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*231 CONVERTING WALLS TO BRIDGES: A REVIEW OF THE PROPOSED ZONING ORDINANCE
FOR THE CITY OF HOUSTON

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*232 I. INTRODUCTION

Governments find many reasons to adopt regulations that inhibit development of affordable housing in certain geographical areas. One central and overriding cause is the dislike of both residents and public officials for additional or different kinds of housing in their neighborhoods and communities. This uncommonly powerful political attitude is often referred to as the NIMBY syndrome--Not In My Back Yard. [FN1]

Among the most common regulatory measures is zoning. Zoning laws specifically serve to limit the use to which property is put. Historically, zoning has served as a means of promoting the development and preservation of the single family home. [FN2] Other uses for zoning such as separating dissimilar land uses from any one area gave rise to the tremendous popularity of zoning as a preferred land use measure. [FN3] Texas first adopted its zoning enabling statute in 1921. [FN4] The City of Houston, the nation's fourth largest city has so far opted not to enact zoning regulations. That may change; 1993 may be the year the city's council and the citizenry vote to approve a zoning ordinance regulating land use and development of property within the city's jurisdictional area. [FN5]

*233 The proposed ordinance would affect the use of land in a number of ways including segregating land uses to industrial, commercial, greenspace, historical and residential purposes. [FN6] Of significant import is how the ordinance addresses residential uses.

It has long been apparent to housing advocates in Houston that the city is burdened with an affordable housing crisis. [FN7] The crisis Houston bears is not significantly different from that in America generally. This crisis is not confined to the lowest income stratas anymore. Indeed many middle income Americans have found it impossible to afford to own their own home. [FN8] Lower income families bear an even greater burden due to the national housing policy against construction of public housing during the last ten to fifteen years. [FN9] In *234 addition to these problems, American cities are faced with a growing number of homeless people who find shelter on streets, in parks, under bridges and on sidewalks. [FN10] Many of these people have mental health and substance abuse problems while some are the casualties of a national economic crisis. [FN11] Some of these American families live in temporary shelters or substandard or over-crowded housing. [FN12]

The City of Houston has an obligation to provide for the health, safety and general welfare of the community. [FN13] It is not reasonable to deny that this obligation includes the provision of safe, decent, affordable housing for its residents. [FN14]

There are a number of ways that a government can provide affordable housing.

[FN15] There are at least an equal number of ways a government can avoid tackling the problem altogether. The current city administration is specifically addressing the lack of affordable housing in Houston. [FN16] It is important that the acts of the city are consistent with its express goals-

- particularly as it relates to providing affordable housing to the community. Consequently, it is important that the proposed zoning ordinance for Houston be consistent with, and not antithetical to, the city's strategies for providing affordable *235 housing in Houston. This paper examines the proposed

zoning ordinance for the City of Houston with the limited purpose of considering the effects such ordinance would have on Houston's affordable housing initiative. It recognizes that zoning does not build housing. [FN17] It also recognizes that the very essence of zoning is the restrictive use of property and therefore to some extent exclusionary, per se. [FN18] These basic

factors notwithstanding, this paper offers ways that some of the walls inherent to zoning, be converted to bridges as a means of unifying a city while providing for the health, safety and general welfare of the public. This

paper also explores the kinds of regulations the State of Texas can consider enacting to remove the barriers to affordable housing.

A. Zoning

Generally, zoning is a planning tool for city government's management and control of growth within its borders. [FN19] The enactment of a municipal zoning ordinance is an exercise of the police power and Texas municipalities derive their power to adopt zoning regulations exclusively from the Texas Zoning Enabling statutes. [FN20] The City of Houston proposes its zoning ordinance pursuant to the Texas Constitution, [FN21] the Texas Local Government Code [FN22] and the City of Houston Charter [FN23] "and such other authorities and provisions of Texas statutory and common law that are relevant

and appropriate." [FN24] The Texas Local Government Code provides that zoning regulations must have as their purpose the promotion of the health, morals, safety and general welfare of the community. [FN25] The City of Houston's proposed ordinance specifically states that its purpose is the protection and promotion of the public health, safety, morals and general welfare of the citizens and residents of the City. [FN26]

*236 Because Texas courts have long held that a city's comprehensive zoning ordinance is presumed to be valid, [FN27] coupled with the fact that the enactment of a zoning ordinance is an exercise of the legislative power of city council, there is an extraordinary burden of proof imposed on one attacking a zoning ordinance. [FN28] However, the city council's power is not absolute and the presumption of validity is overcome when the facts show that the city acted arbitrarily, unreasonably and abused its discretion. [FN29] The presumption also disappears when the ordinance is shown to be

discriminatory and violative of the rights of petitioners and does not bear any substantial relation to the public health, safety, morals or general welfare. [FN30]

To determine whether a petitioner has met her burden of overcoming the presumption of validity of a zoning ordinance, Texas courts follow the standard announced by the Texas Supreme Court in 1971. [FN31] The Court stated

"if reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power. [FN32]

II. CHALLENGING THE PRESUMPTION OF VALIDITY

A. Police Power

The Texas Supreme Court rulings conform with those of the United States Supreme Court which, since its initial ruling in a zoning case, stated that zoning ordinances must find justification in some aspect of a municipality's police power. [FN33] The Court further opined that a debatable ordinance is presumptively valid since it cannot be held "on its face to be arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." [FN34] However, the court reasoned, once the question was raised about the validity of a municipality's zoning ordinance, the determination of the validity *237 of the ordinance depended on local circumstances and conditions ascertainable from fact and specific inquiries. [FN35] Thus a successful plaintiff can rebut the presumption of validity of a zoning ordinance when fact specific inquiries show that application of the ordinance to particular premises or particular conditions prove clearly arbitrary and unreasonable. [FN36]

B. Discrimination

A zoning ordinance can also be successfully challenged when the plaintiff shows that racial prejudice at least partly motivated a zoning decision. [FN37] Courts in such cases apply strict scrutiny in considering the validity of the zoning ordinance. [FN38] In *Arlington Heights v. Metropolitan Housing Development Corporation*, [FN39] the Supreme Court reaffirmed the basic legal tenet that a plaintiff may challenge an apparently neutral law or policy on the grounds that it is racially discriminatory. [FN40] However, race is not the only form of discrimination which would rebut the presumption of validity.

In *Cleburne v. Cleburne Living Center*, [FN41] the plaintiff sought a special use permit to operate a group home for the retarded in a zoning district where such group homes needed prior approval under that city's zoning ordinance. The Supreme Court's review included the initial inquiry into why the city required a special use permit for the plaintiffs' group home but not for more intensive uses as apartment houses, fraternity houses, or hospitals. [FN42] The Court found the answer was clear that the city had been motivated by invalid and

impermissible *238 considerations, specifically, community fear and prejudice.

[FN43] The Court imputed the illicit motives of the community to the city and consequently ruled the zoning ordinance invalid. [FN44]

Zoning ordinances have been directly challenged on the basis of discriminating against non-traditional family units. For example, in *Moore v. East Cleveland* [FN45] a zoning restriction defined family in a way which made it a crime for a grandmother to live with two of her grandsons. The U.S. Supreme Court held that such an ordinance impinged upon freedom of personal choice in matters of marriage and family life. [FN46] However, the *Moore* case involved related persons. [FN47] One of the evolving areas of zoning law and discriminatory impact of these regulations is the law's preference for traditional family residential units, often to the exclusion of multi- and non traditional family housing.

Zoning ordinances have also been used to effectively exclude persons with lower incomes. In *Taxpayers Association v. Weymouth Township* [FN48], New Jersey's highest court provided that as a conceptual matter, regulation of land use cannot be precisely dissociated from regulation of landusers. [FN49] Courts [FN50] and commentators [FN51] have recognized *239 that a common by-product of zoning is discrimination against certain socioeconomic classes. These ordinances have been overruled where the purpose is discrimination for socio-economic reasons. [FN52] On the other hand, where the primary purpose of the regulation falls within the police powers of the government, the ordinances have been upheld. [FN53]

C. Meeting Statutory Prerequisites

Texas law requires that a municipality's zoning ordinance be made in accordance with a comprehensive plan. [FN54] The proposed zoning ordinance for the City of Houston states summarily, "It is adopted in accordance with a comprehensive plan." [FN55] However, outside of the proposed zoning ordinance, there is no existing plan which the ordinance will be "in accordance with." This issue has arisen in Texas before and the courts have held that a zoning ordinance is not invalid because a municipality has failed to adopt a comprehensive plan where the zoning ordinance itself is found to be comprehensive, coherent, and logical. [FN56] However, for a zoning ordinance to meet the "in accordance with a comprehensive plan," prerequisite, the zoning ordinance must bind the municipal legislative body. [FN57] The zoning ordinance should also establish districts grouping the various phases of communal activity with some segregation of industry, business and residences so that the whole is not intra-mixed. [FN58] Furthermore, such zoning ordinances should reasonably ensure that property values and living conditions become reasonably predictable. [FN59] These stated criteria for determining the validity of a zoning ordinance can also constitute the factors which invalidate a zoning ordinance if they are applied in a "too" exclusively manner.

*240 D. Exclusionary Zoning

Zoning Ordinances offend the United States Constitution and are therefore

invalid when implementation screens out socioeconomic undesirables. [FN60] The distinction is critical because the essence of zoning is exclusion. However, where such exclusion is within the municipality's police power and conforms to constitutional and other legal mandates, the ordinance will be upheld. The legislation will only be deemed exclusionary and invalid if it fails to meet these criteria. [FN61] Determining whether an ordinance is valid as permissible land use regulation or invalid as exclusionary zoning presents an interesting challenge. In *Ambler Realty Co. v. Village of Euclid* [FN62], the trial court struck down Euclid's zoning ordinance, finding that its effect was "to classify the population and segregate them according to their income or situation in life." [FN63] The United States Supreme Court reversed the lower court, effectively validating socioeconomic segregation. This ruling remains law today. The Euclid court suggested, however, that a zoning ordinance could be successfully challenged when "concretely applied to particular premises ... or to particular conditions." In later cases, this Euclidean dicta has been used to strike down zoning ordinances. [FN64]

The arguments supporting socioeconomic zoning are vast and include protecting property values, reducing traffic and noise, preserving neighborhood character, reducing crime, increasing sanitary conditions and ensuring public health. [FN65] However, in its official Report to the U.S. President and Housing Secretary, the Advisory Commission on Regulatory Barriers to Affordable Housing suggests that the true driving force of exclusionary zoning is the NIMBY syndrome, [FN66] and not the valid exercise of police power. [FN67] NIMBY is the acronym for *241 "Not In My Back Yard" and describes community opposition to different kinds of housing units in the same community. The Commission stated:

"The NIMBY syndrome is often widespread, deeply ingrained, easily translatable into political actions, and intentionally exclusionary and growth inhibiting. NIMBY sentiment can variously reflect legitimate concerns about property values, service levels, community ambience, the environment, or public health and safety. It can also reflect racial or ethnic prejudice masquerading under the guise of these legitimate concerns." [FN68]

It is well settled law that exclusion on the basis of race and ethnicity is illegal. [FN69] The Fair Housing Act, as amended, specifically provides that discrimination in housing is illegal. [FN70] Senator Mondale, sponsor of the Fair Housing Act, stated that the purpose of the Act is to replace the ghettos "by truly integrated and balanced living patterns." [FN71] There is some duality of purpose of the Fair Housing Act; the anti-discrimination goal, which is expressly stated in the Act and the integration goal, which is part of the legislative history. [FN72] Ultimately, however, the question will be one of policy; whether a municipality will use zoning to promote racial, social and economic exclusion or inclusion.

E. Residential Exclusion

Residential segregation is pervasive. [FN73] Racial segregation is most evident between black and white communities. [FN74] This segregation has *242 been shown to be primarily based on race and not on income or other factors. [FN75] The impact of race seems fundamentally important in determining living

patterns of whites and blacks while race is significantly less fundamental as a dictate of living patterns to hispanics and asians. [FN76] This racial gap in residential housing has accelerated in recent history. In pre-industrial America people of all socioeconomic groups lived within walking distance of their employment. [FN77] These jobs were centrally located thus mandating that

all people lived in the center cities. However, with increased technology, including development of transportation vehicles, it became increasingly more convenient to move away from the central cities to outlying areas.

Consequently, the middle and upper classes left the center cities in increasing numbers until recent years show a marked difference between the suburban communities and the urban cities. [FN78] The suburbs are more white, middle and upper class while the inner city is overwhelmingly poor and minority. [FN79] When zoning is used to foster and continue these residential patterns, it is exclusionary and actionable. [FN80] The City of Mt. Laurel in New Jersey adopted a zoning ordinance that limited land use to single-family *243 detached homes. [FN81] The ordinance effectively excluded people of lower

and moderate incomes, because their access to single family homes is often limited because of the financial demands of home ownership. [FN82] The Mount Laurel zoning ordinance allocated 29.2 percent of the township's land area to industrial use. On these 4,121 acres, no residential development was permitted. Almost all of the remaining land was zoned for single family homes,

and the largest single family district permitted homes be constructed on no less than one-half acre lots. The ordinance did not provide for multi-family residential buildings anywhere in the township. Prior to the Mt. Laurel decision, the township provided for a planned unit development which had resulted in approval of a substantial number of rental apartment units. However, even these units were designed to attract highly educated, higher income residents. There was, for example, a limit on the number of school-aged

children who could reside there. The township defended its ordinance by arguing that the zoning provisions which excluded people of low and moderate means was a proper exercise of the municipality's police power in that it protected the municipal tax rate. The Court struck down the ordinance finding that the city had a duty to protect the welfare not only of the residents within its boundaries but regional residents as well. Furthermore, the Court ruled that the municipality was responsible for protecting all its residents equally. [FN83] Although New Jersey's constitution specifically provided for affordable housing while the Texas Constitution does not, the Supreme Court in

Mt. Laurel, based its ruling on equal protection; that reliance on equal protection is significant because it does apply to Texas. [FN84] Thus a municipality in Texas will not be able to enact a zoning ordinance which does not equally protect all its residents.

The need for low and moderate or affordable housing in Houston is uncontroversial. [FN85] The proposed Houston zoning ordinance expressly identifies 16 purposes for enacting the ordinance including to "support the continued availability of affordable housing within the city." [FN86]

However,

based on the lack of affordable housing currently available in the city, this stated purpose does not go far enough to meet the standard set out in Mt. Laurel.

*244 F. Addressing the Need

In *City of Pharr v. Tippet*, [FN87] residents challenged a city's proposed rezoning ordinance. The rezoning or amended zoning ordinance proposed by the city permitted it to provide a greater number of areas within its boundaries to be zoned multifamily. The City's actions were based on a number of factors, including the increased need for affordable housing in the city, the availability of unimproved land which could be developed as multi-family and the City's receipt of federal money to provide necessary utility improvements associated, in part, with the development of multi-family housing. The court found that the city's reliance on these factors were neither arbitrary nor capricious and supported the city's amended ordinance to provide multi family housing.

The argument for exclusionary zoning on the ground of protecting residents from the burden of taxes and otherwise was specifically stricken in *Britton v. Town of Chester*. [FN88] The Town of Chester amended its zoning ordinance to permit multi-family housing only as a part of a planned residential development. The amendment was challenged by plaintiffs who were people of low and moderate income who had been unsuccessful in finding adequate, affordable housing as well as a builder committed to constructing affordable housing. The court found that only 1.73% of the land in Chester could be used for multi-family housing under the ordinance. The court held that the town was required to consider regional needs when enacting zoning ordinances which sought to control growth. The court interpreted general welfare broadly and held that municipalities are required to bear its fair share of the burden of increased growth and could not wrongfully exclude persons of lower income. [FN89] The Chester court held that there were no "substantial and compelling reasons that would warrant the Town of Chester, through its land-use ordinances, from fulfilling its obligation to provide low and moderate income families within the community, and a proportionate share of same within its region, from a realistic opportunity to obtain affordable housing." [FN90]

The pattern of excluding black and poor residents from predominantly white housing communities was probably most clearly illustrated in the recent housing desegregation case of *United States v. Yonkers Board of Education*. [FN91] In *Yonkers*, the City of Yonkers *245 limited the construction of low income housing developments to predominantly black communities. Plaintiffs alleged that the City had discriminated against its black residents by not building low income housing in its white communities. [FN92] The City argued that the racially imbalanced housing patterns actually resulted from economic factors rather than from any racial discrimination. They further argued that property values in their community would depreciate if low income housing existed in its area. In striking down the Yonkers practice, the court disregarded the city's economic argument, labelling it a subterfuge for the city's intentional discriminatory practices.

In still another case, *United States v. City of Parma*, [FN93] the district court found that the City of Parma, which was the largest suburb of Cleveland had systematically excluded blacks from living in Parma in violation of the Fair Housing Act. This act of exclusion rested in the City's opposition to any form of public or low income housing. The court upheld a HUD determination

that Parma's low income housing need was 2669 units while the city had no low income housing. The court required the city to permit the construction of low income housing within the city "to eliminate, to the extent possible, the discriminatory effects of Parma's [past] actions." [FN94]

G. Summary

American courts have generally ruled against municipal ordinances which restrict residential development in a manner which excludes people based on economic and racial grounds. In these cases, it is apparent that the exclusion of multi-family units, especially where the need exceeds their availability, constitutes impermissible exclusionary zoning. [FN95] It is also apparent that the location of such housing is important. [FN96] That is, a city will not be permitted to locate such housing solely in black communities in lieu of locating such housing in white communities. In reviewing the proposed zoning maps for the City of *246 Houston, it is important to determine where the areas zoned multi-family are located. Additionally, the sites of low income public housing will also be important in determining whether a municipality has enacted an invalid zoning ordinance because it is exclusionary. The extent to which a municipality considers these factors in assessing the location of affordable housing should also be dependent on what effectively protects the general welfare of all of the community as well as its regional impact.

This summation begs a more controversial question of whether ethnic integration is of such uncontroverted benefit to the community that it mandates a city policy favoring integration in furtherance of its police power to promote the general welfare.

Numerous governmental policies [FN97] and legislation [FN98] reflect a goal of ethnic integration. As was earlier acknowledged, there is a school of thought which embraces the theory that the Fair Housing Act specifically includes a goal of ethnic integration. [FN99] Whether or how that issue will ultimately be determined is not expressly the issue here. Recognizing the fact that many theorists view integration as a reasonable, just and necessary goal of governmental and private entities, it is prudent to consider the basis for such conclusion and determine whether such policy is needed to promote the general welfare of the community.

Longtime proponents of civil rights and liberty in America have stressed the need for ethnic integration as a means of resolving the occurrence and effects of discrimination against classes of people. [FN100] This support for integration grew out of the judicial movement away from the doctrine of separate but equal expounded in Plessy v. Ferguson [FN101] and toward the doctrine of integration expressed in Brown v. Board of Education. [FN102] It is important to understand the dynamics and failure of Plessy v. Ferguson to recognize the requisite for Brown v. Board of Education and the impact on today's policy makers.

*247 H. Plessy v. Ferguson, Validating Segregation

The plaintiff in Plessy vs. Ferguson was not challenging the constitutionality of separating the races. To the contrary, Plessy, a Louisiana resident, was of mixed descent, being 7/8ths Caucasian and 1/8th African, claimed that the African blood was not discernible in him and therefore he should be treated like a white man. [FN103] What this meant was that he was entitled to every recognition, right, privilege, and immunity owed to white citizens of the United States. Mr. Plessy's challenge was borne from his purchase of travel passage on the railway and subsequent boarding of that train and sitting in a railcar held exclusively for white travelers. When Mr. Plessy was asked to vacate the "white" car and move to the "African" car, he refused, was forcibly removed from the car, imprisoned and found guilty of a criminal act. The Court stated that "a statute which implies merely a legal distinction between the white and colored races--a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color--has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. [FN104] The Court further opined that the 14th amendment did not have as its purpose the integration of the races but to "establish the citizenship of the negro, ... and to protect [them] from the hostile legislation of the states granting to [them] the privileges and immunities of citizens of the United States, as distinguished from those citizens of the states. [FN105] It further stated:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation ... do not necessarily imply the inferiority of either race to the other, and have been generally recognized as ... [a proper] exercise of police power. [FN106]

Thus the Plessy majority relied on the distinction between laws which interfered with the political equality of the races and those which *248 required the separation of the races. [FN107] Clearly, even as the majority announced in Plessy, this discourse was predicated on one basic premise, that although separated, the races enjoyed equal facilities, services, treatment and opportunity.

By the time Brown vs. Board of Education was heard by the U.S. Supreme Court that basic premise had been thoroughly negated and the stage set for the move toward integration.

I. Brown v. Board of Education, Promoting Integration

The Brown court reconsidered the separate but equal doctrine accepting the theory that the separate facilities in question were substantially equal. However, the court held that this equality of facilities was insufficient to meet the separate but equal mandate; that the deprivation of equal educational opportunities contravened the Equal Protection Clause of the Fourteenth Amendment. Indeed, the court found that separate educational facilities were inherently unequal. The Court reasoned:

"Today, education is perhaps the most important function of State and

local governments." "[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.... We come then to the question presented: Does segregation of children in public school solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of educational opportunities? We believe that it does." [FN108]

The inherent injury found in segregation of the races was expressed by a lower Kansas Court and embraced by the Brown Court.

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of *249 Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system. [FN109]

Careful review of the Courts' reasoning in the two cases pose very real questions for us today and how we respond to them may have a far reaching effect on the living standards for Americans in general and more specifically in Houston. This review could help determine what steps Houston must make as it considers, enacts and implements its zoning ordinance.

J. The legacies of Plessy and Brown

While the Plessy Court believed that social prejudices could not be overcome by legislation which forced the commingling of the races, [FN110] the Brown Court believed that segregation bore certain inherent inequalities which violated the U.S. Constitution and therefore required legislative mandate. [FN111]

Modern day theorists, in considering the effect of exclusionary zoning, have stated that exclusionary zoning creates economic and nonpecuniary burdens on people. [FN112] "There are serious demoralization costs generated by social immobility and social unrest. Low and moderate income people concentrated in economically segregated neighborhoods are denied the full range of opportunities available to the middle and upper classes." As the National Commission on Urban Problems (Douglas Commission) concluded:

"Our society is designed to assure most of us available alternatives to where we live, how we live, and what we do. Big-city slum dwellers do not have this freedom of choice. They are denied a full range of opportunities in education, jobs and housing. Mainstream Americans take those opportunities for granted and slum dwellers know this. They know how the more prosperous half lives and they aspire to the same way of life. The fact that they cannot achieve this way of life is a source of much of this anger and bitterness. Often that anger results in higher crime rates; sometimes it explodes into

more widespread violence.... The *250 community that seeks to seal itself off from the social crises of our time, to live in quiet luxury in the midst of segregate squalor, is violating the most basic standards of morality.... A balanced housing supply, on the other hand, brings with it all the advantages of cultural diversity, and the satisfaction of contributing one's share toward society." [FN113]

Although exclusionary zoning has been cited for promoting segregated housing and consequently segregated schools and facilities by providing superior opportunities to suburbanites while relegating inner city residents to overwhelming disadvantages, integrated housing and facilities are not necessarily the sole remedy available. Indeed some scholars suggest that the focus on integration is of itself a bond of slavery which humiliates and berates non-whites. [FN114] These scholars suggest that where the goal of integration is pursued to deny legitimacy to the non-white community, the antidiscrimination goal of the Fair Housing Act and equal protection are violated. [FN115] This position renews the posture that individual choice is superior to integration. That is, it is more important and nondiscriminatory if a person had the opportunity to choose where she wanted to live, whether that be in a majority white community or a predominantly non-white community. To achieve this end an adequate number of affordable housing units of high quality must be available in white and non-white communities. The legacy then seems to be simply that all facilities, housing, education, transportation and otherwise should be adequate in all communities regardless of ethnicity or economics. An adequate number of housing so available should be affordable to people of low and moderate income and there should be no legislative barriers to access. However, the ultimate choice of where one selects the affordable unit should remain in and with the resident. The key is that the municipality not enact any law which acts as a bar or exclusion of anyone on the basis of ethnicity or economics. This type of municipal philosophy would not defeat a city's promotion of diversity as a goal. Indeed it would foster such goal because it could attract people of various ethnicities and differences to live and thereby work, learn and socialize together without regard to whether the community was predominantly white or non-white. It would also serve to reject racial prejudice and fear which are reenforced through exclusionary zoning. These steps *251 toward inclusion may prove to be a bold surge to non-discriminatory practices.

While exclusionary zoning tends to further polarize an already divided society, [FN116] inclusionary zoning offers numerous opportunities for a progressive municipality to close these societal gaps. Can there be any question that a unified community promotes the general welfare of the citizenry?

K. Inclusionary Zoning

The City of Houston's proposed zoning ordinance is subject to legal challenge similar to that in City of Parma. [FN117] The proposed zoning ordinance for the City of Houston identifies certain percentages of land area for the different city land use designations. Those percentages provide the following uses:

1. Urban Neighborhood	2.53%
2. Single Family Residences (R-1)	30.00%
3. Duplexes - Quadriplexes (R-4)	2.69%
4. Residential up to 8 units (R-8)	.06%
5. Multi-Family (above 8 units) R-0	3.2%
6. Industrial	6.6%
7. Major Activity Centers	2.6%
8. Greenspace	11.92%
9. Special District	.01%
10. Open Space	and 40.00% [FN118]

It is of no insignificant note that in the City's R-4, R-8, and RO districts, single family residences are allowed while in the R-1 district, no multi-family units are permitted. The clear consequence is a single family preference. This preference is not necessarily negative as long as the city goal to provide affordable housing can be met by providing affordable single family housing. [FN119]

*252 One recognized way of counteracting the damaging effects of exclusionary zoning is through inclusionary zoning. An effective inclusionary zoning program should address at least five goals: (1) it should create as much low and moderate or affordable housing as possible with a view toward meeting the city's need, (2) it should not give rise to counterproductive side effects, (3) it should be relatively easy and inexpensive to administer, to minimize delays and development costs, (4) it should socioeconomically integrate the suburban communities in the process and (5) it should facilitate the consideration of legitimate local concerns. [FN120]

There has been a call on the federal government to encourage and help develop model codes and ordinances for use by state and local governments. [FN121] The Advisory Commission on Regulatory Barriers to Affordable Housing recommended:

... that HUD assume a leadership role and work with government and private-industry groups, such as the American Bar Association, American Planning Association, National Association of Home Builders, National Governor's Association, League of Cities, State Community Affairs agencies, and others to develop consensus-based model codes and statutes for use by State and local governments. Specifically, the Commission sees a need for a new model State zoning enabling act with a fair-share component, model-impact fee standards, and a model land-development and subdivision-control ordinance.

[FN122]

Although the Commission's focus is on the duty of the states to ensure its municipalities provide affordable housing within its boundaries and region,

the City of Houston is in an enviable position of being able to include its affordable housing initiative in its original zoning ordinance. A number of inclusionary plans have been enacted in various parts of the country.

L. The Massachusetts Plan

In 1967 the Massachusetts Senate commissioned an investigation of local zoning ordinances. The purpose of the investigation was to determine whether localities unfairly implemented their zoning *253 ordinances. [FN123] The investigation revealed that certain zoning practices seriously limited the availability of low and moderate income housing. [FN124] As a result, the Massachusetts Act was passed. Called the Anti-Snob Zoning Law, [FN125] the goal of the law is to ensure that at least ten percent (10%) of a community's housing stock is within the price range of low income households. [FN126] The program allows redress to builders who have been refused permits to construct locally unpopular types of affordable housing if less than ten percent (10%) of the jurisdiction's housing stock is classified as affordable. [FN127] In 1982, Massachusetts expanded its role by providing additional incentives for providing affordable housing. The Governor issued Executive Order 215 which instructed all State agencies to withhold development assistance awards from communities that were found to be "unreasonably restrictive of housing growth", with special consideration given to a municipality's efforts to facilitate the development of housing for low and moderate income families. [FN128] In summary, the State of Massachusetts provides incentives by agreeing to count affordable units produced under the program toward the ten percent (10%) affordable housing threshold that the Anti-Snob Statute established. When localities reach the threshold, they are exempt from developer appeals to the State. Instead they are able to retain control over future development within their borders. [FN129] The Massachusetts program has been directly credited with providing about 1000 units of affordable housing per year for 20 years. [FN130] Although this may not be an overwhelming success, it does mean that 20,000 units of affordable housing have been erected in Massachusetts which would probably not have been constructed but for the Anti-Snob legislation.

M. Texas and the City of Houston

The City of Houston can modify this Massachusetts plan to meet its own needs. First, it would need to identify its need for affordable *254 housing. Then it would need to incorporate in its comprehensive development plan a construction (or rehabilitation) program which cites its annual goal for providing affordable housing. Third, the City must include in its program a goal of providing affordable housing throughout the city and the region and not in any particular racial or economic area. An established annual percentage of affordable housing would help to assure that those areas which are already heavily impacted with low income housing units would not continue to exclusively bear this burden but that it would be shared throughout the community.

However, measures taken by the City of Houston should be combined with inclusionary measures for the entire state of Texas. A review of the legislative initiatives from other states provide a menu of the kinds of measures which the Texas legislature can enact.

N. California

The California statute provides for a comprehensive planning strategy which requires municipalities to adopt comprehensive long-term development plans. The law mandates municipalities detail the housing needs of the community including five-year projections identifying how the municipality will satisfy the needs. [FN131] The California law also prohibits municipalities from enacting zoning regulations which unreasonably increase the cost of housing. [FN132] Going even further, the law specifically sets out to encourage the development of affordable housing by requiring the land use ordinances to provide density bonuses and other inclusionary zoning incentives to facilitate the development of lower-income housing. [FN133]

O. Oregon

The state of Oregon also provides for density bonuses for the development of lower-income housing. [FN134] To effect its goal of providing housing for all its residents, Oregon regulates the local planning process through the Oregon Department of Land Conservation and Development (LCDC). This department reviews all local plans, and mandates local compliance with statewide housing goals.

*255 P. New Jersey

In *South Burlington County NAACP v. Township of Mount Laurel*, [FN135] the New Jersey Supreme Court imposed a mandatory, regional concept for providing affordable housing by requiring every developing community to contribute its fair share toward meeting the low and moderate income housing need for the region. To implement this program, the court appointed a three-judge panel to develop fair-share formulas and to implement the court ruling. This ruling was later supplemented by state legislation [FN136] to ensure municipal compliance. These municipalities determined quantitative targets for the amount of low and moderate income housing which represented their fair share contribution to the region's housing stock.

This idea of a fair share plan can be used on a community wide basis in Houston, thus assuring the equitable distribution of affordable housing throughout the City.

Q. Vermont

The land trusts arrangement has provided a successful way for a municipality to include affordable housing in its comprehensive development and/or zoning plan. The land trust allows a homeowner to purchase a home at an affordable price because the underlying land is owned by someone else. [FN137] In Burlington, Vermont, a land trust established in 1984 got a major boost from its partnership with the City of Burlington. [FN138] The Burlington Community Land Trust was incorporated in 1984 and began operation with a seed grant from the city in the amount of \$200,000.00. [FN139] Three years later, the City provided the trust with a \$1,000,000.00 line of credit from its pension fund. [FN140] Using this line of credit, the trust was able to acquire land which

would serve as host to affordable housing units. [FN141] Aside from providing affordable housing units, the homeowner is able to achieve an equity position under some land trust agreements, which equity is recoverable on the sale of the housing unit. Generally, the seller will be able to *256 recover the original down payment, less certain economic adjustments, any loan principal paid off during the ownership, plus the cost of any permanent improvements to the property. [FN142]

There are a number of reasons why the City of Houston should encourage this kind of program. Among those reasons are:

1. It encourages the increased availability of affordable housing units.
2. It encourages upward mobility as inhabitants seek to move from the subsidized unit to one they wholly own.
3. It disperses low and moderate income families throughout the community exposing the people to societally accepted work and educational ethic and
4. It helps assure that the property will remain available for use as affordable housing.

Conceivably, under the currently proposed zoning ordinance, such a program could be effective in providing single family units but there may be less incentive to provide multi-family units because of the potentially higher land costs. Since the proposed ordinance provides less than six percent (6%) of its area for multi-family sites ranging from duplexes to large complexes, this land is less available. This limited availability tends to place a premium on the property thus driving up the cost of the land. When the cost of the land is high, then the improvements on that land are high. Effectively this reduces the probability that such land will be used for affordable housing and increases the probability that such use will be for higher income families thereby excluding people based on socioeconomic criteria. If the City of Houston provides incentives for the development of affordable housing opportunities, the land trust sites could be used for various types of housing from single family residences to condominiums as well as single room occupancy transitional housing.

R. Virginia

In 1989, the Virginia legislature enacted an enabling statute authorizing certain local governments to adopt an affordable housing dwelling unit program. [FN143] This legislation would permit zoning *257 ordinances to increase densities in certain areas within the city. The city is also permitted to decrease densities in return for providing specific percentages of affordable housing. [FN144]

Clearly, there are a number of programs the city can make a part of its comprehensive zoning plan to encourage and ensure the City meets its overwhelming need for affordable housing units. The one remaining question is whether the City can expect any quantifiable benefit from enacting a zoning ordinance which provides specific inclusionary measures.

S. The Gautreaux Plan

The Gautreaux experiment is an aggressive race and economic desegregation effort. It arises out of a landmark Supreme Court decision, *Gautreaux residents v. Chicago Housing Authority*. [FN145] Plaintiffs in the case were a group of black public housing tenants of Chicago's public housing. They filed their action claiming the Housing Authority and Department of Housing and Urban Development had violated their Fifth Amendment and Title VI rights by placing public housing sites only in those areas of the city described as "Negro ghettos". The purpose of selecting these sites, they averred, was to avoid placing black families in white neighborhoods. Justice Stewart, writing for the Court, stated that the operation of this housing system had significant segregative effects, not only in the City of Chicago but in the region wide suburbs as well. The court found such system illegal and ordered certain specific remedies aimed at integrating the region's residential communities. Though this ruling was not widely embraced by Chicago area whites or their politicians; one part of the order, the Gautreaux Demonstrations has enjoyed remarkable success. The Gautreaux Demonstration is a program whereby inner city, low and moderate income non-whites (predominantly black) are moved out of the inner city ghettos and into many of Chicago's predominantly white suburbs. The housing sites are scattered so that poor people are not concentrated in any identifiable area. This demonstration began after the landmark 1976 Supreme Court Decision, and the results show that the lifestyles of the participants before and after the program show stark differences.

*258 T. Before Gautreaux

A recent Cable News Network program narrated by Bernard Shaw which aired in 1992 showed the dismal statistics of living in isolated low income neighborhoods. [FN146] Those statistics show that the "vast majority of blacks live as segregated now as they were 30 years ago--No other group has suffered as much from segregated [communities] as have blacks." [FN147] The black adults which live in these segregated communities make up the following statistics: 50% of all violent crime arrests; 50% of U.S. prison population; and 40% welfare recipients. [FN148] The children reared in these communities suffer equally dismal futures; they represent 16% of public school enrollment but 40% of the children classified as disabled or deficient, they are more than twice as likely to die during their first year of life, they are 3 1/2 times more likely to live in poverty, they are 1 1/2 times more likely to drop out of school, they are likely to earn only 56% of incomes earned by whites, 7 times more likely to be murdered, and 3 to 4 years behind white students in educational progress. [FN149] Economist, Ron Mincy, has said "housing segregation is a critical and neglected determinant of the underclass." [FN150] Terrance Tompkins, a 14-year old child living among this underclass in Chicago was asked, "Of the grownups you see around you, who do you admire most?" He answered, "I don't see anyone." [FN151]

The key to an effective zoning program which could impact tremendously the kind of underclass in the City of Houston would be to include a formal inclusionary zoning plan. This kind of plan can alter the situation suffered by so many people in this city and country, where a person's address can mean the difference between success and failure.

U. After Gautreaux

The impact of opening neighborhoods through inclusionary zoning is evident from what happened in the Gautreaux program. Of the over 4,000 families who were moved out of the "island of poverty" communities in Chicago and into both urban and suburban communities, the vast majority have had dramatic impact on their lives. *259 Parents who participated in the Gautreaux program, who had never worked before, were more likely to work than before and those adults who moved to suburban communities were 50% more likely to be working than before: [FN152] 90% of the children of these families were in college or worked, 95% of them graduated high school and 54% of them were in college. [FN153] But the impact of these phenomenal changes in life styles and consequent value to the overall community must be tempered by certain other realities.

V. The City must Avoid "tipping" the Balance of Power

It is important to the underrepresented, that what little political and economic clout they may have not be neutralized by any dilution effects of inclusionary zoning efforts. Concentration of racial and economic groups in segregated residential enclaves, has caused a number of problems, but it has also produced certain business and social enterprises which cater to the needs of the group. Likewise, certain political clout has been gained through the election of representatives for the group whose mission is to address the group's interests. Dilution of a group-identifiable community or district would directly affect the likelihood for this representation. [FN154] Thus if the City adopts a policy of integration by inclusion it should be enacted with a sensitivity to the negative impact of "tipping". [FN155] The tipping point describes that point where integration becomes potentially harmful. [FN156] For example, when lower or moderate income communities are gentrified by the introduction of middle and upper income people who rehabilitate their homes there is an outward positive impact for the whole city. However, when that movement reaches a certain point, negative effects occur. The low and moderate income families are no longer able to afford to live in their communities. And because many of these families tend not to be owners, but renters, they do not realize any financial benefit of the increased property valuation. They are subsequently displaced to other areas where housing is affordable. However, in a city where *260 affordable housing is scarce in the beginning, and the gentrification further reduces that availability, the housing alternatives are that much more limited and the plight of low and moderate income families more and more hopeless.

Similarly middle and upper income households can be affected if integration exceeds the tipping point. When these groups can attain their basic residential objectives, total exclusion of low and moderate households is not

required and will meet minimal opposition. [FN157] As with basic zoning goals, the various communities should be able to see, in a comprehensive fashion, what they can reasonably expect surrounding land to be used for and what their property values can reasonably be expected to be. [FN158]

III. CONCLUSION

The City of Houston has an opportunity to develop a strong zoning ordinance which provides for the housing needs of all its citizens in a well-planned and effective way. That opportunity should be seized. Although most states have upheld exclusionary zoning ordinances, the presumption of validity of such ordinances can be rebutted when the municipality has not acted in accord with its police powers and or when the actions it takes are based on racial and economic prejudice. The currently proposed City of Houston zoning ordinance does not effectively address the residential needs of its low and moderate income residents. The City should correct these oversights by:

1. replacing purpose "p". The following language is one example:

"to increase the availability of affordable housing for all people in Houston regardless of race, ethnicity, social or economic standing."

2. including a definition of affordability. An example:

"housing is affordable when a family is able to spend no more than 30% of its gross income for rent, mortgage and utilities for residential accommodations which are deemed sanitary, healthy, safe and of a quality which promotes morals and the general welfare."

3. including barrier elimination programs and incentives:

*261 a. work with area wide participants to address business, community, education, transportation, construction needs which inclusionary provisions would address;

b. consider permitting various housing options, including manufactured housing;

c. consider development costs and fees, part of which could be used for creating and maintaining housing trust funds to aid in the construction and or acquisition of affordable housing units;

d. educate the public regarding misconceptions about the effect of affordable housing on property values, economic stability, safety and otherwise;

e. eliminate absolute building code requirements which tend to increase housing costs and discourage construction of affordable housing units;

f. eliminate excessive site-development standards; and

g. work with the state legislature to eliminate barriers to affordable housing by requiring inclusionary practices.

4. including among its purposes desegregation of its communities without forcing integration.

5. including a periodic review procedure to determine whether any zoning or other municipal ordinance, procedure, policy or otherwise impedes the availability of affordable housing.

6. increasing the land available for the development of affordable housing throughout the city; and

7. employing some innovative model programs, providing the integrity of the various communities and encouraging the beneficial effects of diversity. [FN159]

But these initiatives should not be limited in Texas to the City of Houston. The Texas legislature should take affirmative measures to provide affordable housing throughout the state. State action tends to diffuse exclusionary zoning regulations, especially in smaller cities where officials rely heavily on development permission as a form of patronage because land use controls can be measured independently without the pressure to act to promote social, racial, and economic alienation. [FN160]

*262 Through these efforts, the City of Houston and the State of Texas could establish state wide communities connected by bridges rather than divided by walls.

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[FN1]. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD" REMOVING BARRIERS TO AFFORDABLE HOUSING,,, Washington: 1991 at 1-2, Report to President Bush and Secretary Kemp.

[FN2]. See, Richards, Zoning for Direct Social Control, 1982 DUKE L.J. 761, at 764, citing Bettman, Constitutionality of Zoning, 37 HARV.L.REV. 834, 839-40.

[FN3]. See id., citing R. Baucock, The Zoning Game 115 (1966); B Silgan, Land Use Without Zoning 49 (1972); J. Delafons, Land-Use Controls In the United States 26 (1962); National Commission on Urban Problems, Building the American City 204 (1969).

[FN4]. Tex.Rev.Civ.Stat.Ann. art 1096 (Vernon 1993); Tex.Rev.Stat.Ann. art. 1011a and 1175 (Vernon 1993).

[FN5]. On January 9, 1991, City Council for the City of Houston approved the creation of a zoning commission which was authorized to study the issue of zoning for the City of Houston and recommend a zoning ordinance. The zoning commission was governed by a board of commissioners which included professionals, business persons and community representatives. This board submitted its proposed ordinance to City Council in January 1993. City Council is expected to vote on the ordinance. Thereafter, the voters will cast their

ballots for or against zoning.

[FN6]. The Proposed Ordinance provides for a number of land use designations. These classifications are:

R-1 Residential Single Family Detached dwellings on individual lots

R-4 Includes uses allowed in the R1 District as well as attached or detached dwellings with no more than 4 units on a lot.

R8 Includes uses allowed in R1 and R4 districts and apartment buildings with no more than eight dwelling units on a lot.

R0 Includes uses allowed in R1, R4 and R8 districts as well as apartment complexes with no limit on the number of dwelling units on a lot.

Bed and Breakfasts, group homes, hospices, nursing homes, multi family residences are restricted to the R8 and R0 districts.

[FN7]. Comprehensive Housing Affordability Strategy (CHAS) for the City of Houston, which report shows that approximately 6% of low income families eligible to receive tenant-based rental assistance under the Section 8 certificate and voucher programs actually received such assistance. This 6% represents about 6933 families, which means 115,500 eligible families in Houston do not receive Section 8 rental assistance. Of these 115,500 households, 2500 families are served through Houston's Housing Authority's conventional public housing program while a total of over 10,000 families have

applied for and are on the combined waiting lists for the Section 8 and conventional public housing lists. This means there is a documented existing need for over 10,000 units of affordable housing; and there are another 102,000 plus families who are probably eligible for some assistance, many of whom are living in substandard housing.

[FN8]. Stockman, Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing, 78 VA.L.REV. 535 (March, 1992).

[FN9]. Steinback, A Decent Place to Live Revisited, The Enterprise Foundation, August 1992. "The supply of inexpensive rental housing continues to dwindle, even as the number of poor seeking such housing increases. By 1989, the latest

year for which figures are available, there were 4.1 million more poor households seeking apartments with low rents than there were units available in a price range they could afford, according to a Place to Call Home: The Low-Income Housing Crisis Continues, a study by the Low-Income Housing Information Service and the Center on Budget and Policy Priorities authored by

Edward B. Lazere, Cushing N. Dolberare, Paul A Leonard and Varry Zigas ... [R]ent burdens continue to place tremendous strain on lower-income households.

Today, almost 60 percent of the nation's poor renters pay at least half of their meager earnings for shelter ... With literally no income cushion to fall

back on, millions of American households are but one or two missed rent checks from eviction--and possible homelessness."

Appropriations for the subsidized housing programs operated by the U.S. Department of Housing and Urban Development fell by more than 80% (inflation adjusted) between 1978 and 1991.

[FN10]. National Coalition for the Homeless, Homelessness in the United

States: Background and Federal Response--A briefing paper for Congressional Candidates, on the rights of the Homeless 91988 at 71-72.

[FN11]. Id.

[FN12]. Id.; See, City of Houston CHAS, supra note 7; America's Housing Crisis, supra, note 8; In Houston according to a 1987 report compiled by the Bureau of Census and HUD's office of Policy Development and Research entitled American Housing Survey for the Houston Metropolitan Area, there are 144,600 owner occupied households in Houston paying more than 30% of their gross income for housing costs. Additionally, there are 195,099 renter occupied households in Houston paying more than 30% of their gross income for housing costs. There are 72,299 overcrowded housing units in Houston and 14,038 substandard housing. CHAS at xii-xiv.

[FN13]. U.S. Const. amend. X; See, Sinclair Ref. Co., v. Chicago, 178 F.2d 214, 216 (7th Cir.1949).

[FN14]. Tex.Gov't.Code.Ann. <section><section> 392.001 - 392.011 (Vernon 1993); <section> 392.011(f) states:

the governing body of municipality shall adopt a resolution declaring that

there is a need for a housing authority if it finds that there is:

- (1) unsanitary or unsafe inhabited housing in the municipality: or
- (2) a shortage of safe or sanitary housing in the municipality available to persons of low income at rentals that they can afford.

[FN15]. See generally, Tex. Gov't Code Ann. <section> 392.001 et seq.; See specifically, <section><section> 392.051, 392.052, 392.057, 392.065, 392.081.

[FN16]. City of Houston Mayor Robert C. Lanier, NEIGHBORHOODS TO STANDARDS, A REPORT BY THE MAYOR'S TRANSITION SUBCOMMITTEE, Mayor Policy Statement to Bring Neighborhoods to Standard, 1992.

[FN17]. Daniel R. Mandelker, Environment and Equity 83 (1981).

[FN18]. Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[FN19]. Abrams, Case notes and Comments on Local Growth Control Management Concepts, 750 A.L.I.-A.B.A. 629 (August, 1992).

[FN20]. Tex.Gov't.Code.Ann. <section> 211.011 et. seq.

[FN21]. Tex. Const. art. XI <section> 5; Houston Zoning Ordinance, Hearing Draft, Department of Planning and Development--Zoning Division, November 25, 1992.

[FN22]. Supra, note 20.

[FN23]. Houston Zoning Ordinance, Hearing Draft, Department of Planning and Development--Zoning Division, November 25, 1992.

[FN24]. Id.

[FN25]. Tex.Gov't.Code Ann. <section> 211.011, et. seq.

[FN26]. Houston Zoning Ordinance, Hearing Draft, Department of Planning and Development--Zoning Division, November 25, 1992.

[FN27]. San Antonio v. Hunt, 458 S.W.2d 952 (Tex.Civ.App.1970).

[FN28]. Burford v. City of Houston, 379 S.W.2d 671 (Tex.Civ.App.--1964).

[FN29]. Pharr v. Tippitt, 616 S.W.2d 173 (Tex., 1981)

[FN30]. Id.

[FN31]. Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex.1971).

[FN32]. Id.; See also, University Park v. Benners, 485 S.W.2d 773 (Tex.1972).

[FN33]. Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 144 (1926).

[FN34]. Id. at 395.

[FN35]. Id. at 387.

[FN36]. Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 477, 72 L.Ed. 842, (1928). The U.S. Supreme Court struck the application of the City's zoning ordinance based on the particular conditions standard discussed by the Euclid court.

[FN37]. Ellis, Neighborhood Opposition and the Permissible Purpose of Zoning, 7 J. LAND USE & ENVTL.L. 275 (1992).

[FN38]. Id., citing Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

[FN39]. 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). In Arlington Heights, a wealthy suburb sought to prohibit rezoning which would have permitted subsidized multi family housing within its borders. The issue was whether the challenge was motivated by an invidious discrimination purpose. Finding that proof of racially discriminatory intent or purpose is required to show violation of equal protection clause. Holding that in this case, burden not met.

[FN40]. Id.

[FN41]. 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313, 53 U.S.L.W. 5022 (1985)

[FN42]. Id.; See, Ellis, Neighborhood Opposition, 7 J. LAND USE & ENVTL.L. 275 (1992), citing Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW <section> 16-2 to <section> 16-5 at 1439-51 (2d ed. 1988).

[FN43]. Id.

[FN44]. Id.

[FN45]. 431 U.S. 494 (1977)

[FN46]. Id. at 499.

[FN47]. The ordinance subject of the Moore case defined family as "a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a). Husband or wife of the nominal head of the household.

(b). Unmarried children of the nominal head of the household or of the spouse of the spouse of the nominal head of the nominal head of household, provided, however, that such unmarried children have no children residing with them.

(c). Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d). Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for them by the nominal head of the household and the spouse of the nominal head of the household.

(e). A family may consist of one individual."

[FN48]. 71 N.J. 249, 364 A.2d 1016 (1976), dismissed, cert. denied, 430 U.S. 977 (1977).

[FN49]. Id. at 277, 364 A.2d at 1031.

[FN50]. See Id.; *Ambler Realty Co. v. Village of Euclid*, 297 F.Supp. 307, 316 (N.D.Ohio 1924), rev'd, 272 U.S. 365 (1926).

[FN51]. *Lasker, Unwalled Towns*, 43 THE SURVEY 675, 676 (March 6, 1920).

[FN52]. See, *Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN L.REV. 767 (1969); *Richards, Zoning for Direct Social Control*, 1982 DUKE L.J. at 764.

[FN53]. *Britton v. Town of Chester*, 595 A.2d 492 (N.H.1991).

[FN54]. *San Antonio v. Hunt*, 458 S.W.2d 952 at 956 (Tex.Civ.App.1970).

[FN55]. *Houston Zoning Ordinance*, supra note 22, at I-1 Section 48-1106.

[FN56]. *University Park v. Benners* 485 S.W.2d 773 (Tex.1972); See, *Coffee City v. Thompson*, 535 S.W.2d 758 (Tex.Civ.App.--Tyler 1976), writ ref'd n.r.e.; *Benintendi, Comment, The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 U. DAYTON L.REV. 207 (1991), challenging the sufficiency of comprehensive zoning ordinances as replacements

for comprehensive plans.

[FN57]. *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 294 (Tex.Civ.App.--Dallas, 1989).

[FN58]. *Coffee City v. Thompson*, 535 S.W.2d 785 (Tex.Civ.App.--Tyler 1976) writ ref'd n.r.e.; *San Antonio v. Hunt*, 458 S.W.2d 952 (Tex.Civ.App.1970).

[FN59]. *San Antonio v. Hunt*, 458 S.W.2d 952, 956 (Tex.Civ.App.1970), (Justice Cadena, dissent).

[FN60]. Seidel, HOUSING COSTS AND GOVERNMENT REGULATIONS, 158 (1978).

[FN61]. See, Yale Rabin, EXPULSIVE ZONING: THE INEQUITABLE LEGACY OF EUCLID IN ZONING AND THE AMERICAN DREAM 101 (Charles M. Haar & Jerold S. Kayden eds., 1989). Where the author, an urban planner and architect, challenges the Euclid protection of zoning as a device for land use as discriminatory. Rabin argues that exclusionary zoning and other land use devices are largely responsible for creating and perpetuating residential segregation. Additionally, Rabin looks at how zoning is used in African American communities as opposed to Anglo communities. He finds that zoning frequently allows intrusive and hazardous uses which degrade the residential environment of African American neighborhoods. He calls this practice of permitting residential incompatible zoning uses in black communities "expulsive zoning".

[FN62]. 297 F.Supp. 307 (N.D.Ohio 1924).

[FN63]. *Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 144 (1926).

[FN64]. *Id.*

[FN65]. *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 477, 72 L.Ed. 842 (1928).

[FN66]. Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, "Not in My Backyard" Removing Barriers to Affordable Housing, Washington: 1991 at 1-2.

[FN67]. *Id.*

[FN68]. *Id.*

[FN69]. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97, S.Ct. 555, 50 L.Ed.2d 450 (1977).

[FN70]. Fair Housing Act, 42 U.S.C. 3601 et.; See, Tein, The Devaluation of NonWhite Community In Remedies For Subsidized Housing Discrimination, 140 U.PA.L.REV. 1463 (April, 1992).

[FN71]. See, H.R.Conf.Rep. No. 1279, 93d Cong.2d Session 3 (1974); See, Tein, The Devaluation of NonWhite Community In Remedies For Subsidized Housing Discrimination, 140 U.Pa.L.Rev. 1463 (April 1992).

[FN72]. Some scholars believe that to place the statutorily stated goal on par with the legislatively expressed goal is untenable. See *Id.*

[FN73]. Kushner, *APARTHEID IN AMERICA: AN HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES* (1980); Galveston, *FEDERAL FAIR HOUSING POLICY: THE GREAT MISAPPREHENSION, BUILDING FOUNDATIONS: HOUSING AND FEDERAL POLICY* 137 (Denise DiPasquale and Langley C. Keys eds. 1990) U.S. Dept. of Commerce and U.S. Dept. of HUD., *Current Housing Reports: American Housing Survey for the United States in 1989* (1990).

[FN74]. Massey and Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980*, 52 *AM.SOC.REV.* 802, (1987), which stated that the compiled data indicates that the majority of blacks rarely interact with whites, live in predominantly black neighborhoods and interact with only black residents. Of the four racial groups included in the study, blacks were the most spatially isolated at the average indices of .491, more than double the .201 rate for hispanics, and ten times the .047 figures for Asians.

[FN75]. Kain, *THE INFLUENCE OF RACE AND INCOME ON RACIAL SEGREGATION AND HOUSING POLICY, IN HOUSING DESEGREGATION AND FEDERAL POLICY* 99 (J. Goering ed.) (1986).

[FN76]. See, Massey and Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-1980*, 52 *AM.SOC.REV.* at 813-823, (1987), wherein the authors state that "... the high level of black residential segregation suggests that race is a fundamental factor in residential housing patterns. Since their study showed that there was no evidence that socioeconomic factors makes a significant difference, the controlling factor is race. Distinguishing between race and black race, the study shows that Hispanic and Asian residential housing patterns are characterized by low levels of residential segregation further supporting the proposition that "black race", not socioeconomic status, continues to determine housing patterns in the U.S. Metropolitan Areas: *Black and Hispanic Segregation Along Five Dimensions*, 26 *Demography* 373 (1988).

[FN77]. Wharner, Jr., *THE PRIVATE CITY* 50 (1968), stating that most areas of the new big city were a jumble of occupations, classes, shops, homes, immigrants, and native Americans; See, Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt At Opening the Suburbs to Affordable Housing*, 78 *VA.L.REV.* 535 (March, 1992).

[FN78]. Park, Burgess and McKenzie, *THE CITY* 50-58 (1925), where the authors describe a "concentric circles" model, with social status increasing proportionally as one moves farther from the city's center.

[FN79]. *Id.*

[FN80]. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 *STANL.REV.* 767 (1969); *N.A.A.C.P. v. Mt. Laurel*, 336 A.2d 713, 67 N.J. 151 (N.J.1975).

[FN81]. *N.J.S.A.* 40: 55-30 to 51.

[FN82]. *Id.*

[FN83]. Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 336 A.2d 713, 67 N.J. 151, (N.J.1975), dismissed, cert. denied, 423 U.S. 808 (1975); Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 456 A.2d 390 92 N.J. 158 (N.J.1983).

[FN84]. U.S. Const. amend XIV.

[FN85]. Comprehensive Housing Affordability Strategy (CHAS) for the City of Houston, supra note 7.

[FN86]. Houston Zoning Ordinance at 1-1 to 1-2.

[FN87]. 616 S.W.2d 173 at 179.

[FN88]. 595 A.2d 492 (1991).

[FN89]. Id.

[FN90]. Id.

[FN91]. 624 F.Supp. 1276 (S.D.N.Y.1985) aff'd 837 F.2d 1181 (2d Cir.1987) cert. den'd 486 U.S. 1055 (1988).

[FN92]. U.S. v. Yonkers Board of Educ., 837 F.2d 1181, 1184-1185 (2d Cir.1987)

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[FN93]. 494 F.Supp. 1049 (N.D. Ohio), remedial order, 504 F.Supp. 913 (N.D. Ohio, 1980), aff'd in part, rev'd in part, 661 F.2d 562 (6th Cir.1981).

[FN94]. Id.; The district court fashioned an extensive remedy highlighting the severity of the violation. One aspect of the remedial order required the City of Parma to advertise itself as an "open" community where all persons are welcome and to proclaim that discriminatory practices which have characterized Parma in the past no longer reflect the attitude of the City and its citizens. Another required all Parma city officials and employers to undergo a mandatory fair housing educational program.

[FN95]. Id.

[FN96]. Id.

[FN97]. See, President John F. Kennedy, Executive Order 11,063, 3 C.F.R. <section> 652 (1962); Potter, Racial Diversity in Residential Communities: Societal Housing Patterns and a proposal for a "Racial Inclusionary Ordinance," 63 S.CAL.L.REV. 1151 (1990).

[FN98]. See, Title VIII, Civil Rights Act of 1968; Smolla, Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight, 1981 DUKE L.J. 891 (Dec.1981).

[FN99]. Congressman Walter Mondale, stating that the Fair Housing Act was

enacted for the purpose of eliminating discrimination in the sale or rental of housing, H.R.Conf.Rep. No. 1279, 93rd Cong., 2d Session 3 (1974) reprinted in 1974 U.S.C.C.A.N. 4975.

[FN100]. Tein, *The Devaluation of Non-White Community In Remedies For Subsidized Housing Discrimination*, 140 U.PA.L.REV. 1463 (April, 1992).

[FN101]. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1986).

[FN102]. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[FN103]. *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1886).

[FN104]. *Id.*

[FN105]. *Id.*

[FN106]. *Id.*

[FN107]. *Id.*

[FN108]. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

[FN109]. *Id.*

[FN110]. *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1886).

[FN111]. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954).

[FN112]. Stockman, *Anti-Snob Zoning*, 78 VA.L.REV. 535 (March 1992); See, THE COSTS OF HOUSING DISCRIMINATION AND SEGREGATION: AN INTER-DISCIPLINARY SOCIAL SCIENCE STATEMENT IN LIEF AND GOERING, THE IMPLEMENTATION OF THE FEDERAL MANDATE FOR FAIR HOUSING IN DIVIDED NEIGHBORHOODS 227 (Tobin ed. 1987).

[FN113]. *Id.*

[FN114]. Tein, *The Devaluation of Non-White Community In Remedies for Subsidized Housing Discrimination*, *supra*, note 101.

[FN115]. *Id.*

[FN116]. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD" REMOVING BARRIERS TO AFFORDABLE HOUSING,,, Washington: 1991 at 1-2, Report to President Bush and Secretary Kemp.

[FN117]. *U.S. v. City of Parma*, 494 F.Supp. 1049 (N.D.Ohio).

[FN118]. HOUSTON CHRONICLE, December 22, 1992 at 26A, quoting City Planning Director Donna Kristaponis.

[FN119]. The mere fact that land may be available to be used for multi-family residences does not support an initiative to provide affordable housing. Such "opportunities" are elusive when coupled with the preference for single family residential use and the lack of incentives to encourage affordable housing.
In

Surrick v. Zoning Hearing Board of Upper Providence, 476 Pa. 182, 191-194, 382

A.2d 105, 110-115 (1978), the court held the zoning ordinance restricting the development of multi family dwellings to the business district was exclusionary. The court relied on a three prong test, including whether the ordinance had an exclusionary effect rather than the exclusionary intent.

[FN120]. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD" REMOVING BARRIERS TO AFFORDABLE HOUSING,,, Washington: 1991 at 1-2, Report to Pres. Bush and Sec. Kemp.

[FN121]. Id.

[FN122]. Id.

[FN123]. See, Stockman, Anti-Snob Zoning, 78 VA.L.REV. 535 (March 1992), citing Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393 (Mass.1973).

[FN124]. The committee report highlighted the need for legislative steps: The Committee ... found that there is an acute shortage of decent, safe and low and moderate cost housing throughout the Commonwealth ... unless shortsighted [[zoning] controls can be avoided, regional needs considered, and the whole process of building made faster, both suburb and city will suffer together."

[FN125]. Stockman, Anti-Snob Zoning, supra, note 124.

[FN126]. Id.

[FN127]. Id.

[FN128]. Id.

[FN129]. Id.

[FN130]. Id.

[FN131]. Cal. Gov't Code <section><section> 65580-65589.8 (West 1993).

[FN132]. Id.

[FN133]. Cal.Gov't.Code <section> 65583 (West 1993), provides that in all developments of five units or more, the municipality must require that 25% of the units be set aside for lower income families.

[FN134]. Or.Rev.Stat. <section><section> 197.005-197.850 (1978).

[FN135]. 336 A.2d 713 (1975).

[FN136]. N.J.Stat.Ann. <section><section> 53-27 D, at 301-329 (West 1985),
New
Jersey Fair Housing Act 43.

[FN137]. Waxman, Innovative Land Trusts Create Opportunity for Better Lives, SACRAMENTO BEE, October 20, 1991 at 12D.

[FN138]. Id.

[FN139]. Id.

[FN140]. Id.

[FN141]. Id.

[FN142]. McAulifee, Plan Gives Lift To Affordable Housing Hopes; Land Trust Would Lower The Cost of Home Ownership, STAR TRIBUNE, April 20, 1992 at 1A.

[FN143]. Va.Code Ann. <section> 34 (West 1989).

[FN144]. Va.Code Ann. <section> 15.1 et. seq. (West 1989).

[FN145]. 503 F.2d 930 (7th Cir.1974).

[FN146]. Cable News Network, A House Divided, (Narrated by Bernard Shaw, October 12, 1992).

[FN147]. Id., (narrated by Kathy Slobogin).

[FN148]. Id.

[FN149]. Id.

[FN150]. Id.

[FN151]. Id.

[FN152]. Id.

[FN153]. Id.

[FN154]. Bell, Jr., Serving two Masters: Integration Ideals and Client Interests in Social Desegregation Litigation, 85 YALE L.J. 470 (1976); See, McGee, Jr., Afro American Resistance to Gentrification and the Demise of Integrationist Ideology in the United States, 23 URB.LAW. (1991); Marcuse, To Control Gentrification: Anti-displacement Zoning and Planning for Stable Residential Districts, 13 N.Y.U.REV.L. & SOC. CHANGE 931 (1984).

[FN155]. White, Note, Gentrification, Tipping and the National Housing Policy, 11 N.Y.U.REV.L. & SOC. CHANGE 255 (1983); See Id.

[FN156]. Id.

[FN157]. Id.

[FN158]. Coffee City v. Thompson, 535 S.W.2d 758 (Tex.Civ.App.--Tyler 1976).

[FN159]. ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD" REMOVING BARRIERS TO AFFORDABLE HOUSING, Washington: 1991 at 7-5 to 8-11, Report to President Bush and Secretary Kemp.

[FN160]. See, Mc Dougall, From Litigation to Legislation In Exclusionary Zoning, 22 HARV. CIVIL RIGHTS CIVIL LIBERTIES LAW REVIEW, 623, 639 (Spring 1987), citing Geisler, LOCAL CONTROL VERSUS SOCIAL CONTROL IN LAND USE

PLANNING: SOCIOLOGICAL PERSPECTIVES, IN PROPERTY AND SOCIAL RELATIONS 93,
102-
103 (P. Hollowell ed. 1982).