\textsuperscript{122} \textit{See, e.g.}, Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971). The Supreme Court consistently refused to consider the issue. \textit{See, e.g.}, Massachusetts v. Laird, 400 U.S. 886 (1970); Mora v. McNamara, 389 U.S. 934 (1967).

\textsuperscript{123} \textit{See, e.g.}, MASS. GEN. LAWS ANN. ch. 40B, §§ 20 to 23 (Supp. 1974).

\textsuperscript{124} MODEL LAND DEVELOPMENT CODE (Proposed Official Draft, 1975). The Code posits certain categories of development as having statewide or regional significance. One such category in section 7-301(4)(d) is the "development of housing for persons of low and moderate income." Section 7-302 allows a denial of an application for a development permit to be appealed to a state agency if the application involves an issue of statewide or regional significance. A commentator has suggested
esting to note that the Mount Laurel court recognized the advantages of legislative alternatives even as it intimated a willingness to rezone.125 A similar sentiment was expressed by a New York court that had struggled to formulate standards for testing the validity of an ordinance that excluded multi-unit housing.126 The court acknowledged its duty to continue to assess the validity of zoning schemes, but its preference for a legislatively created regional or state body to perform this function was obvious.

The most notable of the state programs to date is the Massachusetts zoning appeals law, which was enacted in 1969 to facilitate the approval of low- and moderate-income housing projects.127 Under the Massachusetts scheme, any public agency or "limited dividend or nonprofit organization" that proposes to build low- or moderate-income housing may make a single application to a local board of appeals. This application makes unnecessary separate applications to the various agencies, including the zoning commission, which have jurisdiction over certain features of the project.128 Local boards are required to act relatively quickly, since a failure to respond within a specific period is deemed an approval of the project.129 Denial of an application by a local board may be appealed to a state agency, the Housing Appeals Committee, which is also required to process applications expeditiously.130 The Appeals Committee is empowered to vacate an adverse decision of a local board and to direct the issuance of a comprehensive permit.131 In short, the law guarantees an eligi-

that the requirement for state scrutiny of any large scale development, section 7-301(1), will give the state agency opportunity to halt the construction of large-lot houses if the development would remove substantial acreage from the market. See Note, 6 Rutger's-Camden L.J. 727, supra note 4, at 750-51. Further hope for low- and moderate-income housing is provided by section 7-305 of the Code, which forbids a municipality to allow any development that will create 100 or more jobs for nonresident employees unless there is, or will be, adequate housing within the immediate vicinity.

125. 67 N.J. at 189-91, 336 A.2d at 732-33. It has also been argued that comparison with legislative remedies may reveal more effective alternatives than those available from the courts. This argument contends that title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to d-5 (1970), which authorizes HEW guidelines, demonstrates that judicial activity alone cannot achieve full school desegregation. See Developments in the Law, supra note 40, at 1158.


131. Mass. Gen. Laws Ann. ch. 40B, § 23 (Supp. 1974). The standard for this review is whether the denial was consistent with local needs, a criterion defined in section 20. One component is the proportion of low- and moderate-income units in the city or town. If more than ten per cent of the units in the municipality are low- or moderate-income housing, or if more than one and one-half per cent of all land consists of such housing, local needs are presumed satisfied. In addition, a town need
ble developer a relatively expeditious and inexpensive procedure, with an appeal to an obviously sympathetic agency.

The Supreme Judicial Court of Massachusetts, in *Board of Appeals of Hanover v. Housing Appeals Committee*, upheld the constitutionality of these provisions, and in the course of doing so clarified several aspects of the law. The court concluded that the law "represents the Legislature's attempt to satisfy the regional need for housing without stripping municipalities of their power to zone." It interpreted the law to mean that an applicant under the scheme need not possess title to the proposed site, but that the board of appeals or housing committee may require disclosure of present or planned property interest in the site, and condition a permit on certain property interest requirements. Thus, applicants can receive approval of their plans before acquiring the property, but individuals who have no potential interest in the site can be barred from making frivolous applications.

The Massachusetts law has been criticized by several commentators, principally for the modest amount of low-income housing that a community can present and still fulfill its "local needs." Other perceived shortcomings in the scheme include its failure to coordinate environmental considerations with housing needs, its failure to define the region for which minimum needs are to be evaluated, and the possible exclusion of private developers from the benefits of the law. Nonetheless, there have been quantifiable housing gains as a result of the legislation. As of June 1973, local appeals boards had granted six comprehensive permits under the new procedures, and construction was underway on three of the sites. During the same period the Housing Appeals Committee issued five decisions, all of which overturned denials of comprehensive permits by local boards. While these developments are hardly revolutionary, they do represent progress in the economic integration of some communities. Significantly, the Massachusetts legislature has not ceased its effort to

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136. *See note 131 supra.*
137. *See Note, 6 Rutgers-Camden L.J. 727, supra note 4, at 744 & n.113 and 745-46.
139. *Id.*
140. *Cf. B. Segan, supra note 33, at 174-75.*
deal with the problems of parochial land use controls, for it recently established a regional body with authority over local zoning. 141

Other states have established state and regional agencies with varying degrees of authority. 142 The New York Urban Development Corporation, created in 1969, 143 was originally empowered to override local zoning ordinances in order to construct low income housing, but in 1973 the New York legislature rendered this power nugatory by granting municipalities a veto over any proposed residential project. 144 The Development Corporation was progressively weakened as a provider of funds for low-income housing by the New York fiscal crisis until, in February 1975, it became insolvent. 145 Funds have been obtained to pay off existing obligations, but New York has suspended all plans for state-subsidized housing construction. 146 Thus, what began as the powerful cornerstone of a most ambitious state program, combining land use powers with authority to construct housing, has developed into a state corporate entity with little potency.

Meanwhile, attempts to legislate anti-exclusionary laws have been defeated in a number of states, 147 including New Jersey, the locus of the Mount Laurel litigation. 148 It appears, then, that the future of widespread legislative action to counteract exclusionary zoning remains uncertain and the prospects for an upsurge in low- and moderate-income housing construction remain bleak.


142. All but the most recent of these programs are compiled and described in U.S. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 93D Cong., 2d Sess., STATE LAND USE PROGRAMS (Comm. Print 1974).


145. N.Y. Times, Feb. 25, 1975, at 1, col. 1 (late city ed.); N.Y. Times, Feb. 26, 1975, at 1, col. 2 and at 20, col. 1 (late city ed.). An analysis of the collapse is provided in N.Y. Times, March 16, 1975, at 8, at 1, col. 5 (late city ed.).

146. N.Y. Times, Nov. 1, 1975, at 1, col. 6 (late city ed.); N.Y. Times, Nov. 9, 1975, at 127, col. 3 (late city ed.).

147. Proposals for schemes similar to the Massachusetts law have been proposed and defeated in both Connecticut and Wisconsin. Note, 54 B.U. L. REV. 37, supra note 135, at 73 n.243.

148. See Mallach, supra note 78, at 678-81.
IV. CONCLUSION

In a sense, the only sure conclusion is that the appropriate judicial response to exclusionary zoning cases is not easily ascertained. The initiative of some state legislatures has relieved certain courts of the need to make and implement land-use decisions. Yet many legislatures, including that of New Jersey, have failed to take action against exclusionary practices and thereby forced individuals to institute Mount Laurel and similar lawsuits. It has thus been left to the courts of these states to decide upon a course of action for resolving the controversies that will inevitably confront them.

In determining its posture in such cases, a court should realistically assess the limitations of the judiciary and should tailor its decrees so as to prompt state legislative action or municipal alteration of exclusionary zoning patterns. Even if its exhortations fall upon deaf ears, however, a court should not readily take on the myriad problems inherent in intelligently rezoning a municipality.

The most feasible remedy in a situation similar to Mount Laurel is a declaratory judgment. If a court declines to rezone an entire municipality but declares that the municipality has engaged in unlawful exclusion, a property owner can later use this judgment to challenge any refusal to grant a variance, permit, or zoning amendment for the construction of concentrated, multi-unit dwellings. While this later litigation over a single piece of land could well introduce the problems inherent in broad-based rezoning, it would do so on a smaller scale, with the issues more clearly in focus. Since it is unlikely that a declaration of unlawful exclusion will precipitate a flood of litigation by developers anxious to build low-income housing, a court adopting this posture need not fear that it will be called upon to rezone an entire community by "increments."

The temptation for those who desire decent housing for the nation's less affluent to advocate increased judicial activism will doubtless grow as the disheartening economies of construction exacerbate the already-existing shortage. Yet any "victories" of plaintiffs in exclusionary zoning cases will be hollow absent the development of significant programs for housing construction. In some cases, developers will doubtless take advantage of a declaration of unlawful zoning by seeking permission to build subsidized or other lower-income housing in the community involved. However, in those cases where builders are not willing to utilize the decree, the resources marshalled for the litigation might be better expended in promoting state or federal programs that compel suburbs to deal realistically with the housing problems of the metropolitan areas in which they are located. Advocates of suburban economic integration should, therefore, concentrate their efforts upon the enactment and implementa-
tion of laws that integrate land use decisions with adequately financed housing construction. 149

149. Thus, the best-directed efforts might steer away from establishing a constitutional right and instead concentrate on developing statutory programs. This may disturb some, for legislation is subject to repeal, whereas a constitutional right presumably possesses a vitality independent of legislative whim. However, some of the most important social goals do not lend themselves to transformation into constitutional rights. It is difficult to imagine, for example, a more important social goal than the delivery of adequate health and nutritional care to every person in the country. It is also difficult to imagine how such a goal could emerge as a court-enforceable constitutional right. What is needed is the inculcation of a national attitude that includes commitment to the achievement of these aims. Prescriptions for engendering such an attitude are hardly self-evident, but this may reflect a need for an effort which seeks more than a few victories in court.