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STUDENT ARTICLES

EXCLUSIONARY ZONING AND ITS EFFECT ON HOUSING OPPORTUNITIES FOR THE HOMELESS

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[T]he stark reality of homeless persons and families is at one and the same time an appeal to conscience and an exigency to do something to remedy the situation.¹

INTRODUCTION

America is the land of opportunity, yet for an estimated three hundred and fifty thousand to three million homeless Americans,² this land provides little opportunity and sees few dreams become realities. Those whose primary nighttime residence might be a doorway or train station are without a necessity which American culture recognizes as fundamental—a home. Homelessness can be attributed to a variety of precise causes, but, fundamentally, the causes of homelessness are mental incapacity or financial insufficiency.

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1. PONTIFICAL COMM'N "IUSTITIA ET PAX", WHAT HAVE YOU DONE TO YOUR HOMELESS BROTHER? THE CHURCH AND THE HOUSING PROBLEM 22 (1987).

2. NATIONAL COALITION FOR THE HOMELESS, HOMELESSNESS IN AMERICA: A SUMMARY I (1988). Although this paper focuses on the national homeless problem, the problem of homelessness is a worldwide phenomenon. The Catholic Church estimates that "[a] thousand million people, that is one fifth of the human race, do not have decent housing. One hundred million quite literally do not have a roof over their head." PONTIFICAL COMM'N "IUSTITIA ET PAX", *supra* note 1, at 22 (emphasis in original). Thus, there is an urgent need for immediate solutions to the problem of homelessness on any level.

Undoubtedly, some homeless persons prefer existing by the grace of strangers to earning a living for themselves. Nevertheless, some portion of America's homeless population is homeless, not because of mental deficiencies or a parasitic spirit, but because of economic circumstances beyond their control. It is this group of homeless—those who are involuntarily homeless due to economic circumstances created by exclusionary zoning³—upon which this student article focuses.

Homelessness is, among other things, a housing problem; therefore, barriers to the availability of low-income housing for the homeless should be removed. This student article focuses on exclusionary zoning's relationship to the lack of affordable housing opportunities in order to target impediments to homeless persons' securing permanent shelter.

Part II of this student article begins with a profile of homelessness, followed by an explanation of zoning law and how it affects the homeless. Part III focuses on exclusionary zoning and its adverse effects on the preferred free operation of the market. Part IV recognizes possible responses to exclusionary zoning ordinances, and analyzes the effectiveness of current efforts to rezone in favor of low income groups. Part V asserts that the benefits of exclusionary zoning are slight in comparison to the human costs. Finally, part VI proposes alternatives to current zoning practices in order to ease limitations on permanent housing opportunities for the homeless.

I. ZONING AND THE HOMELESS

Although the precise number of homeless persons is difficult to determine, the homeless population continues to grow.⁴ A particularly disturbing statistic is the dramatic rise in the number of homeless families.⁵ Understanding why people are homeless is the first step toward a solution.

The National Coalition for the Homeless notes that "[t]he leading cause of contemporary homelessness is the lack of affordable housing. . . . Whenever there is a shortage, [of affordable housing] there is competition. When there is com-

3. For the purposes of this student article, zoning means legally restricting sections or districts of a city to particular uses, such as residential, industrial or commercial. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2126 (2d ed. 1983).

4. The National Coalition for the Homeless notes that the homeless population is increasing at a rate of 25 percent per year. NATIONAL COALITION FOR THE HOMELESS, *supra* note 2, at 2.

5. *Id.* at 2. See also Rossi, *The Family, Welfare and Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 283 (1989).

petition, someone loses. In this case, losing means being pushed out of one's home."⁶ Therefore, one clear solution to homelessness is an adequate supply of permanent, affordable housing. By restricting property uses, zoning incidentally impedes low-income housing opportunities and, thus, stands in the way of a solution to homelessness. As one author notes: "The most effective way of limiting the supply of housing is to give to government a general power to control the use of land. . . . The process is called *zoning*."⁷

Lower-income families are economically excluded from certain areas of cities through ordinances prohibiting construction of apartments, use of mobile homes, and conversion of single family dwellings into multifamily dwellings. Michael Danielson observed in *The Politics of Exclusion*:

Zoning regulations, building codes, and other local policies prevent construction of inexpensive housing, increase the cost of houses which are built, and otherwise severely restrict access to the metropolitan rim by lower-income families. . . . [T]he exclusionary policies of local governments . . . produce far more spatial separation [among racial, ethnic, and economic groups] than would be the case if only economic and social factors influenced the distribution of people in the spreading metropolis.⁸

In other societies where municipal governments play a minor role in regulatory land use and housing, division along social and economic lines is "far less pervasive than in the United States . . . lower-income families tend to be spread throughout the metropolis."⁹

Zoning ordinances restrict land use, and the "types, size and density of dwelling units that may be constructed on land"¹⁰ in accordance with a comprehensive plan. This practice was introduced into the United States in its present form by a 1916 New York city ordinance which divided the city into residential, commercial, and unrestricted use districts. The ordinance also mapped out sections for building height and area restrictions. By 1926, at least 425 municipalities had enacted ordinances similar to New York's.¹¹

6. NATIONAL COALITION FOR THE HOMELESS, *supra* note 2, at 2-3.

7. Karlin, *Zoning and Other Land Use Controls*, in *RESOLVING THE HOUSING CRISIS* 35-36 (M. Johnson ed. 1982).

8. M. DANIELSON, *THE POLITICS OF EXCLUSION* 23 (1976).

9. *Id.*

10. D. MOSKOWITZ, *EXCLUSIONARY ZONING LITIGATION* 17 (1977).

11. R. NELSON, *ZONING AND PROPERTY RIGHTS* 7-11 (1977).

As zoning was originally envisioned, local authorities were to adopt detailed regulations that would cause or allow development to occur automatically. Today, although a comprehensive plan is required, local authorities' discretion predominates and zoning ordinances are continuously amended.¹²

The regulations are "enacted by the local legislative body and enforced by local officials."¹³ A city's zoning power is derived from a grant of power through an enabling act commonly found in state statutes which explicitly transfers these powers to the municipality.¹⁴

Zoning is a function of a state's police power,¹⁵ existing for the purpose of protecting the health, safety, morals, or general

12. B. SIEGAN, *OTHER PEOPLE'S PROPERTY* 139 (1976).

13. J. DUKEMINIER & J. KRIER, *PROPERTY* 1230 (1981).

14. The following is an excerpt from the Standard State Zoning Enabling Act, formulated by the U.S. Department of Commerce:

Section 1. Grant of Power. For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered 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 purpose.

Section 2. Districts. For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

Section 3. Purposes in View. Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

Reprinted in Dahlman, *An Economic Analysis of Zoning Laws*, in *RESOLVING THE HOUSING CRISIS* 220 (M. Johnson ed. 1982).

15. The term "police power" means the power to enact regulations via the legislature to protect the health, safety and morals of the community. Authority is delegated from the state legislature to municipalities.

welfare of its citizens. The protection of a state's "general welfare" is interpreted as a broad grant of power which supplies the government with a justification for virtually any zoning law it sees fit to pass. The ownership of property is a fundamental right,¹⁶ however, and an individual's property rights, under the due process provisions of the fifth and fourteenth amendments, should be free from arbitrary governmental intrusion under the guise of zoning for the general welfare.

Today, however, zoning ordinances are seldom overturned judicially; the zoning acts of the legislature are overwhelmingly presumed valid. Zoning, in general, is considered constitutional,¹⁷ and specific ordinances will not be disturbed unless they are "arbitrary or irrational . . . having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."¹⁸

Such a liberal grant of deference to the state's police power inevitably diminishes certain liberties of both the landowner and the homeless. A landowner's right to parcel his land as he sees fit, to sell or rent his property for multiple family uses, or operate a business in his home is limited. The effects of diminishing the landowners' liberties diminish the liberties of the homeless. Zoning areas for single families prohibits landowners from building an apartment or converting a home to a multifamily dwelling and prohibits homeless individuals who are not related from pooling their resources to buy or rent a home which, individually, they would be unable to afford.

Exclusionary zoning policies have played their part in limiting housing opportunities for the homeless. In a recent action, for example, zoning officials in a Connecticut town passed a regulation banning the homeless from occupying local motels which served as emergency shelters.¹⁹ The town's one-page letter to the motel owners stated that "motel units occupied other than for 'transient lodging' are considered dwelling units . . . and that 'dwelling units are not allowed in the town . . . on a rental basis.'"²⁰ This exercise of land use restrictions sets a threatening precedent for the homeless who rely primarily on emergency shelter to provide immediate housing needs.²¹

16. R. RUSHDOONY, *THIS INDEPENDENT REPUBLIC* 52-64 (1978).

17. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

18. *Id.* at 395.

19. See *N.Y. Times*, Mar. 22, 1989, at B2, col. 4.

20. *Id.*

21. In Connecticut, where the ban was enacted, it is estimated that 18,600 people are staying in various shelters. *Id.*

II. ECONOMIC LIMITATIONS ON HOUSING OPPORTUNITIES

In 1972, the Center for Urban Policy Research at Rutgers University published a study entitled *Zoning and Housing Costs*. The study identified three economic limitations on housing opportunities which persisted during the 1970s and, no doubt, account for much of the homelessness of the 1980s. The three limitations named by the study were inflation, a rise in the standard of acceptable housing, and local zoning and tract developments.²² This article recognizes these limitations, but focuses on zoning because it is more localized and subject to the community's control, thus offering an immediate opportunity for change.

Exclusionary zoning regulations are not without benefits for some segments of society. Those who can afford the benefits enjoy large homes on large lots, quiet streets uncluttered by old cars, and long drives to work or shopping. The problem is not that certain people choose to live in such an environment; the problem is that the zoning regulation prohibits the choice by individual landowners, developers, and buyers to share the expenses of a one-acre lot by building two smaller houses or of living near the workplace to avoid the burdensome cost of transportation. How does a planning commission decide the optimum number of persons entitled to live on an acre of land? Bernard Seigan recounts the discussions at a public meeting in a Chicago suburb: some residents argued that a density exceeding twenty apartments per acre would lead to slums, while others swore that five houses to an acre was the limit. However, only twenty-five minutes away stood high rise apartments in areas zoned at 400 units per acre. Not only were these areas not slums, but the incidence of crime was among the lowest in the city, and living conditions among the best.²³

Practically, exclusionary zoning prohibits lower income families and landowners from bargaining for something that will benefit both. Rather than protecting the weak from the power of the strong, the poor from the exploits of the wealthy, the law is perverted: exclusionary zoning protects the aesthetics of the strong and the wealthy. Exclusionary zoning regulations "show that instead of providing for the public welfare, it has done well for the private welfare of the well-to-do. It has generally been harmful to those of average and less income," writes Siegan.²⁴

22. L. SAGALYN & G. STERNLIEB, *ZONING AND HOUSING COSTS* ii (1972).

23. B. SIEGAN, *supra* note 12, at 31-32.

24. *Id.* at 40.

The discriminatory effects of exclusionary zoning on low income individuals, Siegan notes, is manifested in a number of ways. Exclusionary zoning restricts the production and supply of housing stock; whereas, the best method for lowering housing costs, both new and used, is to increase supply. In addition, many construction and design standards are unnecessary, but are required in order to exclude inexpensive homes in more affluent areas. Exclusionary zoning also "prevents the succession of moves set in motion by . . . new construction. . . . Consequently, the exclusionary effects of zoning do not terminate at the boundary lines of a municipality, but continue on throughout the housing market."²⁵

III. RESPONSES TO EXCLUSIONARY ZONING

Proponents of exclusionary zoning argue, among other things, that if an individual is displeased with a municipality's zoning plans, he need only to change the course of those plans at the polls. Zoning is a governmental function, carried out through boards made up of elected officials. Many officials are in office often due to campaign contributions from developers and wealthy citizens who enjoy the benefits of restrictive zoning. As one author observes: "Owners, developers, and builders eagerly contribute to the political campaigns of those who aspire to election to an office with zoning authority—even when they do not support or indeed may actually reject the candidates personally or philosophically."²⁶

It is obvious that those who cannot afford shelter in the first place cannot contribute financially to a sympathetic candidate. For the homeless to make a difference, they would need to organize grass roots coalitions to determine and cast votes for their best political choice. As one author notes, "Discrimination on the basis of poverty is . . . pernicious in the context of municipal zoning, not just because it is official discrimination, but because municipal land-use decisions burden the non-resident poor who have no say in making those decisions. From this perspective, exclusionary zoning might be described as a voting rights problem."²⁷ For the homeless individual, chang-

25. *Id.* at 40-41.

26. Siegan, *Property, Economic Liberties, and the Constitution*, in *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST* 366 (M. Johnson ed. 1982).

27. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 *YALE L. & POL'Y REV.* 348, 370 (1988).

ing exclusionary zoning ordinances through the voting process is an exercise in futility.

The judicial system is available to the homeless as a means of overturning ordinances with exclusionary effects.²⁸ As discussed previously, however, zoning decisions are extremely difficult to discredit. In addition, "[c]ourts have had great difficulty in dealing with . . . issues [of exclusionary zoning] and have been unsuccessful in resolving them. One of the difficulties courts face is that all of the interests are not always represented in each case."²⁹ Often the builder or developer contests zoning practices. Seldom, if ever, does the builder make known the interests of those about to be excluded.

Homeless individuals initiating their own suits federally must first overcome the issue as to whether they have standing to sue.

Standing requires that the plaintiff satisfy two prerequisites: the plaintiff must allege an 'injury in fact,' and must assert an interest which is arguably within the zone of interests which is protected or regulated by the statutory or constitutional provision involved in the case. The first requirement is one of causation and relates to whether the defendant's conduct has actually injured the plaintiff.

The lawsuit must be related to an actual course of events which has caused the plaintiff a specific injury. In other words, there must be a significant connection between the injury and particular acts which caused it. The claim must not be speculative or hypothetical; it must be concrete. The second requirement concerns whether the plaintiff is the possessor of a right that has been infringed upon. Without such a right, the plaintiff has suffered no legal loss and there is no cause of action and, consequently, no standing to sue.³⁰

Actual injury is often difficult to prove.³¹ In *Warth v. Seldin*,³² the Supreme Court denied standing to plaintiffs who challenged an exclusionary municipal zoning ordinance as having an unconstitutional racially discriminatory effect. The

28. See generally D. MOSKOWITZ, *supra* note 10.

29. *Id.* at 21.

30. *Id.* at 23.

31. Standing is easier to prove in state courts because the plaintiff need not establish that the claim arose from a violation of constitutional or federal statutory rights.

32. 422 U.S. 490 (1975).

plaintiffs were low income individuals unable to find affordable housing in the municipality. Plaintiffs were required to show that "absent the . . . restrictive zoning practices, there is a substantial probability that [plaintiffs] would have been able to purchase or lease in [the municipality] and that, if the court affords the relief requested, the asserted inability of [plaintiffs] will be removed."³³

In order to overcome standing requirements in federal courts, the plaintiffs should ideally be low income residents who are inadequately housed and desire to live in affordable housing within the community, but cannot find it due to exclusionary zoning; future residents who have looked unsuccessfully for housing in the community, but would live there if housing were available; and, finally, present residents who desire their community to become racially or economically integrated.³⁴ Finding present residents, however, who would be willing to accept a possible drop in property value, or a puncture in the insulated community for the sake of economic integration may be an impossibility. Again, the roadblocks to the homeless are great in the effort to find affordable housing made unavailable through exclusionary zoning.

Typically, it is easier for the excluded low income plaintiff to have his claim heard in a state court rather than in the federal system because of more liberal standing requirements. Again, however, the plaintiff is faced with the huge task of convincing the court to overturn a presumptively valid law. The plaintiff must show that the ordinance bears no rational relationship to public health, safety, morals, or general welfare.

In a series of landmark decisions, the New Jersey Supreme Court revised zoning ordinances in favor of requiring that the city plan for the development of low income housing.³⁵ The question arises: How effectively does a change in zoning actually provide housing to low income individuals?

IV. EFFORTS TO REZONE IN FAVOR OF THE POOR

In *Southern Burlington County NAACP v. Township of Mount Laurel*,³⁶ the New Jersey court attacked exclusionary zoning

33. *Id.* at 504.

34. D. MOSKOWITZ, *supra* note 10, at 62-63.

35. See *Hills Dev. v. Township of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (Mount Laurel I); *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II).

36. 67 N.J. 151, 336 A.2d 713 (1975).

practices. The basic issue of the Mount Laurel case was whether a developing suburb could employ zoning to "make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it."³⁷ The court ruled unanimously that Mount Laurel could not zone out the poor, insisting that local zoning must promote the general welfare by providing for "adequate housing of all categories of people."³⁸ The community, the court ruled, "must permit multifamily housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial or unjustifiable minimum requirements as to lot size, building size and the like."³⁹

While recognizing that zoning limits housing opportunities for lower-income families, the court did not find fault with zoning in general. It found that the city had the responsibility both to plan for "adequate" housing for lower-income families and to *provide* it. The court imposed an affirmative obligation to provide lower income housing "at least to the extent of the municipality's fair share of the present and prospective regional need therefor."⁴⁰ However, as one author observes: "[I]f the wood fiber in all the books and papers written about the original Mount Laurel decision were converted into construction materials, it would conceivably amount to more low-income housing than was built as a result of the decision."⁴¹

Problems remained for lower-income families desiring to enter Mount Laurel's housing market because the court left the city planners in control. What constitutes a "fair share"? How are "present and prospective needs" to be defined? These terms are vague, but the court tried to enforce its 1975 decision through an order issued in Mount Laurel II.⁴² The court decided that three judges should hear all zoning appeals throughout the state and develop a consistent doctrine to enforce Mount Laurel I. Communities must take affirmative steps to build a "fair share" of lower-income housing by, for example, applying for state and federal housing programs and

37. *Id.* at 173.

38. *Id.* at 179.

39. *Id.* at 187.

40. *Id.* at 188.

41. W. FISCHER, *THE ECONOMICS OF ZONING LAWS* 320 (1985).

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

requiring developers to build lower-income housing in order to get permission to build higher-income housing.

The factual aftermath of the Mount Laurel decisions presents mixed results. Beneficiaries of the "fair share" zoning practice have tended to be middle class suburbanites. Most are blue collar workers. The decisions, however, have done little for the homeless and minorities. Zoning restricts housing opportunities and causes prices to rise above market levels because developers are discouraged from competing for low-income families' dollars. "Mount Laurel units cannot be priced so that they benefit households earning less than about 40% of the regional median income; even with such creative endeavors it is clear that the poorest of the poor cannot be served."⁴³

The New Jersey Supreme Court refused to be content with free-market outcomes. In effect, the court rejected the conclusions of a report issued in 1969 by the University of Michigan's Institute for Social Research.⁴⁴ The report, entitled *New Homes and Poor People*, concluded that the poor benefit from *any* new housing construction whether they move into the new houses or the vacancies created by families moving in the sequences begun by the new construction. "[A] succession of related moves develops. In this process families satisfy their need for more suitable housing, and an aging supply is reallocated."⁴⁵ This reallocation provides a major source of housing for the poor "if the market works properly."⁴⁶

Although a free market does not create perfect conditions, it remains the best tool for allocating housing resources. Competition among developers raises the supply of available housing and depresses the prices. Even the lower-income consumers can bid for goods in a free market. They can act as responsible agents who count costs, pool resources, and outbid others for property they desire. This does not mean that the low-income families will be able to acquire the same size or quality of shelter as higher-income families; it does mean that builders will be encouraged to develop land in a way that desirable and affordable shelter is available to families regardless of economic status. Walter Williams champions the free market as the best provider of housing for lower income families in the following example:

43. Payne, *Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?* 6 YALE L. & POL'Y REV. 361, 367 (1988).

44. See J. LANSING, C. CLIFTON & J. MORGAN, *NEW HOMES AND POOR PEOPLE* (1969).

45. *Id.* at 2.

46. *Id.*

Imagine a three-story brownstone being rented by a nonpoor . . . family for \$200 per month. . . . But if six poor . . . families suggested that the building be partitioned into six parts to rent for \$75 per part, the landlord might have to reassess his position. Namely, he would have to evaluate the prospect of an income yield of \$450, by renting to the six [poor families], as opposed to an income yield of \$200 by retaining his [nonpoor] tenant.⁴⁷

Zoning ordinances often expressly prohibit this type of living arrangement, or effectively prohibit it through restrictions.

Suburban areas, to a greater extent than cities, have highly restrictive zoning ordinances. There are laws that fix minimum lot size, minimum floor space in the house, minimum distance to adjacent houses plus laws that restrict property use to a single family. *The combined effect of these laws . . . is to deny poor people the chance to outbid nonpoor people.* It is far more difficult for a person to get together the whole house price than one month's rent for a cubbyhole.⁴⁸

When economic regulations thwart the operation of free persons to produce and control property, prices rise and quality usually falls. Without the freedom to pursue economic opportunities, poor Americans are resigned to live at the taxpayers' expense, and the taxpayers must support the poor at a higher cost because the regulations have caused prices to rise.⁴⁹

V. PROPOSALS

Admittedly, zoning objectives are not entirely illegitimate. Certain land use and building requirements can be defended on the basis of safety. In addition, zoning segregates industrial and residential uses for the sake of public health and safety. These are valid public and environmental concerns. Some consider the zoning balancing act "as involving a choice between a clean and pure environment or adequate housing for all people."⁵⁰ Exclusionary ordinances passed under the guise of "general welfare" as opposed to legitimate public health and safety concerns, however, give little consideration to human costs.

47. W. WILLIAMS, *THE STATE AGAINST BLACKS* 143 (1982).

48. *Id.* (emphasis added).

49. *Id.* at 144. See also M. FRIEDMAN, *CAPITALISM AND FREEDOM* Ch. 11 (1962).

50. *Id.* at 20. See *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956, 959 (1st Cir. 1972).

In order to remedy most effectively the negative effects of land use restrictions on the homeless, the balance of power needs to be shifted away from unnecessary government control of land use, and greater access to a means of redress for burdensome land use restrictions should be made available to the homeless. A strong proposal, therefore, would 1) narrow the scope of current state zoning enabling acts, 2) provide a more strict judicial standard of review in exclusionary zoning cases, and 3) facilitate an accessible means of redress for the homeless.

First, because many municipalities have restricted the availability of low-income housing through unnecessary regulations, zoning power must be curtailed. This could be achieved by limiting the scope of current zoning enabling acts.⁵¹ In 1982, the President's Commission on Housing suggested that states adopt a provision in their enabling acts which would forbid restrictive zoning unless a "vital and pressing governmental interest" existed.⁵² Implementation of this optimal standard would be a helpful starting block for the abolition of unnecessarily restrictive regulations.

The states should then give meaning to this standard by defining those interests that they consider "vital and pressing" for the protection of public health and safety. Such interests might include adequate sanitary services, disaster protection, construction which accommodates unique environmental concerns, and parking control.⁵³ The preservation of historic districts may be a viable public concern as well. The governmental interests should be clearly defined, however, so as to narrow the scope of enabling acts. A well-defined scope of power would eliminate unreasonable exclusionary zoning practices, and allow the market to control the development of housing naturally.⁵⁴ In this way, permanent housing opportunities for the homeless would cease to be restricted by arbitrary municipal control.

This is the point that the New Jersey Supreme Court missed in *Mount Laurel I* and *II*: zoning restricts the free allocation of resources to those who want or need them because it impedes producers' and consumers' bargaining power. City

51. For an example of a current enabling statute, see R. NELSON, *supra* note 11, at 5.

52. THE REPORT OF THE PRESIDENT'S COMM'N ON HOUSING 200 (1982).

53. See generally *id.* at 200, n.5.

54. For a good example of a model enabling statute, see Kmiec, *Protecting Vital and Pressing Governmental Interests—A Proposal for a New Zoning Enabling Act*, 30 WASH. U.J. URB. & CONTEMP. L. 19, 32-34 (1986).

planners cannot predict the wants or needs of free people. The shelter they deem "adequate" may or may not adequately meet the needs of the consumers. City planners cannot accurately predict the value that producers and consumers place on opportunity.

Competition in the economic marketplace will allow for maximum satisfaction of consumer needs and desires and provide consumers with new and better products at lower cost. By supporting regulation of economic markets, Americans give power to certain persons, "city planners" or the courts, to command what land will be developed or what housing will be built. That power must necessarily harm some in the housing market—the homeless are the ones who suffer.

According to the suggested standard, if the validity of a restrictive zoning ordinance should come into question, the burden of proof should fall on the municipality to show a "vital and pressing interest." This would serve to facilitate a means of redress for the homeless affected by exclusionary zoning practices. This proposal gains support from *United States v. Carolene Products Co.*,⁵⁵ the case which initially established the presumption of constitutionality regarding zoning laws.

In a famous footnote, Justice Stone noted that a "more searching judicial inquiry" is required when legislation "prejudice[s] . . . discrete and insular minorities."⁵⁶ Justice Stone suggests that reversal of the presumption of constitutionality is justified in these cases. Exclusionary zoning is legislation which directly prejudices the homeless, by abridging their right to own property. In addition, courts should be particularly sensitive in cases of economic discrimination because it often cloaks underlying racial discrimination.

To the extent that many homeless are minorities,⁵⁷ zoning discriminates racially as well as economically.

Racial discrimination is not far below the surface of economic discrimination. Our society simply would not tolerate the amount of poverty found in black and other minority communities if whites were proportionally as poor as these less-favored groups. . . . Residency restrictions are an excellent surrogate for racial exclusions and they have proven difficult to eradicate.⁵⁸

55. 304 U.S. 144 (1938).

56. *Id.* at 153 n.4.

57. Rossi, *The Family, Welfare and Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 283 (1989).

58. Payne, *supra* note 43, at 370-71.

It is intolerable that "[t]hrough zoning laws, government has in fact become the sponsor of exclusion and discrimination and the instrument through which supply is curtailed and price increased."⁵⁹ Courts continue to give broad deference to the legislature in cases of economic discrimination when, in fact, the inherent racial discrimination should require increased scrutiny by the courts in order to safeguard endangered fundamental rights. Consequently, as Justice Holmes suggests, the governmental infringement affecting the homeless, a particular minority, should be subject to more rigorous scrutiny.

In order to provide immediate redress for the homeless, all municipal zoning boards should form grievance committees, which include community members, in order to hear disputes regarding exclusionary ordinances and provide necessary remedies at a local level. This will give communities an opportunity to reevaluate ordinances suspected of being restrictive pursuant to each unique situation. In addition, it would provide a less expensive, more accessible means of dispute resolution for homeless and low income individuals.

CONCLUSION

For those who are homeless due to economic reasons, restrictive zoning practices impede access to permanent housing opportunities. Arbitrary municipal control of land use leaves homeless individuals with the task of finding a home in cities zoned essentially for the wealthy and middle classes. The modification of zoning enabling laws is only one method of creating permanent housing opportunities for the homeless. Because society "has the obligation to guarantee for its citizens and members those living conditions without which they cannot achieve fulfillment, either as persons or as families,"⁶⁰ municipalities should not unnecessarily limit the adequate housing available in order to give the homeless a means for cultivating a *home*, and the values which accompany a place to call one's own.

59. Karlin, *supra* note 7, at 36.

60. PONTIFICAL COMM'N "IUSTITIA ET PAX", *supra* note 1, at 18-19.

