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A Brief Essay on Inclusionary Zoning and Environmental Values

Donald W. Stever*

"A quiet place where yards are wide, people few . . ."¹

I. The Picket Fence Origins of Traditional Zoning and its Exclusionary Biases

When Justice Douglas wrote the now-famous phrase quoted above as a policy justification for sustaining an exclusionary zoning ordinance's definition of "family" he was articulating not a new view of the function of zoning ordinances, but restating the very essence of the zoning scheme promoted by the Standard Zoning Enabling Act (SZEa), adopted in virtually every state, and upheld against constitutional attacks in *Village of Euclid v. Ambler Realty Co.*² The SZEa scheme is heavily biased in favor of segregating not only residential from nonresidential uses, but also single-family detached residential uses from multi-family residential uses, placing the former at the pinnacle of the "Euclidian triangle."³ The source of this

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1. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

2. 272 U.S. 365 (1926). The title of this case spawned common usage of the phrase "Euclidian zoning" to refer to Standard Zoning Enabling Act zoning.

3. SZEa zoning is premised upon the concept that all higher uses may be had as a matter of right in districts zoned for "lower" uses. Thus, since single-family residen-

bias is nowhere better seen than in Justice Sutherland's language in the portion of the *Euclid* opinion upholding the practice of segregating single-family from multi-family residential uses. The court referred approvingly to arguments that apartments have "[r]esulted in destroying the entire section [devoted] for private house purposes,"⁴ that apartments are often "parasite[s]", and constructed "in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district,"⁵ and bring to residential areas "disturbing noises."⁶ When placed in residential districts, apartments, the Court said, "come very near to being nuisances."⁷ Essentially, what the court is saying is that apartment houses are alright, so long as they remain in their place.⁸

The Supreme Court's *Euclid* rationale reflects the predominant urban biases of the dominant economic classes during the early twentieth century in the United States. It is also reflective of the limitations of urban planning and structural design at that time. The primary reason for segregating multi-family uses from single-family uses was that not to do so might inflict some sort of undefined economic (or social) harm on the single-family residence-owning group⁹ whose lifestyle

tial (SFR) uses are viewed as the "highest" use. SFR districts are generally exclusive, but single-family uses are permitted in commercial, multi-family or industrial districts. Plotting this pattern graphically results in a triangle.

4. *Euclid*, 272 U.S. at 394.

5. *Id.*

6. *Id.*

7. *Id.* at 395.

8. The trial judge in *Euclid* viewed the zoning ordinance from a different perspective, at least insofar as it segregated residential uses. The District Court opinion states, in part that "in the last analysis, the result to be accomplished [by such an ordinance] is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live . . . in a single-family dwelling, . . . and others in an apartment . . . is primarily economic." *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924). There are, of course, other reasons why people prefer to live in multi-family situations, and the reasons change over time with changes in societal attitudes or a person's age.

9. It was also argued at the time that apartments might interfere with air circulation and increase traffic. These concerns, whatever their validity in the 1920's, are of less consequence today. Development patterns and land development technologies have changed radically in a number of ways over the last sixty years. In areas such as

was incompatible with the prevailing multi-family residential scheme. It must be recalled that at the time *Euclid* was decided the predominant form of single-family development was the grid-pattern street layout with individual lots of generally uniform size containing a dwelling house surrounded by back, front and side yards. Lot sizes usually varied from 1/10 acre up to an acre. Low- and moderate-income housing was generally in the form of tenements or railroad flats, usually built within close proximity to areas of concentrated employment. Those who lived in single-family residences were the establishment classes, while in multi-family situations, the recently arrived immigrants and other minority groups.¹⁰

II. The Contemporary Rationale For Segregating Housing Types

It must be understood that the issue discussed in this article is an urban phenomenon. In the truly rural areas of the United States, most households fall within the low- or moderate-income classifications used in the inclusionary zoning cases, even though the predominant housing type is single-family residential. In the farm belt in America's small towns, inclusionary zoning is simply not an issue. Where it is an issue is in the older cities and in the country's growing suburban and exurban areas, where the vast majority of the population resides.

The reasons advanced currently for keeping low- and moderate-income housing from areas already developed into single-family residences, or from essentially undeveloped areas, are different from the rather straightforward biases of the 1920's. More often than not, environmental concerns have been voiced as the primary reasons for zoning out multi-fam-

exurban New York, for example, traffic problems have in some cases been exacerbated by the *failure* to integrate various residential uses since workers attracted to corporate parks located in residential towns, who are unable to afford single-family residence near their place of employment, clog rural arteries commuting to work. See Atonna & Counts, *New and Innovative Ideas in Land Use Controls - With or Without Zoning*, Inst. on Plan., Zoning & Eminent Domain 1, 7-11 (1980).

10. *Id.*

ily or small-lot single-family residential uses.¹¹ It is usually argued either that there is a need for open space¹² or that some resource, like water, would be adversely affected by intensive development.¹³

Unfortunately, environmental concerns can easily become a pretext for less laudable motivations behind large-lot, single-family zoning. This is particularly troublesome in light of the fact that courts when reviewing zoning ordinances since *Euclid*, have accorded almost total deference to legislative findings.¹⁴ The courts in New York seem particularly willing to assume, at least provisionally, that environmental concerns may form a valid basis for zoning schemes that in general, and without regard to site-specific environmental constraints, make little or no room for low- or moderate-income housing.¹⁵ The validity of this assumption is suspect and needs to be further explored by the legal community, the legislature and the courts with the alternative premise in mind, that adequate protection of meaningful environmental values can be achieved without eliminating multi-family and other low/moderate income housing from rural and suburban communities. In fact, the failure to accommodate a mixture of housing types may in some communities actually contribute to environmental degradation.

A. *Environmental Impacts to be Assessed*

Initially, it is important to define as clearly as possible

11. See, e.g., *Suffolk Hous. Serv. v. Town of Brookhaven*, 91 Misc. 2d 80, 397 N.Y.S.2d 302 (1977), *aff'd*, 109 A.D.2d 323, 491 N.Y.S.2d 396 (1985); *North Shore Unitarian Universalist Soc'y v. Village of Upper Brookville*, 110 A.D.2d 123, 493 N.Y.S.2d 564 (1985); *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981).

12. See *North Shore Unitarian Universalist Soc'y*, 110 A.D.2d at 124, 493 N.Y.S.2d at 565.

13. *Id.* at 125, 493 N.Y.S.2d at 566.

14. See *Kurzius*, 51 N.Y.2d at 340, 414 N.E.2d at 682, 434 N.Y.S.2d at 182.

15. For example, in *Kurzius*, the New York Court of Appeals stated, "[a]lthough environmental factors may justify large-lot zoning, we do not hold that this type of zoning is permissible without qualification, because minimum lot requirements may involve exclusionary practices." *Id.* at 346, 414 N.E.2d at 684, 434 N.Y.S.2d at 184.

what is to be considered when dealing with the issue of zoning premised on environmental concerns. The primary low- and moderate-income housing forms are now multi-family structures,¹⁶ attached single-family units,¹⁷ and mobile homes.¹⁸ The relevant question to be asked is whether any of these housing forms have an inherently more negative environmental impact than single-family residential housing which is not affordable by low- and moderate-income persons. In order to address this question, the types of impacts associated with human habitation must be addressed separately.

In general, human residential occupation of land areas will involve the following broad categories of environmental impact:¹⁹

- (1) water pollution, either of surface waters or ground-water caused by sewage discharges;
- (2) solid waste generation, and the consumption of resources required for disposal;
- (3) open space consumption;
- (4) destruction or impairment²⁰ of critical ecosystems;

16. These may be rental apartments that are either subsidized by public agencies or are not, or condominiums that are priced moderately because they are built pursuant to financing and/or tax incentives designed to keep the price of the units low. See also *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*).

17. As in the case of apartments, these may either be rental units or condominiums.

18. This term is intended to cover "modular manufactured" homes as well as the wheeled single unit variety. The modular concept has in recent years come to dominate the industry.

19. I have not listed below, and do not discuss in this article, infrastructure impacts, such as school overcrowding and the costs of increased fire protection, and so forth. These are not "impacts," so much as fiscal matters. They are, moreover never legitimate excuses for not developing affordable housing, but are only relevant as to the timing of growth. In New York, New Jersey and in a number of other states, cash exactions are available to offset these types of infrastructure costs. See generally D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law*, Section 7.8 (1986) (commentary listed); Hagman, *Exactions, User Fees and Assessments: What Are the Limits*, in 1983 *Zoning and Planning Law Handbook* 45 (F. Strom ed. 1983); Adelstein & Edelson, *Subdivision Exactions and Congestion Externalities*, 5 J. Legal Studies 147 (1976).

20. There are a number of "critical" ecosystems that are generally believed to require protection. Two examples that have been protected in a number of states and by the federal government are wetlands and coastal estuaries. Other possible exam-

- (5) construction-related impacts such as soil erosion, sedimentation and defoliation;
- (6) motor vehicle-related impacts; and
- (7) aesthetics.

Whether a given density of habitation will produce undesirable effects in any of the above categories is a question of fact that requires a substantial data base and sophisticated analysis on a town-wide basis. A few communities have attempted such data gathering and analysis,²¹ but most operate on only a rudimentary set of data on the carrying capacity of the town ecosystems and resources. Thus, for most communities, there is simply no factual predicate for a large-lot, low-density zoning scheme based on environmental considerations.

1. *Water Pollution*

Water pollution concerns may be relevant to population density within a particular geographic area, or to the development of a specific site, depending upon the availability of public sewers. Single-family residences placed on large lots can usually be served by conventional septic tank and leach field systems, which use the soil as the primary means of wastewater purification.²² Such systems do not work with high volumes of concentrated sewage, and thus are inappropriate for apartment dwellings and dense clusters. Such housing

ples may include flood plains, areas of steep slopes, prime agricultural lands, unique or otherwise valuable forest ecosystems, and areas of historical or archeological value. See N. Robinson, *Environmental Regulation of Real Property* §§ 5.01-5.09, 21.03 (1986). See generally J. Kusler, *Regulating Sensitive Land* 1-53 (1980)(part one of this book discusses critical areas and zoning).

21. The Village of Upper Brookville, for example, apparently retained a water management consultant to determine the impact of intensive development on an underlying aquifer that provided the sole source of drinking water for a large area of Long Island. See *North Shore Unitarian Universalist Soc'y v. Village of Upper Brookville*, 110 A.D.2d 123, 493 N.Y.S.2d 564 (1985).

22. How large the lot needs to be in order to adequately accomodate subsurface sewage disposal depends primarily on the soil type and seasonal high water table. In some soils no matter how large the lot, a septic system simply will not function adequately to prevent ground water contamination. See K. Lynch, *Site Planning* 181-82 (2d ed. 1971); Bouma, *Subsurface Applications of Sewage Effluent*, in *Planning the Uses and Management of Land* 665-703 (M. Beatty, G. Petersen & L. Swindale eds. 1979).

types must either be tied into a public sewer system or be served by a community sewage treatment facility.²³ This fact produces siting constraints for most low- and moderate-income housing types in communities other than heavily urbanized ones, and may, in a community without significant receiving water availability, severely limit the sites available for large units of such housing.²⁴

2. *Solid Waste*

Solid waste, unlike water pollution, can never be rationally pointed to as a reason to exclude low and moderate income families from a community. There is no evidence that low and moderate income families generate more solid waste than upper income families. In fact, in the United States, the reverse is probably the case. Moreover, the economics of solid waste management dictate large, regional facilities, the siting and operation of which is usually the responsibility of a higher level of government than the one responsible for zoning and land use decisions.²⁵

23. Tying into an existing public system involves construction of pipes, and sometimes pumping stations. In Westchester County, New York, the county-owned sewer system is available to about 1/3 of the county's land area. Within the service area, developers generally pay the costs of extending interceptor sewers to the property line, and also build the collector sewers within the development.

Construction of a private sewage treatment facility is much more expensive, and requires the availability of a stream of sufficient size and water quality classification to accept the discharge of treated effluent, which under federal and state standards is generally allowed to contain some pollutants. A few states prohibit the operation of privately owned sewage treatment facilities entirely, though most allow them, subject to the conditions of water pollution discharge permits.

24. There are, nevertheless, technologies available for disposing of sewage from modest sized multi-family developments that do not require expensive treatment plants and significant receiving water. Chlorinated sand filters and trickling filter systems have been employed effectively in such situations. See Bouma, *supra* note 22; Sopper, *Surface Application of Sewage Effluent and Sludge*, in *Planning the Uses and Management of Land* 633-63 (M. Beatty, G. Petersen & L. Swindle eds. 1979).

25. Although there are still a few "town dumps" here and there, state and federal regulation of solid waste disposal has caused massive regionalization of this activity. Today, the county, or, in some areas, a state authority, is responsible for solid waste disposal.

3. *The Open Space Issue*

Preservation of open space is the most widely cited reason for large-lot zoning, and also the rationale for the decisions in those New York cases that have upheld zoning schemes that are facially exclusionary.²⁶ The open space issue accordingly requires careful analysis.

The concept of useful open space does not mean the same thing to all people. For some, a small garden plot more than suffices as a window on nature. For others, far more room is required to satisfy the yearning for unenclosed space. There are, however, less subjective criteria upon which the value of open spaces can be assessed.

One such criterion is the value of an area for wildlife purposes.²⁷ Most species of wildlife seek to avoid human habitation and maintain more stable populations when not in constant close contact to human dwellings.²⁸ Moreover, diversity of plant associations and terrain types, access to available water, and similar considerations are important to the maintenance of healthy, diverse wildlife populations.²⁹ Most large-lot zoning schemes, which spread houses more or less uniformly over two to five acre parcels, effectively sprinkle humans

26. See, e.g., *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 346, 414 N.E.2d 680, 684, 434 N.Y.S.2d 180, 184 (1980). But see, e.g., *Mayo, Land Use Control*, 33 Syracuse L. Rev. 401 (1982). The *Kurzius* decision has been severely criticized by one commentator, who has pointed out the extent to which it "suggests the ease with which a community might disguise its discriminatory intent in euphemistic references to 'open space zoning'." *Id.* at 409-10.

27. For the purpose of this discussion, it is to be assumed that the wildlife of concern are larger mammals and most species of bird, which tend to move from one place to another over time.

28. There are certain timid animals which keep their distance from human aggregation, while others adapt to them. P. Anderson, *Omega Murder of the Ecosystem and Suicide of Man* 197 (1971).

29. In any given area various types of microbes, tiny soil organisms, and larger plants and animals can be found living close together, interacting with one another in a variety of ways. Often and absolute dependence exists among these species. This multi-species system is called a natural community.

The natural community operates within the context of a physical environment. Physical factors determine, to a large degree, the type of community which comes to occupy an area. Soil and atmospheric conditions, along with plant types, dictate the type of community which clothes a region. R. Darnell, *Ecology and Man* 43-44 (1973).

throughout the entire range of wildlife inhabiting whatever acreage out of which the development was carved. Dense clusters of habitation,³⁰ on the other hand, coupled with aggressive preservation of undeveloped areas provide greater opportunities for wildlife.³¹ It can be argued, for example, that the adverse impact of pesticide use, which is endemic to back yards in suburban areas,³² would be far less significant if a hundred units are clustered into ten or so acres of a two hundred acre tract, than if the same number of units are spread over the entire tract.³³

Even recreational considerations usually favor concentrated clusters of habitation over spread-out large-lot zoning. The development and maintenance of hiking or horseback trails by a community or a recreational club is clearly more feasible and cost efficient when there are fewer "owners" to be dealt with.³⁴ Weaving a trail system through two hundred fifty acres of three acre zoned land requires negotiations with countless lot owners, through whose "close"³⁵ the proposed trails must pass. Undeveloped open space associated with a clustered or apartment development is generally managed by an owners' association, or by the community, which is a single owner for negotiation purposes.

The argument most often heard against low cost housing in rural communities is that apartment houses or dense town house developments will destroy the rural, idyllic character of the community.³⁶ While such a statement could be true in

30. N.Y. Town Law § 281 (McKinney 1965 & Supp. 1987) authorizes cluster zoning. Clustering results in a "grouping of density into a portion of a parcel instead of uniform density throughout the parcel." P. Buck, *Modern Land Use Control* 95 (1978).

31. See P. Buck, *supra* note 30, at 95.

32. For a thorough discussion of pesticide law and regulation see D. Stever, *The Law of Chemical Regulation and Hazardous Waste* ch. 3 (1986).

33. *Id.*

34. In addition, insurance questions, though in no way eliminated, are at least simpler to address when the trail areas are in single, rather than multiple, ownership.

35. Close is defined as "[a] portion of land, as a field, inclosed as by a hedge, fence, or other visible inclosure, or by an invisible ideal boundary founded on limit of title. The interest of a person in any particular piece of land, whether actually inclosed or not." *Black's Law Dictionary* 231 (5th ed. 1979).

36. See Brown, *County Effort on Zoning Meets Resistance*, N.Y. Times, Mar. 22,

some circumstances (and there are no doubt legions of examples that could be pointed to by advocates of this point of view), whether it is or is not true in any given situation, is a design and site planning issue, and not a zoning issue. As a practical matter, a good site planner and architect can hide even a very large structure or complex on most sites of any significant size, given the topography in most of the eastern United States.

The failure to accomodate rural character is more often a product of the unwillingness of local planning boards and town legislatures to exercise the authority they possess under subdivision legislation. However, in states like New York, where "contract zoning" is permitted,³⁷ a town can creatively use its legislative authority to set conditions which a developer must meet in order for rezoning to be granted. This authority can be substantial, essentially giving the town the power to dictate detailed site parameters, mandate close clustering,³⁸ develop and maintain screening,³⁹ impose architectural conditions,⁴⁰ and the like.

1987, § 11, at 1, col 1. This article discusses the North Salem, N.Y. Town Board's decision to rezone two areas where multi-family housing was formerly allowed to one- and two acre residential use. Noted in the article was that the town's potential for growth was limited because of its environmental setting and rural characteristics, which made development difficult or impossible.

37. "Contract zoning" is also sometimes called "conditional zoning". It is a device by which undeveloped tracts are zoned restrictively, but under an ordinance that allows upzoning under conditions to be established by the legislative body. Since rezoning is a legislative, rather than an administrative act, the device provides wide latitude for the imposition of creative conditions on the developer. *See generally* Colvard v. Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981).

38. *See generally* R. Unterman & R. Small, Site Planning For Cluster Housing (1977).

39. Screening is typically implemented by means of vegetative buffers and mandatory rear yard setbacks with fifty to hundred feet either deed restricted to prevent removal of vegetation or, more effectively, deeded to the homeowner association with a covenant to maintain the buffer.

40. The application of the municipality's zoning authority to impose architectural conditions on the developers, during the early twentieth century, was limited by the traditional concepts of the time.

Local ordinances early adopted a standard approach for establishing regulatory guidelines as necessary protection of the public well-being through assuring adequate light, air and open space. These regulations, uniformly applica-

4. Critical Ecosystems

Critical ecosystem impairment is a site-specific phenomenon that is to be addressed by restrictive local laws and permit requirements, in the absence of or in addition to state or federal regulatory requirements.⁴¹ Even though a community contains a significant percentage of critical ecosystem land, that fact merely affects the location of the development, and cannot reasonably form the basis for zoning that excludes affordable housing by large minimum lot sizes.

Farmland represents a special problem. More often than not, farms can be developed, and the only reason they are viewed as critical areas is that the amount of local farmland, viewed either as a future resource or a cultural heritage, is decreasing. Although there may well be compelling reasons to prevent development of farmland into non-farm uses,⁴² there is absolutely no logical support for a zoning scheme that favors single-family residential development of farmland over multi-family development, or which limits development of

ble throughout each zone district, established allowable heights, set backs, and building bulk for all construction meeting the permitted use standards. Atonna & Counts, *supra* note 9, at 13. However, today "[t]here is no question that the monolithic city of the early century is gone." *Id.* at 23. Currently, a zoning ordinance can require that a board approve plans and specifications for structures in order to promote conformity to "minimal architecture standards" and "prevent unsightly, grotesque and unsuitable structures." State ex rel Stoyanoff v. Berkley, 458 S.W.3d 305, 310 (Mo. 1970) (ordinance upheld as protecting the general welfare of persons in the entire community and protecting property values). Cf. Piscatelli v. Township Committee of Scotch Plains, 103 N.J. Super. 589, 248 A.2d 274 (1968); Pacesetter Homes v. Olympia Fields, 104 Ill. App. 2d 218, 244 N.E.2d 369 (1968) (where such ordinances have been overturned on the basis of lack of authority under state enabling legislature, vagueness of provision contained in the ordinance, and disapproval of the function by the architectural advisory committee).

41. Wetland destruction, for example, is heavily regulated by the federal government under Section 404 of the Clean Water Act, and also by a number of states. For example, New York has enacted both The Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law and The Tidal Wetlands Act, Article 25 of the Environmental Conservation. Both New York Wetlands Acts were designed to preserve and protect wetlands, as valuable resources, and to prevent their despoliation and destruction. See N.Y. Env't. Conser. L. §§ 24-0103, 25-0102 (McKinney 1984).

42. For the debate on the necessity of preserving farmland, see E. Roberts, *The Law and the Preservation of Agricultural Land* (1982); Fischel, *The Urbanization of Agricultural Land: A review of the National Agricultural Lands Study*, 58 Land Eco. 236 (1982).

farmland to large-lot, unclustered projects.⁴³

5. *Construction-related Impacts*

Construction-related impacts are not inherently more or inherently less significant depending upon the price of the dwellings being constructed. What is significant, however, is the total percentage of the site that is under development. The broader the area of land disturbance, the greater the potential for unavoidable construction impacts, such as sediment run-off and foliage injury. This fact argues strongly in favor of tightly clustered developments, which leave large areas of the tract undisturbed. Furthermore, tightly clustered developments tend to be attractive to affordable housing developers since they tend to cost less to develop.⁴⁴ They are thus more viable in terms of the low profit-margin economics of that type of project prevalent in the Northeast.

6. *Motor Vehicles*

Motor vehicle traffic impacts are a common excuse for the spread out, large-lot zoning. There is no question that poorly designed traffic patterns or overly dense residential developments situated on small, rural lands can create havoc. The issue, however, has nothing to do with the nature of the housing being developed, but simply with gross density per roadway access point.⁴⁵ There is no evidence that residential traffic patterns vary significantly with the income level of the drivers. People generally go to and return from work within the same general time frames, generating peak traffic flows, regardless of whether they are executives or office workers.

43. It should be understood that I am *not* arguing in favor of massively dense, small-lot sprawling affordable housing developments, such as occurred during the 1950's with projects like the Levittowns. Such development is clearly unacceptable by any standards today. I am simply saying that if the carrying capacity of a given two hundred fifty acres is "X" dwellings, it is not environmentally better, all other things being equal, that the dwellings are on large lots.

44. "Cost reduction techniques of mass housing can be properly applied to low-rise medium-density housing developments". R. Unterman & R. Small, *supra* note 38, at 1.

45. See Lynch, *supra* note 22, at 125-29, 149.

What is more important is the direction of travel and the design and spacing of the ingress and egress points. Virtually all traffic engineers agree that controlled access is safer than uncontrolled access, and that the greater the spacing between access points the greater the margin of safety and the lesser the potential for congestion. With proper design, traffic volume decline is significant.⁴⁶ There are, of course, limits to the number of vehicles that will be considered acceptable for any roadway system,⁴⁷ and since road upgrading is expensive, it is not unreasonable for a town government to consider capping development at a level below which upgrading needs to be considered. Such action requires detailed roadway capacity analyses and is inherently housing-type neutral.

7. *Aesthetics*

Finally, aesthetics are so site-specific that they cannot reasonably form the basis for rejection of an inclusionary zoning scheme in any community. Municipalities have broad powers to impose aesthetic-based standards on land developments, regardless of their nature or purpose.⁴⁸

46. *Id.* at 148-49. The same does not appear to be as true for commercial developments, which compress arriving traffic into a much shorter time lens.

47. *Id.* at 145-46.

48.

Although the design profession has always championed the cause of beauty in the everyday environment, aesthetic achievements in land development in the United States has been [termed] meager and limited. . . . [Though] sympathetic to the cause of aesthetics, the courts initially appeared to favor health and safety arguments, however tenuous, over aesthetic justifications for zoning. It took them many years to fully endorse the use of police power to achieve aesthetic objectives.

Banerjee, *Land Use Policy and Value Choice: Environmental Design Perspective*, in *The Land Use Policy Debate in the United States* 83, 84 (J. de Neufville ed. 1981) (citations omitted). See also *supra* note 42 and accompanying text.

"Recently some scholars have suggested that aesthetic welfare is an integral part of general welfare, and have argued that it must play a major role in social policy decisions. This argument can also be extended to the area of land use policy. . . ." Banerjee, *supra*, at 83-84. One of the leading cases sustaining land use controls based on aesthetic considerations alone is *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, *app. dismissed*, 375 U.S. 42 (1963). This case involved a zoning ordinance which prohibited erecting clotheslines in front or side yard, abutting the street. The Stovers had previously erected six clotheslines in their front yard, contin-

In summary, the use of environmental concerns as a basis to reject a zoning scheme that affirmatively includes provision for affordable housing will, in most cases, not withstand close scrutiny. Most environmental concerns are site, or at most area-specific, and can be adequately addressed by regulatory mechanisms that are available to be employed by municipal officials.⁴⁹ Although the authority to mitigate or prevent environmental harm exists, municipalities often employ the existing regulatory tools poorly. Thus, to the extent that there are examples of environmental degradation resulting from affordable housing projects, they may well be explained as products of timid or unknowledgeable local regulatory action. In all events, such examples are undoubtedly matched incident

ually adding rags and other unsightly apparel to them as a protest against their taxes. The court concluded: "[O]nce it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power." *Id.* at 467, 240 N.Y.S.2d at 738, 191 N.E.2d at 275.

A case subsequent to *Stover*, *Cromwell v. Ferrier*, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967), made it clear that ordinances enacted for aesthetic reasons alone were permissible in New York. *Cromwell* cited *Stover* as "now the leading case" on the "aesthetics only" rule and rejected prior holdings that required some other valid police power objective. Note, however, that a majority of courts upholding such ordinances usually base their determinations on more traditional grounds, in addition to the aesthetic considerations. See also Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. Rev. 125 (1980); Reisel, *Aesthetics as a Basis for Regulation*, 1 Pace L. Rev. 629 (1981). See generally, *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (ordinance permitting advertising of on site commercial activity but forbidding other commercial advertising and noncommercial advertising is unconstitutional on its face); *State ex rel Saveland Park Holding Corp. v. Wieland*, 269 Wisc. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955) (case stated that it was immaterial that the sole objective of the ordinances, which regulated architectural appeal and function, was to protect property values); *Berman v. Parker*, 348 U.S. 26 (1954) (contained dictum that suggested that aesthetic considerations alone were sufficient basis for the exercise of zoning provisions).

49. In addition to those discussed, a number of state legislatures have adopted environmental impact review laws that either require or authorize local officials to require a detailed, written evaluation of the environmental impacts of large projects. In New York, such a law is codified in the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law. SEQRA has existed in New York since 1976. Similar statutes exist in California, (Cal. Env't'l Qual. Act, Cal. Pub. Res. §§ 21000-21193 (1986)); Oregon, (Ore. Rev. Stat. §§ 468.005-468.480 (198)); Michigan, (Thomas J. Anderson, Gordon Rockwell, Env't'l Protection Act of 1970, Mich Comp. L. Ann. §§ 691.1201-691.1205 (1987)); and in several other states.

by incident by examples of gross environmental insults caused by unaffordable housing developments and commercial developments, and so argument by anecdote on the issue seems particularly unproductive.

B. *The Mount Laurel Approach to Reconciling Affordable Housing and Environmental Considerations*

The New Jersey Supreme Court addressed the relationship between environmental considerations and an affordable housing doctrine in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*.⁵⁰ The court had, in an earlier decision, *Mount Laurel I*, stated that a municipality could avoid an otherwise mandatory obligation to provide low and moderate housing opportunities on environmental grounds only if the environmental problems identified were "substantial and very real,"⁵¹ and "reasonably necessary for the public protection of a vital interest."⁵² In *Mount Laurel II*, the court modified its approach somewhat, stating in general that otherwise mandated low- and moderate-income developments can be avoided if they would cause "substantial environmental degradation."⁵³ The court further explained what it meant by its general language in two ways. First, it made it clear that it would exempt from a *Mount Laurel* obligation any areas listed in the State Development Guide Plan (SDGP)⁵⁴ as "conservation areas" or "agricultural areas," as defined in the SDGP.⁵⁵ Next, in the two companion cases with *Mount Laurel II*, *Caputo v. Chester*⁵⁶ and *Round Valley v.*

50. 92 N.J. 158, 456 A.2d 390 (1983).

51. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 187, 336 A.2d 713, 731 (1975) (*Mount Laurel I*).

52. *Id.*

53. *Mount Laurel II*, 92 N.J. at 331 n.68, 456 A.2d at 479 n.68.

54. The State Development Guide Plan is a statewide plan produced by a New Jersey state agency, which the court seized upon as its basis for determining which areas were under sufficient growth pressure to warrant a mandatory obligation to foster the development of affordable housing.

55. *Mount Laurel II*, 92 N.J. at 231, 456 A.2d at 427. See also Licata & Licata, *The Environmental Implications of Mount Laurel II*, 15 Rutgers L.J. 627, 630 (1984).

56. *Mount Laurel II*, 92 N.J. at 309, 456 A.2d at 471.

Clinton,⁵⁷ the court discussed environmental circumstances in which it would deny a "builders remedy" to developers who had otherwise made out a successful *Mount Laurel* case.⁵⁸

In *Caputo*, the court denied a builder's remedy to a plaintiff whose parcel was in an environmentally sensitive area, reasoning that the "fair share" obligation did not extend to such areas.⁵⁹ *Round Valley* involved a site located in an area that clearly would qualify for *Mount Laurel* treatment, but which was argued by local officials as environmentally unacceptable for development. The court stated that in such a case the builder's remedy would be denied if the "appropriate environmental agency" had passed on the development and found that substantial environmental damage would result from the development, or that "sound planning principles" dictated that the site should not be developed.⁶⁰

In other places in the opinion, however, the court's signals were not clear. At one point, the court stated that sound planning studies calling for open space preservation "may, under proper circumstances, be sufficient justification for large lot zoning, including five-acre zoning."⁶¹ Yet, elsewhere within the opinion, it reserved decision as to whether the *Mount Laurel II* obligation would "under any circumstances override" the goals of state critical area legislation designed to limit growth in the coastal zone and the New Jersey "pine barrens" areas.⁶²

It would appear that the New Jersey Supreme Court's difficulty with the interface between its affordable housing doctrine and environmental protection is a product of the court's overall approach to the problem of exclusionary zon-

57. *Id.* at 321, 456 A.2d at 478.

58. The "builder's remedy" involves the court's ordering the municipality to re-zone the plaintiff's property and issuance of a building permit to allow construction of complying housing, an extraordinary remedy the court stated should be applied to *Mount Laurel*-type cases. The ordinary remedy in successful zoning challenges is remand to the municipality.

59. *Mount Laurel II*, 92 N.J. at 310, 456 A.2d at 471. *See also*, Licata & Licata, *supra* note 55, at 633-34.

60. *Mount Laurel II*, 92 N.J. at 331, 456 A.2d at 480.

61. *Id.* at 315, 456 A.2d at 471.

62. *Id.* at 246, 456 A.2d. at 434.

ing. The court's approach was to impose an obligation on towns to find a place for low- and moderate-income housing only if such towns are under growth pressure,⁶³ thus essentially imposing a sort of judicially created overlay zone on such communities. Having singled out such areas for special treatment, the court is left with having to balance two sets of social priorities in such towns. These priorities are the desire to accomodate disadvantaged people and the desire to preserve the environment. It thus forces the decisionmaker into making value judgments about whether the environmental impacts associated with a given level of affordable housing development are sufficiently onerous to warrant stifling such development and shunting it elsewhere. It has, in a sense, imposed a *Mount Laurel* burden on the environment, risking the creation of a double standard of environmental protection.

It is far from clear whether either the environment or social justice would prevail in the face of such a difficult conflict situation, and, at least, the very fact that such a conflict can be postulated presents an uncomfortable situation. *Mount Laurel* did not spring from a conflict between poor people and the environment or environmentalists. It involved a struggle between those who have and those who have not.

Had the court taken a simpler approach, ruling that any zoning scheme which does not permit a mixture of residential housing types within zoning districts is, per se violative of the state constitution,⁶⁴ it might not have been presented with this problem. Such a ruling would, of course, have struck at the very heart of the SZEAs "Euclidian" zoning hierarchy, and would have been perceived not only as revolutionary by the zoning establishment, but, heretical. This is the heart of the matter.

63. Licata & Licata, *supra* note 55, at 629.

64. It is not my purpose here to argue the constitutional point, or to argue either side of the issue of whether inclusionary zoning is required as a matter of social policy in New Jersey, New York, or anywhere else. That task is left to others. I assume, for the purpose of this essay, that inclusionary zoning is at least socially desirable, and am concerned here only with the question of whether such a goal is in any way inconsistent with sound notions of environmental conservation. My point of view on this issue, which should by now be clear, is that it is not.

SZEA zoning, which divides communities into districts of uniform land uses, has been the dominant land use regulatory tool in the United States since the 1920's.⁶⁵ The New Jersey Supreme Court was constrained to craft its rulings within the confines of the SZEA framework, and in so doing produced a less than satisfying resolution to a serious social inequity. SZEA zoning imposes a straight jacket upon communities that contemporary land planning methodology and environmental awareness has rendered obsolete.

In stepping back and looking at the problem, one is constrained to agree with Ian McHarg and his disciples,⁶⁶ that SZEA zoning has seen its day and should be replaced with something better. McHarg has argued that SZEA zoning is insensitive to valid environmental constraints.⁶⁷ SZEA zoning has also arguably been the vehicle for social injustice, as the New Jersey Supreme Court so eloquently articulated in *Mount Laurel II*.⁶⁸

The New York courts have thus far rejected the *Mount Laurel* approach to the exclusionary zoning problem.⁶⁹ They have, however, fallen into the trap of seeking to define some sort of bellweather standard for imposing upon a municipality an obligation to do something more, in the way of provision,

65. R. Ellickson & D. Tarlock, *Land Use Controls*, 36-42 (1981).

66. See I. McHarg, *Design With Nature* (1969). McHarg states that this book

is a personal testament to the power and importance of sun, moon, and stars, the changing seasons, seedtime and harvest, clouds, rain and rivers, the oceans and the forests, the creatures and the herbs. They are with use now, co-tenants of the phenomenal universe, participating in that timeless yearning that is evolution, vivid expression of time past, essential partners in survival and with us now involved in the creation of the future.

Id. at 5. McHarg believes that in urbanizing a particular environmental region, it is essential for man to determine the capacity of the region to withstand such a change. The product of man's works should not cause more despoliation than is necessary. Man must "design with nature." *Id.*

67. "Where planning does occur, its single instrument is zoning and by this device political subdivisions are allocated densities irrespective of geology, physiography, hydrology, soils, vegetation, scenery or historic beauty." *Id.*

68. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. at 158, 456 A.2d at 390 (1983) (*Mount Laurel II*).

69. See *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 78 N.Y.S.2d 672 (1975).

for low- and moderate-income housing, than its zoning ordinance allows.⁷⁰ New York courts have, as a result of their judicially imposed standards also positioned themselves squarely before the horns of the dilemma posed by municipalities which erroneously premise their claim for the right to exclude lower income people on unsupportable concerns about environmental degradation. To date, the New York courts have not postulated a sound solution for this dilemma.

III. An Approach to Reform

A sounder approach to equalizing access to housing in suburban areas, albeit one that arguably requires legislative action, would be the replacement of SZE zoning with something more attuned to contemporary environmental planning. Such an approach should direct that any land use decision-making process affectuating change start with an analysis of the environmental limitations of the area. These limitations should be premised on a complete environmental data base,⁷¹ maximum site utilization in terms of density, structural footprint, and the like, which would be determined empirically without regard to the type of residential use contemplated. Utilizing this type of approach necessitates the result that the rejection of affordable housing must be accomplished without

70. *Id.* Berenson placed an obligation on each community in the state to adequately fulfill its present and future housing needs and give consideration to regional housing needs and requirements in enacting zoning ordinances. *Id.* at 110-11, 341 N.E.2d at 242-43, 378 N.Y.S.2d at 680-81.

71. No attempt is made here to describe what such a data base should include. There are a number of excellent resource inventory computer programs available and several technical publications. The kinds of data that are important include soil types, slope contours, water courses, vegetation, rainfall patterns, roadway networks, the location of collector and/or interceptor sewers, and so forth. See Miller & Nichols, *Soil Data*, in *Planning the Uses and Management of Land* 67 (M. Beatty, G. Petersen & L. Swindle eds. 1979); Pionke & Kleckner, *Hydrologic Data*, in *Planning the Uses and Management of Land* 117 (M. Beatty, G. Petersen & L. Swindle eds. 1979); Rust, *Plant Cover Data*, in *Planning the Uses and Management of Land* 143 (M. Beatty, G. Petersen & L. Swindle eds. 1979); Stoner & Baumgardner, *Data Acquisition Through Remote Sensing*, in *Planning the Uses and Management of Land* 159 (M. Beatty, G. Petersen & L. Swindle eds. 1979); Neimann & McCarthy, *Spatial Data Analysis and Information Communication*, in *Planning the Uses and Management of Land* 187 (M. Beatty, G. Petersen & L. Swindle eds. 1979).

the benefit of pretextual environmental obfuscation.⁷² However, if the threshold environmental criteria point to severely limited development, the town should be immune from attack premised on social policy goals, such as a need for affordable housing.

It is important to stress that the analytical approach suggested here is not an environmental impact analysis such as that which occurs under New York's State Environmental Quality Review Act (SEQRA)⁷³ or similar statutes. Such statutes require disclosure of impacts on a case by case basis, and generally produce rather poor products that are premised on quickly-assembled, inadequate data bases. The approach suggested is more rigorous, and essentially requires establishing a detailed set of resource maps covering all undeveloped or sparsely developed areas of the community. Thereafter, the municipalities, with the assistance of experts, must impose development limitations that are both binding and consistent with the identified resource constraints, on districts whose boundaries are delineated not by use choices (as they are delineated under SZE zoning), but by empirically-developed boundary lines which are premised on commonly applicable resource constraints. Although such districts could arguably be layered over SZE district boundaries,⁷⁴ it would be far

72. If the environmental carrying capacity is determined initially against a set of empirically-derived criteria, without regard for the nature of the contemplated use except in the broad sense, the choices become ones of policy for the municipality. (Obviously, heavy industrial uses impose different kinds of demands on an ecosystem, and thus the nature of the use has to be taken into account to some extent. However, there is absolutely no reason to consider different types of residential use because the only relevant factors in that situation are the numbers of people and the limitations on centralized sewage disposal). For example, new growth will require new municipal services, for example, the municipality will be able to choose between providing the services, and passing at least some of the cost onto the developer, or not doing so. The municipality cannot turn down a development simply because it does not wish to provide services, on unrelated environmental pretexts.

73. See *supra* note 65. N.Y. Env'tl. Conserv. L. § 8-0109 (McKinney 1984) requires that state and local government agencies prepare environmental impact statements, and that they choose alternatives which reduce adverse environmental effects.

74. See *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.Y.S.2d 58 (1951), where an action was brought for a declaratory judgment that town ordinances establishing a new residence zone were void. Although the ordinance set no boundaries for the new district and made no changes on the building zone map, it was only a prelim-

less cumbersome, and much more effective for the districts to replace the SZEAs boundaries. Legislative action may be required because SZEAs-based zoning enabling statutes generally enable districting only for the purposes set forth in section 1 of the enabling act,⁷⁵ and those purposes relate to uses rather than capacities,⁷⁶ consistent with the level of understanding in the 1920s, out of which the SZEAs grew.

Conclusion

It is clearly time for change in the process by which local land use decisions are made, to provide for a more rational factoring-in of environmental constraints. In some areas, it may also be time to provide a more receptive climate for affordable housing. What has been outlined briefly in this essay is just one blueprint for change that may serve to accommodate both goals.

inary step in the zoning plan and was thus not invalid.

75. N.Y. Town Law § 261 (McKinney 1965).

76. Section 261 of the N.Y. Town Law states that:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. . . .

N.Y. Town Law § 261 (McKinney 1965).