The Twilight of Single-Family Zoning

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A major obstacle to more widespread acceptance of the need to modernize development policies is the popular assumption that Americans have a single preference for lifestyle and shelter. This myth has never been less true. Varying economic circumstances and increasingly diverse household types are accompanied by new patterns of preferences and consumption. **

We still have not sketched out a road map which takes the patterns of shelter purchasing, of lifestyle, of symbol and reality, from those which evolved historically to the requirements and limitations of the future. The failure to generate policy within a more adequate, fuller range of priorities is evident—and will be even more costly tomorrow unless a more creative conceptual apparatus is created. ***

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** Council on Development Choices, *Factors Shaping Development in the '80s*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 3, 7 (F. Schnidman & J. Silverman eds. 1983).

*** Sternlieb & Hughes, *The Evolution of Housing and Its Social Compact*, URB. LAND, Dec. 1982, at 17, 20.

I
INTRODUCTION

As early as the nineteenth century local communities began to use their police power to promote "the public interest" by regulation and segregation of residential and other uses of land.[1] The concept was a simple one—to keep the "pig out of the parlor" (or neighborhood) by exercising local police power through a general ordinance rather than by proceeding on the more difficult case-by-case public nuisance basis.[2] Under the theory of protecting public health and safety, tenement housing often was prohibited in residential areas of detached single-unit dwellings.[3] Within a short time many local communities throughout the country had adopted comprehensive zoning as the primary instrument for segregation and regulation of residential uses of land.[4]

Although the concept of comprehensive zoning received constitutional approval over fifty years ago in *Village of Euclid v. Ambler Realty Co.*,[5] the theory and practice of zoning still engender much debate and litigation.[6] One of zoning's more controversial aspects

1. *See, e.g.*, City of St. Louis v. Hill, 22 S.W. 861 (Mo. 1893) (setback restriction); People *ex rel.* Kemp v. D'Oench, 111 N.Y. 359, 18 N.E. 862 (1888) (height restriction on dwellings); King v. Davenport, 98 Ill. 305 (1881) (exclusion of wooden buildings). A discussion of prezoning land use restrictions is found in 8 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.03 (1983).

2. An early discussion of the nuisance analogy in zoning theory is found in Comment, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 836-42 (1924). *See also* 1 A. RATHKOPF, THE LAW OF PLANNING AND ZONING § 1.01, at 1-1 to 1-13 (1975).

3. *See, e.g.*, Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

4. *See* P. WOLF, LAND IN AMERICA 140 (1981).

> Zoning ordinances are the most pervasive and powerful part of the lexicon of land law in America. Ninety-eight percent of all cities with a population over 10,000 have a zoning ordinance, as does nearly every suburban municipality with more than 5,000 residents; about half of the suburban municipalities with fewer than 5,000 residents function under a zoning ordinance as well.

Id. A discussion of the politics and circumstances surrounding the initial adoption of zoning ordinances is found in S. TOLL, ZONED AMERICAN 124-25 (1969).

5. 272 U.S. 365 (1926).

6. For recent criticisms of zoning based on neo-welfare economic analysis, *see* R. NELSON, ZONING AND PROPERTY RIGHTS (1977) and Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). A criticism of zoning as a legislative model of land use regulation and a proposal for development of an adjudicative model of land use control is found in

has been, and continues to be, that discrimination is inherent in classifications of "higher" and "inferior" residential land uses. Controversy over the use of zoning to exclude certain residential uses of land from an entire community or from large areas of a community first arose when zoning codes were originally adopted and has continued, in one form or another, since that time.[7] When zoning codes in the early part of this century adopted the German ideal of a clean and well ordered community, local communities invariably, as Dan Tarlock points out, "borrowed from Herbert Spencer and used zoning to confirm the 'better' or 'higher' to the exclusion of 'lower' or 'inferior' uses and, of course, those who occupied the uses."[8]

The most common example of this type of "better" and "inferior" discrimination with respect to residential land use is local communities' widespread practice of establishing restrictive "single-family" districts through zoning. Typically, a local zoning code for such a district allows only detached single-unit dwellings built on site and may also require that the occupants of such dwellings be related by blood, marriage, or adoption.[9] Such zon-

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Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980). *See also* Kmiec, *Justifying Land Use Deregulation and An Alternative Free Enterprise Development System*, 5 ZONING & PLAN. L. REP. 33 (1982).

7. No other zoning policy has generated as much controversy as restrictive residential zoning. The literature is too extensive for complete listing here but a few of the more significant writings on this topic are: R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING (1973); Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963) [hereinafter cited as *Suburban Zoning*]; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969); *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971); Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1 (1971); Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URB. LAW. 344 (1971); Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973).

8. Tarlock, *Euclid Revisited*, LAND USE L. & ZONING DIG., Jan. 1982, at 4, 4-5.

9. *See, e.g.*, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, MODEL ZONING ORDINANCE §§ 11-212.A2, 11-204(18) (1953); D. HINDS, N. CARN & D. ORDWAY, WINNING AT ZONING 23-24 (1979).

> The primary differences between the various residential districts have to do with the kinds of structures ("dwelling types") permitted and represent a legacy from the 1920s that still has strong acceptance today. It involves an implied hierarchy of residential uses in terms of desirability, with the single-family dwelling at the top. In part this thinking is an outgrowth of the strong emphasis upon the value of real property ownership in our country. Translated from the rural frontier to newly developed subdivision, it results in the treatment of the single-family house and lot as a "homestead" and of the apartment house as an un-American holdover from the feudal system.

Id. Restrictions on household composition are discussed in 2 A. RATHKOPF, *supra* note 2, §§ 17A.01-.06, at 17A-1 to 17A-53.

ing restrictions exclude as residents in a single-family district persons who wish to or must live in less expensive forms of housing (manufactured housing, duplexes, townhouses, condominiums, or apartments). Persons who wish to form non-family households are also excluded by such restrictions.

Single-family zoning is "the hallmark of modern American land use control."[10] Protection of the single-family area is, and has been, the cornerstone of local zoning programs. Even proponents of planning and zoning acknowledge that "[t]he primary, if not the exclusive, purpose [of zoning] in the 1920's was to protect the single-family district and that objective is foremost four decades later."[11] According to one estimate, more land is zoned for single-family use than for all other uses combined.[12] Moreover, such zoning is as likely to be applied to large areas of undeveloped land as to existing neighborhoods of detached single-unit homes.[13] For a number of years, critics of single-family zoning have argued that this type of regulation, instead of promoting the general welfare, is used primarily as a legal instrument to promote purely private interests in maintaining social, economic, and sometimes racial segregation.[14] Nevertheless, state and federal courts generally have upheld the validity of single-family zoning, even though such zoning may completely exclude from the community less expensive alternative housing or may substantially limit its availability and confine its location to the less desirable and higher density resi-

10. Burch & Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 URB. LAW. 879, 880 (1983).

11. R. BABCOCK, THE ZONING GAME 6 (1979).

12. Crawford, *Whither the Single-Family Zoning District?*, 5 ZONING & PLAN. L. REP. 41 (1982).

13. *See* National League of Cities, *Streamlining the Local Development Process*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 179, 180 (F. Schnidman & J. Silverman eds. 1983); Babcock, *The Egregious Invalidity of the Exclusive Single-Family Zone*, LAND USE L. & ZONING DIG., July 1983, at 4, 6.

> The Southwestern Regional Planning Agency for Connecticut estimates there remain 33,000 areas of vacant residential land, most of it zoned for a minimum lot size of one acre. . . . In the Topeka, Kansas, planning area, there are 60,500 acres zoned single-family and usable. In the Merrimack Valley region of central Massachusetts, there are 17,500 acres vacant and zoned R-1. Even New Orleans, that old city, has 6,500 vacant acres zoned exclusively single-family.

Id.

14. *See, e.g.*, Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 U. MICH. J.L. REF. 625 (1973); Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOL. L. REV. 65 (1969); Note, *Low Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971).

dential areas of a community.[15]

Today, a renewed interest in the wisdom and legal validity of single-family zoning is increasingly evident.[16] Whether the Supreme Court's half-century-old decision in *Village of Euclid* can be relied on to justify and continue the practice of single-family zoning is now an increasingly debated issue, and no longer merely an occasion to visit the bone-yard of zoning jurisprudence. Increasingly the presuppositions supporting the legal validity of single-family zoning are being undermined by a housing market that is beginning to reflect changing economic conditions and social values. These and other developments are producing "an unprecedented assault" on the practice of single-family zoning,[17] in which the future integrity and legal validity of single-family zoning are being seriously questioned. City councils, local courts, and state legislatures across the country are devoting increasing amounts of time to considering the wisdom and legal validity of restrictive residential zoning. Some observers believe that the legal validity of restrictive single-family zoning is already seriously in doubt. It has been argued that restrictive single-family zoning is "patently invalid under the police power."[18] Moreover, recent "legal cracks" in the integrity of single-family zoning suggest that at least some public officials, including judges, have begun to share this view.

Throughout the country the integrity of single-family zoning is

15. For a discussion of federal and state court decisions both upholding and rejecting zoning ordinances that allow only single-family dwellings in a community or that exclude other alternative forms of housing from areas zoned for single-family use, *see* 2 A. RATHKOPF, *supra* note 2, § 17.03.

A few state courts now require that local communities consider the regional need for housing in their zoning decisions. *See, e.g.*, Surrick v. Zoning Hearing Bd., 476 Pa. 182, 189-92, 382 A.2d 105, 108-10 (1977); Associated Home Builders v. Livermore, 18 Cal. 3d 582, 599-601, 557 P.2d 473, 483, 135 Cal. Rptr. 41, 51 (1976); Berenson v. Town of New Castle, 38 N.Y.2d 102, 109-10, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 680-81 (1975); Lakeland Bluff, Inc. v. County of Will, 114 Ill. App. 2d 267, 252 N.E.2d 765 (1969). Presently, only the Supreme Court of New Jersey requires that local communities zone to provide for their fair share of the regional need for low and moderate income housing. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) [hereinafter cited as *Mount Laurel II*]. For a discussion of state court decisions invalidating restrictive single-family zoning ordinances, *see* D. MANDELKER, LAND USE LAW 201-14 (1982).

16. *See, e.g.*, Hare, *Rethinking Single-Family Zoning*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 195 (F. Schnidman & J. Silverman eds. 1983); Burch, *supra* note 10; Babcock, *supra* note 13; Crawford, *supra* note 12; Tarlock, *supra* note 8.

17. Burch, *supra* note 10, at 880.

18. Babcock, *supra* note 13, at 4.

under attack on a number of fronts. Local communities are under pressure to revise single-family zoning restrictions to accommodate the growing market demand for smaller and less costly alternative forms of new housing.[19] Pressure is increasing to permit accessory apartments in existing single-unit dwellings and to permit detached accessory units on developed lots.[20] Zoning restrictions on household composition are now being challenged in court, often successfully, as unreasonable impositions on individual rights of privacy and choice.[21] Restrictions on household composition are also attacked as impediments to the policy of deinstitutionalizing disabled or dependent persons through living in "group homes."[22]

This article will present a preliminary sketch of these developments and suggest that in the near future their cumulative impact may well substantially alter traditional thinking concerning both the efficacy and legal validity of restrictive residential zoning. Part II of the article provides the context for later discussion with an overview of the public purposes traditionally associated with single-family zoning and of the legal principles which generally have insulated this zoning practice from successful attacks in litigation. Part III of the article discusses the efficacy of single-family zoning in view of the socio-economic and demographic changes that are beginning to have significant impacts on the housing market. It also discusses the legal developments undermining the validity of single-family zoning which these changes have to some extent already brought about. Part IV discusses how these recent developments, both legal and extra-legal, may potentially alter traditional thinking concerning the efficacy and validity of restrictive residential zoning. The conclusion suggests that the now widespread practice of single-family zoning will likely be substantially curtailed in scope and restrictiveness as zoning policy changes from one of exclusion to one of accommodation and regulation—a change in policy that, if not voluntarily implemented by local communities, may eventually occur through state legislation or judicial decision.

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19. Local deregulation of new housing development is discussed *infra* at text accompanying notes 108-74.

20. Recent developments relating to accessory apartments and detached accessory units are discussed *infra* at text accompanying notes 200-30.

21. Zoning restrictions on household composition with respect to shared housing are discussed *infra* at text accompanying notes 244-77.

22. Zoning restrictions on group homes are discussed *infra* at text accompanying notes 278-91.

II

THE TRADITION OF SINGLE-FAMILY ZONING

In the past, federal and state courts have applied the "minimum rationality" due process standard to determine the constitutionality of local police power regulations.[23] The Due Process Clause of the United States Constitution and similar provisions in state constitutions are generally interpreted as prohibiting government from imposing arbitrary restrictions on the use of private property. Under this standard, local zoning and other police power ordinances are held constitutionally valid so long as there is a reasonable basis to believe that the restriction will further "a legitimate public purpose," ordinarily defined to include policies promoting either health, safety, morals, or the general welfare.[24] A zoning restriction, as an exercise of local police power, is presumptively valid.[25] Therefore, the party attacking the restriction must convince the court that the zoning restriction is clearly arbitrary and illogical in view of the public purposes alleged to be furthered by the restriction.[26] This due process standard embodies the notion that a court's function is not to consider the wisdom of a police power regulation, but merely to assess its constitutionality. In applying this standard, courts have generally upheld zoning restrictions where the due process issue is fairly debatable.[27]

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23. For a discussion of court decisions applying the "minimum rationality" due process standard of review to zoning enactments see 1 A. RATHKOPF, *supra* note 2, §§ 5.01-.04, at 5-01 to 5-21.

24. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

25. *Euclid*, 272 U.S. at 388; Village of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974).

26. *Euclid*, 272 U.S. at 395; *Belle Terre*, 416 U.S. at 8; Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977).

27. Justice Hopkins summarized the application of the presumption of validity rule to local police power regulations in his opinion in De Sena v. Gulde, 24 A.D.2d 165, 265 N.Y.S.2d 239 (1965) as follows:

> When a municipal legislative body enacts an ordinance, a presumption of validity attaches to its resolution . . . . The presumption of validity has the effect of (1) imposing the burden of proof on the party questioning the ordinance; and (2) sustaining the ordinance if the propriety of its enactment is fairly debatable. The content of the burden on the assailant is sometimes said to extend further than a mere preponderance of the evidence to prove beyond a reasonable doubt . Still, the presumption is not irrebuttable . . . , and perhaps we may best rationalize the presumption as a reminder of the force of legislative judgment which must be supported by the courts if there is "any state of facts either known or which could reasonably be assumed" on which the ordinance could be based . . . .

Id. at 169, 265 N.Y.S.2d at 243-44 (citations omitted). *See generally* 2 A. RATHKOPF, *supra* note 2, § 21.02, at 21-10. A greater degree of due process protection is generally required only where the legislative classification is considered to be "suspect" (such as race) or where a "fundamental right" (such as the right to vote) is involved. *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974) (ordinance which restricted occu-

In 1926, the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[28] applied this due process standard to give its constitutional blessing to comprehensive zoning and, in particular, to the concept of segregating different types of residential uses of land through zoning.[29] In the ensuing years, single-family zoning has been widely used to allow in certain areas only single-unit detached dwellings built on site and to exclude from those areas all other forms of housing.[30] In *Village of Belle Terre v. Boraas*,[31] the Supreme Court applied this due process standard to uphold the constitutionality of a local zoning restriction regulating household composition in an area zoned for single-family use.

These Supreme Court decisions, as well as similar state court decisions, have been viewed as legitimizing the use of zoning to provide areas composed exclusively of single-unit detached dwell-

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pancy to single-family units and did not permit more than two unrelated people from occupying such units did not burden a fundamental right, and in applying the requisite rational basis scrutiny, ordinance was deemed a valid exercise of land use legislative power) *with* Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (ordinance which restricted occupancy of single-family units and which defined "family" so narrowly as to exclude cousins, violated due process guarantee by the Fourteenth Amendment, the ordinance not bearing a rational relationship to a legitimate state interest). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978). Housing restrictions that involve economic discrimination have never been held by the United States Supreme Court to involve a "suspect classification." *See* James v. Valtierra, 402 U.S. 137 (1971). Furthermore, the Supreme Court has rejected arguments that citizens have fundamental associational rights related to living with whom they choose or to housing itself. *See* Village of Belle Terre v. Boraas, 416 U.S. at 7; Lindsey v. Normet, 405 U.S. 56 (1972) (constitution does not guarantee access to a certain quality of housing). Recent state court decisions have tended to rely on state constitutional due process or equal protection provisions when invalidating restrictive residential zoning enactments. *See Mount Laurel II*, 92 N.J. 158, 208-09, 456 A.2d 390, 415 (1983); D. MANDELKER, *supra* note 15, at 206-14.

28. 272 U.S. 365 (1926).

29. *Id.* at 397.

30. *See* National League of Cities, *supra* note 13, at 180:

> Most zoning and subdivision rules stress the single-family detached house as the norm—and sometimes as the only type of housing permitted. For example, a 1976 survey of 42 growing communities found that only one in 20 permitted anything other than single-family homes without special zoning procedures of some kind. Today, almost everywhere, it is easier to build single-family houses than townhouses or apartments. Large lots are encouraged. Mixed uses is prohibited or treated as a special case. Density limits and excessive requirements for facilities and amenities prohibit construction of housing affordable for most people.

A listing of court decisions upholding the validity of restrictive single-family zoning ordinances is found in 2 A. RATHKOPF, *supra* note 2, § 17.03, at 17-20, 17-21.

31. 416 U.S. 1 (1974) (household restriction prohibiting occupancy by more than two unrelated adults). *But see* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (household restriction prohibiting occupancy by blood relatives violates right of privacy).

ings. In the words of Justice Douglas, "family values, youth values and the blessings of quiet seclusion and clean air make [such an] area a sanctuary for people."[32] Today local zoning codes go beyond merely regulating household composition and excluding alternative forms of housing. Local zoning codes may typically restrict lot size, include setback and yard requirements, height, bulk and architectural controls, and may even contain restrictions on fences, clotheslines, type and number of pets, and on parking of recreational vehicles.[33]

At the time of the Supreme Court's decision in *Village of Euclid*, a number of state courts had sanctioned the use of the local police power to protect and promote the development of detached single-unit dwellings.[34] The public purposes asserted in support of these early ordinances often related directly to public health and safety. As a general rule, the local ordinances excluded multi-unit housing from established neighborhoods and restricted such housing to less desirable undeveloped land. At that time, multi-unit housing was mostly tenement housing. Tenements were widely perceived, with some justification, as malodorous, vermin infested tinderboxes which threatened conflagration and the spread of disease.[35] Relying on the health and safety purposes alleged in support of these ordinances, early state court decisions often upheld the ordi-

32. Village of Belle Terre v. Boraas, 416 U.S. at 9; *see also* Agins v. City of Tiburon, 447 U.S. 255 (1980) (against a due process challenge, Court upheld the constitutionality of zoning ordinance, enacted after appellants purchased their property, which restricted development to one-family dwellings, accessory buildings, and open space uses, and imposed density restrictions); Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980) *cert. denied*, 450 U.S. 1042 (1981) (Court upheld constitutionality of zoning restriction that imposed minimum lot size requirement).

33. *See, e.g.*, People v. Bannett, 40 Misc. 2d 296, 243 N.Y.S.2d 131 (1963), *aff'd*, 14 N.Y.2d 493 (1964) (restriction on harboring certain animals and pets upheld); People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *appeal dismissed*, 375 U.S. 42 (1963) (clothesline restriction upheld); City of Pepper Pike v. Landskroner, 53 Ohio App. 2d 63, 371 N.E.2d 579 (1977) (dictum) (restriction on outside storage of trailers upheld); INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE PRACTICE OF LOCAL GOVERNMENT PLANNING 421-31 (F. So, I. Stollman, F. Beal & D. Arnold eds. 1979).

34. *E.g.*, Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Brett v. Building Comm'r of Brookline, 250 Mass. 73, 145 N.E. 269 (1924); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

35. In upholding the exclusion of apartments from single-family areas, one state court in 1919 characterized apartments as "chambers of noise and horrors" and found that they constituted "a national menace" which threatened "race suicide." State *ex rel.* Morris v. City of East Cleveland, 22 Ohio N.P. (n.s.) 549, 31 Ohio Dec. 98, 109, 114 (1919), *aff'd on rehearing*, 31 Ohio Dec. 197 (1920). *See generally Suburban Zoning*, *supra* note 7.

nances when challenged on due process grounds. Several state court decisions, however, noted that such police power ordinances would be upheld only in cases of "public necessity" and would be held invalid when supported by less compelling general welfare purposes, such as preserving an area's aesthetic character or protecting property values.[36]

The Supreme Court applied this "nuisance" approach in *Village of Euclid v. Ambler Realty Co.*[37] to uphold a zoning restriction which prohibited apartment housing in an area reserved for single-family dwellings and duplexes. The trial court invalidated the restriction on the ground that the real purpose of the ordinance was "to classify the population and segregate them according to their income or situation in life."[38] Speaking for the Court, Justice Sutherland upheld the constitutionality of the restriction on the ground that, in neighborhoods of single-family homes, apartments "come very near to being nuisances"[39] by

> interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which would otherwise fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, . . . thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.[40]

Noting that the zoning restriction in question was presumptively valid,[41] Justice Sutherland found that the reasons for the restric-

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36. *See, e.g.*, City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).

> [T]he public view as to what is necessary for aesthetic progress greatly varies. Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. . . . The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are therefore remitted to the proposition that the police power is based upon public necessity, and that the public health, morals, or safety, and not merely aesthetic interest, must be in danger in order to justify its use.

Id.

A recent analysis of the role of aesthetics in land use regulation is found in Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355 (1982).

37. 272 U.S. 365 (1926).

38. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).

39. 272 U.S. at 395.

40. *Id.* at 394.

41. *Id.* at 388.

tion "were sufficiently cogent" to preclude the Court from holding the ordinance unconstitutional as a "clearly arbitrary and unreasonable" exercise of the police power by the local community.[42] Justice Sutherland further stated that a police power regulation, such as the zoning ordinance in question, would not be held invalid simply because it was "drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves"; in some fields "the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation."[43]

Over the years, federal and state courts have frequently cited *Village of Euclid* to support single-family zoning.[44] Courts no longer rely on the public nuisance rationale which early court decisions applied to urban tenements. Instead, courts now are more likely to rely on the following public purposes to legitimize single-family zoning: (1) that such zoning controls population density and thereby reduces noise and traffic; (2) that such zoning protects the character of the area and thereby serves to maintain property values; and (3) that such zoning promotes a local community's fiscal interest by excluding or limiting alternative forms of housing that might generate public expenditures which exceed the increase in tax revenues that such housing would generate.[45] It is not clear that *Village of Euclid*, when read in its historical context, actually supports the use of these general welfare purposes to justify modern restrictive single-family zoning.[46] However, recent Supreme

42. *Id.* at 395.

43. *Id.* at 388-89.

44. *See, e.g.*, City of Brookside Village v. Comeau, 633 S.W.2d 790, 792 (Tex.), *cert. denied*, 103 S. Ct. 570 (1982); Duckworth v. City of Bonney Lake, 91 Wash. 2d 19, 26, 586 P.2d 860, 865 (1978); Krause v. City of Royal Oak, 11 Mich. App. 183, 193-94, 160 N.W.2d 769, 774 (1968).

45. *See, e.g.*, Stewart v. Inhabitants of Durham, 451 A.2d 308, 311 (Me. 1982); Beaudoin v. Rye Beach Village Dist., 116 N.H. 768, 771, 369 A.2d 618, 621 (1976); Rademan v. City and County of Denver, 186 Colo. 250, 254, 526 P.2d 1325, 1327 (1974); State *ex rel.* Wilkerson v. Murray, 471 S.W.2d 460, 462 (Mo.), *cert. denied*, 404 U.S. 851 (1971). *See also* F. POPPER, THE POLITICS OF LAND-USE REFORM 67-70 (1981).

46. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 244, at 473-75 (1971); Tarlock, *supra* note 8, at 4. As Professor Hagman points out:

> [H]ow is it that the single-family zone became known as the "highest use" zone, rather than multiple [unit] residential zones, which had greater densities of people? If zoning is in the interest of the poor, why is it that apartment buildings are the buffer zone between industrial-commercial zones and single-family residential zones, rather than the single-family zones, with fewer people, being the neighbor of the undesirable commercial and industrial uses? If safety of pedestrian children is a

Court decisions clearly indicate that these general welfare purposes may legitimately be furthered by a local community's exercise of the police power.[47]

Whether these "general welfare" purposes are actually furthered by such zoning is a controversial issue. Critics of single-family zoning argue that at best single-family zoning is connected only tenuously to the general welfare purposes which such zoning allegedly promotes. For example, the "control on population density" rationale obviously would not apply to manufactured housing and mobile homes located on lots no smaller than those on which conventional on-site built single-unit dwellings are located. Similarly, multi-unit housing such as duplexes, apartments, or townhouses can often be constructed without increased population density. The number of units in a building is only one factor affecting increased population density in an area.[48] Other significant factors include the size of each unit, age of residents, the amount of open space and street area, and existing population density in the surrounding area.[49] Moreover, critics of single-family zoning have pointed out that the "control on density" rationale is generally directly related to the general welfare purpose of "protecting a local community's fiscal interest" that is asserted in some cases to support the validity of such zoning.[50] Where excluded forms of alternative housing would not increase an area's

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major concern, how is it that the apartments housing the poor are on the major traffic arteries rather than the single-family homes? If adequate light and air is [sic] provided for residents in multiple family high-rise buildings in the interests of their health, safety and welfare, how is the police power justified in providing more light and air by imposing regulations limiting land use to single-family development?

D. HAGMAN, *supra* this note, at 474-75.

47. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (aesthetics); Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (open space, ill effects of urbanization); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (quiet seclusion and clean air). State courts now usually embrace these general welfare zoning purposes. *See, e.g.*, Stewart v. Inhabitants of Durham, 451 A.2d 308, 311-12 (Me. 1982).

48. 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 51.02, at 320 (1974).

49. *Id.*

50. *See, e.g.*, 1 N. WILLIAMS, *supra* note 48, § 14.01, at 293-96. In many instances, multi-family developments may be more fiscally advantageous to a municipality and a school district than all other types of housing except the most expensive single-family developments. *See, e.g.*, NEW JERSEY, COUNTY & MUNICIPAL GOVERNMENT STUDY COMMISSION, HOUSING AND THE SUBURBS: FISCAL AND SOCIAL IMPACT OF MULTIFAMILY DEVELOPMENT 104-05 (9th Rep. 1974) *cited in* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 360 (1979); Babcock, *supra* note 13, at 6; *Suburban Zoning*, *supra* note 7, at 1058-59. *See generally* M. NEUTZE, THE SUBURBAN APARTMENT BOOM: CASE STUDY OF A LAND USE PROBLEM 45 (1968); R. SCHAFER, THE SUBURBANIZATION OF MULTIFAMILY HOUSING 114-18 (1974).

population density, critics note that a local community's expenditures for public services generally would be no more affected by development of excluded forms of housing than by development of allowed single-unit dwellings.[51]

Critics challenge on several grounds the validity of single-family zoning to protect an area's residential character and to maintain property values. Largely undeveloped areas, of course, generally lack any distinctive residential character to protect. The public interest in restricting development in such an area to detached single-unit dwellings presupposes a future market demand for such housing which may never arise.[52] As to existing areas of detached single-unit dwellings, critics argue that restrictions on household composition, accessory apartments, and on building type (except perhaps for height restrictions or in historical areas) often have a tenuous connection at best to the character of an area or property values.[53] Moreover, critics of restrictive single-family zoning argue that zoning restrictions which exclude alternative forms of housing solely to protect the character or property values of an area are more in the nature of "the bylaws of a private country club" rather than means to promote "the general welfare."[54]

Arguments emphasizing the rather tenuous connection between single-family zoning and the traditional "general welfare" purposes asserted in support of this zoning practice have generally been unheard or unheeded by the courts. Courts typically have accepted at face value the public purposes asserted to support such zoning and have seldom questioned seriously the reasonableness of residential land use restrictions.[55] Both state and federal courts have preferred to leave questions about the wisdom of or necessity for residential use restrictions to the discretion of local legislative bodies.[56] Since *Village of Euclid*, courts have had little difficulty

51. *See supra* note 50.

52. *See* Babcock, *supra* note 13, at 6.

53. *See Suburban Zoning*, *supra* note 7, at 1067-68.

54. Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974) ("social preferences, . . . while permissible in a private club, have no relevance to public health, safety or welfare"). *See* Babcock, *supra* note 13, at 7-8, for criticism of the Supreme Court's reversal of the Second Circuit's holding.

55. *See, e.g.*, Stewart v. Inhabitants of Durham, 451 A.2d 308 (Me. 1982). Though courts seldom have ruled that residential zoning restrictions are invalid "on their face," courts in many cases have invalidated such restrictions under the "taking theory" or the "arbitrary as applied" theory. For a discussion of how recent changes and developments may impact the "taking" and "due process" theories of invalidity see text *infra* accompanying notes 322-47.

56. *See, e.g.*, Stewart v. Inhabitants of Durham, 451 A.2d 308 (Me. 1982).

in finding that "the general welfare" embraces the purposes discussed above which have traditionally been asserted in support of single-family zoning.[57] On occasion, courts have even equated protection of detached single-family dwelling areas to preserving patriotism and domestic tranquility in American society.[58]

Courts endorse, or at least tolerate, single-family zoning in part because of a limited view of their role in reviewing the validity of zoning ordinances. Courts also tend to adhere to the conventional belief that *Village of Euclid*[59] resolved years ago any doubts about the validity of segregating residential land uses. It is equally likely that several unspoken presuppositions have shaped the traditional judicial view that single-family zoning does not offend due process.[60] For example, courts have probably assumed that any income discrimination resulting from the "higher" and "inferior" residential use classification implicit in single-family zoning is somewhat ameliorated by the fact that single-family zoning often protects middle- as well as upper-income neighborhoods.[61] Simi-

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57. *See, e.g.*, *id.* at 311.

58. *See, e.g.*, City of Jackson v. McPherson, 162 Miss. 164, 174-76, 138 So. 604, 605 (1932); State *ex rel.* Morris v. City of East Cleveland, 31 Ohio Dec. 98,110 (C.P. 1919) *aff'd on rehearing*, 22 N.P. (n.s.) 549, 31 Ohio Dec. 197 (C.P. 1920); Fraser v. Fred Parker Funeral Home, 201 S.C. 88, 96-97, 21 S.E.2d 577, 581 (1942). The *Fraser* court stated:

> No higher use could be made of a piece of property than to have established thereon this greatest of all institutions, the home. It is not simply a place of residence, a house, but an institution that carries with it the idea of ultimate retreat, security, or release from the cares and struggles for a living, an atmosphere in which the young are reared, an atmosphere in which the aged are cared for, an institution definitely recognized and fostered under a wise public policy.

Id. For a discussion of the idea that restrictive single-family zoning may be undermining "social harmony" in American society today, *see infra* text accompanying notes 306-09.

59. 272 U.S. 365 (1926).

60. On occasion, these presuppositions are articulated by a reviewing court.

> It may be a reasonable view that the health and general physical and mental welfare of society would be promoted by *each family* dwelling in a house by itself . . . . It is a matter of common knowledge that there are in numerous districts plans for real estate development involving *modest* single-family dwellings *within the reach as to price* of the *thrifty* and *economical* of *moderate wage earning capacity*.

Brett v. Building Comm'r, 250 Mass. 73,78-79, 145 N.E. 269, 271 (1924) (emphasis added).

61. Single-family zoning restrictions have been applied with varying standards to moderately priced smaller homes as well as to expensive larger homes on five-acre tracts. It is interesting to note that at least one commentator has suggested that the continued existence of restrictive residential zoning may be due in part to the fact that people generally favor "income segregation" in their living environment. *See* D. HAGMAN, *supra* note 46, § 244, at 474-75. If this is true, one may expect support for such zoning to decline as its discriminatory impact shifts toward benefiting those per-

larly, courts have probably assumed that nearly all households consist of married couples with children.[62] Courts have probably thus perceived single-family zoning as a means to promote and protect an area's family character. Courts have probably assumed that alternative forms of housing, such as apartments and mobile homes, serve merely as temporary housing for most people until a detached single-family dwelling is purchased. This assumes that most people want to live in detached single-unit homes and that eventually, through hard work and sacrifice, they will be able to afford such housing.[63] These traditional presuppositions concerning the wisdom and legal validity of single-family zoning reflect a view of American society that is now decidedly more in tune with a bygone era than with the realities of American life in the 1980's.

III

THE EFFICACY AND VALIDITY OF SINGLE-FAMILY ZONING

A. The Efficacy of Single-Family Zoning

The American romance with the traditional single-family home may be coming to an end. In 1980, the proportion of household units occupied by owners declined for the first time in over forty years,[64] and at least one commentator predicts that this decline will continue throughout the 1980's.[65] The proportion of new housing development consisting of detached single-unit homes be-

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sons who could afford to board the "housing train" when its financing structure was subsidized by government, while disadvantaging the vast majority of new households, often with higher incomes, who today cannot afford housing. *See* Sternlieb & Hughes, *The Evolution of Housing and Its Social Compact*, URB. LAND, Dec. 1982, at 17, 20. For a discussion of the housing affordability problem and its potential political impact on deregulation of land development *see infra* text accompanying notes 72-88.

62. According to a recent report, while 70% of households in past decades consisted of married couples, only about 25% of the estimated 17 million new households that are expected to be formed in the 1980's will consist of married couples. D. BERGER, D. BERTSCH, J. BOWMAN & M. SHAUL, THE STATE ROLE IN AFFORDABLE HOUSING 3-4 (Sept. 1981) (Academy for State and Local Government). A discussion of the changing nature of household formation patterns and its impact on the efficacy of single-family zoning is provided *infra* at text accompanying notes 89-107.

63. For a discussion of the housing affordability problem and of changing housing preferences, both of which are now undermining these assumptions, *see infra* text accompanying notes 72-107.

64. *See* Sternlieb & Hughes, *supra* note 61, at 19 (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 763 (1981)).

65. *See, e.g.*, *id.* at 20.

gan to decline in 1975[66] and has continued, with attached forms of owner-occupied single-unit housing increasing at a rate of over 72% compared to a 26.5% increase for detached single-unit homes.[67] Moreover, the proportion of new single-unit dwellings consisting of manufactured housing and mobile homes has increased substantially in recent years, comprising 29% of the single-unit market in 1980 and 36% of that market in 1981.[68] Analysts predict that this trend will continue with sales of manufactured housing rising by possibly 66% during the mid-1980's.[69] According to one report, American society has reached "a historic turning point in home ownership."[70] Homeownership is declining and the economic forces that have contributed to this development are seen by some analysts as "long term" and "chronic" conditions that will continue to affect the housing market in the foreseeable future.[71]

1. The Housing Affordability Problem

There is growing consensus that one of the most critical issues facing this country in the years ahead is the inability to produce sufficient affordable housing.

> During the 1980s, there will be a sizable increase in the demand for housing. The country will witness an unprecedented increase in the rate of household formations, and many of the homebuyers' ages will range from 25 to 30 years old—members of the baby boom generation born after World War II. This increase in demand will drive housing costs up in the absence of the production of an adequate supply of units. More people may be in need of housing and less able to afford it than at any time in modern history.[72]

A recent study found that even if interest rates decline, "[t]he growing imbalance between demand for housing and the nation's ability to produce a sufficient quantity of shelter at an affordable

66. *See* G. STERNLIEB, J. HUGHES & C. HUGHES, DEMOGRAPHIC TRENDS AND ECONOMIC REALITY 85 (1982).

67. *See* Garrigan, *Multifamily Properties: An Attractive Investment for the 1980s*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 71, 73 (F. Schnidman & J. Silverman eds. 1983).

68. LAND USE DIG., June 15, 1982, at 1 (citing Greenebaum, *Analysts Warm to Factory-Built Housing*, FORTUNE, Apr. 19, 1982, at 181, 181).

69. *Id.*

70. Sternlieb & Hughes, *supra* note 61, at 17.

71. *Id.* at 20.

72. Nolon, *The Role of Local Government in Affordable Housing*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 175, 175 (F. Schnidman & J. Silverman eds. 1983).

cost portends a housing crisis of unparalleled dimensions during the 1980s. [M]ore households will find less housing for sale or rent, and then, often at a cost they cannot afford. . . ."[73] Most of the developers in the nation who are still building houses are building homes that cannot be considered affordable to median-income families.[74] In addition to high interest rates and inflation in building materials, other significant factors affecting the cost of new residential development include local zoning restrictions and other land use controls which "have kept the levels of housing production far below potential demand, thereby artificially inflating local housing prices."[75]

Recent data indicate that, regardless of household configuration or tenurial status, American households now spend a greater proportion of their income on housing than ever before.[76] High interest rates and the increased cost of land, labor, materials, and energy, coupled with stagnation in real incomes, have caused an unprecedented decline in home buying power.[77] While the inflation-adjusted median sales price of a new single-family home increased by over 30% between 1970 and 1981, real median family income decreased by nearly 3% during that period.[78] Analysts view the home-buying hysteria which characterized the latter half of the 1970's and which led to record rates for homeownership as a unique phenomenon which has largely terminated with the end of long-term fixed rate mortgages at rates below inflation.[79] The ratio of the sales price of new single-family homes to median fam-

73. D. BERGER & D. BERTSCH, *supra* note 62, at 4. As this report explains:

> Housing trends apparent in the 1970s—a widening gap between housing costs and household incomes and limited housing availability—are expected to become more pronounced during the 1980s. Today, less than one-fourth of all American families can afford the $64,000 median-priced, single family new home. And the price of existing housing is increasingly bid-up as the volume and cost of new housing are at odds with demand; the nation produced fewer housing units in 1980 than in any of the preceding ten years. Moreover, the need for additional housing will never have been greater. By the end of the 1980s, there will be 100 million households in America—17 million more than in 1980 and 50 percent more than in 1970.

Id. at 1.

74. "Housing, to fit the needs and the pocketbooks of today's (and tomorrow's) households is, to put it simply, not being built." Council on Development Choices, *Factors Shaping Development in the '80s*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 3, 5 (F. Schnidman & J. Silverman eds. 1983).

75. *Id.*

76. *See* G. STERNLIEB & J. HUGHES, *supra* note 66, at 97.

77. *See* D. BERGER & D. BERTSCH, *supra* note 62, at 1-2.

78. Sears, *Problems and Prospects for Housing Finance*, URB. LAND, Sept. 1982, at 11, 11.

79. *See* G. STERNLIEB & J. HUGHES, *supra* note 66, at 92-93, 100.

ily income increased from 2.37 to 3.07 between 1970 and 1980.[80] This increase, as well as high interest rates and mortgages that increasingly shift the interest rate risk from the lender to the borrower, have made homeownership an unrealistic goal for most new families and households.[81]

This economic reality is reflected in housing starts, which in 1981 and 1982 were only one-half of the two million starts in both 1977 and 1978.[82] More recent studies indicate that sales of new single-family homes in 1982 reached an all-time record low,[83] and the median selling price of a new single-family home had reached the all-time high of $82,000 in late 1983.[84] The homebuyer paid over five times more per month for a new house in 1983 than he would have paid in 1970.[85]

Housing is likely to become even less affordable for first-time buyers in the years ahead. It is estimated that 17 million new families will require housing during the 1980's.[86] Most of these new families will not be able to afford a new detached single-family home.[87] This unprecedented decline in the home buying power of the American middle class is the primary factor shaping the housing industry in this country. The housing market is likely to turn increasingly toward rental housing and less expensive alternative forms of owner-occupied new housing[88]—forms of development that are likely to be prohibited in undeveloped areas subject to restrictive single-family zoning.

2. Changing Household Patterns

Changes that have occurred in household size and composition

80. *Id.* at 96.

81. *See* Council on Development Choices, *supra* note 74, at 4-5. The Council's report states: "Homeseekers are being priced out of the market in larger and larger numbers. While in 1970 almost half of all American families could afford the median priced, single-family new home, today less than one-quarter can." *Id.*

82. Sternlieb & Hughes, *supra* note 61, at 19.

83. Telephone interview with Mr. Michael Sumichrast, National Association of Homebuilders, Wash., D.C. (Dec. 1, 1983) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NEW ONE-FAMILY HOUSES SOLD AND FOR SALE C-25 at 3 (May 1983)).

84. Dayton Daily News, Nov. 3, 1983, at 20, col. 2.

85. Computed on the basis of the median sales price of a new single-family house in 1970 of $23,400 at a mortgage rate of 7% and the median sales price in September, 1983 of $82,000 at a mortgage rate of 12% both with a 25-year mortgage and a loan to value ratio of 90%.

86. *See* D. BERGER & D. BERTSCH, *supra* note 62, at 3-4.

87. *Id.*

88. *See* Garrigan, *supra* note 67, at 75.

are also likely to dampen the future market demand for traditional detached homes. Recent demographic data sketch "the broader outlines of a metamorphosis of the American household."[89] Household size is steadily declining due to decreasing birth rates[90] and to the increasing number of households of elderly, divorced, and never-married persons.[91] During the last thirty years, average household size has decreased from 3.37 to 2.75 persons, a decline of 18.4%.[92] This trend has accelerated during the last ten years.[93] The decline in household size is a significant factor in the market demand for new housing. Nearly one-half of the increase in total housing units between 1970 and 1980 is estimated to be the result of decreased household size.[94] Decreased household size, coupled with housing's high cost, will likely increase demand for smaller and less expensive new housing development.

Perhaps the most important change in the nature of American households is the declining importance of the nuclear family. Married couples with children now comprise less than one-third of all households.[95] Between 1970 and 1980 nonfamily households (either persons living alone or with nonrelatives only) in-

89. G. STERNLIEB & J. HUGHES, *supra* note 66, at 24.

90. The number of live births per 1,000 total population decreased in this country from 23.7 in 1960 to 16.2 in 1980. *Id.* at 33. According to this study, the probability that this trend will continue "is very high." *Id.* at 34.

91. The Sternlieb and Hughes study found that America is now "an aging society." *Id.* at 20. Between 1970 and 1980 the number of persons age 65 or over increased by over 5 million persons to the record level of 25,544,000 persons in this age category and accounted for almost 24% of the national increase in population growth during this period. *Id.* at 13-14. By 1990, the total number of persons age 65 or over is expected to increase to nearly 30,000,000 persons. *Id.* at 16.

Divorce rates in this country increased 141% between 1960 and 1980. *Id.* at 24. As a percentage of the marriage rate, the divorce rate in 1980 reached 48.6% compared to a rate of 23.4% in 1950. *Id.*

The number of persons living alone also increased significantly between 1970 and 1980. The number of single-person households increased by 75% during this period and in 1981 constituted 23% of all households. 8 FAM. L. REP. (BNA) 2628 (1982). The rise in single-person households is due in part to the fact that men and women are marrying later in life. According to Census Bureau data, the percentage of never-married women age 25-29 doubled between 1970 and 1980, the percentage of never-married men age 20-24 rose from 55% to 70% during that period, and the percentage of never-married women age 20-24 rose from 36% to 52% during the same period. *Id.*

92. G. STERNLIEB & J. HUGHES, *supra* note 66, at 21-22.

93. *Id.*

94. *Id.* at 22.

95. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, *Households and Family Characteristics: March 1981*, Series P-20, No. 371, at 2 (May 1982) [hereinafter cited as BUREAU OF THE CENSUS].

creased by over 73%—five times faster than family households.[96] The percentage of households composed of married couples declined by more than 13% between 1960 and 1980.[97] Households once considered atypical now dominate recent growth in household formation, and Census Bureau projections indicate that these trends are likely to continue well into the 1990's.[98] For example, from 1970 to 1980, husband-wife households increased by 7.7%, nonfamily households increased by 73.1%, female householders (no husband present) by 55.3%, and male householders (no wife present) by 38.9%.[99] The declining importance of the traditional nuclear family, the household unit most likely to prefer and to be able to afford a detached single-family home, is likely to significantly affect the new housing market well into the next decade.

These economic and demographic changes are also reflected in the types of households occupying homes in established neighborhoods of detached single-family homes. Recent data indicate that existing detached single-unit homes are unlikely to be occupied primarily by families with children. Households consisting of married couples with children under eighteen years of age have been declining both in real numbers and as a percentage of all households.[100] In 1980, this household type comprised only 30.3% of all households[101] and occupied less than one-half of all owner-occupied housing units.[102] In 1980, husband-wife households comprised only 60.9% of all households.[103] Households not composed of nuclear families are increasing their percentage share in owner-occupied housing at rates double and triple those of family households.[104] Particularly in urban and older suburban areas,

96. G. STERNLIEB & J. HUGHES, *supra* note 66, at 25.

97. *Id.*

98. *Id.* at 34-35.

99. *Id.* at 25.

100. *See* BUREAU OF THE CENSUS, *supra* note 95, at 2; Sternlieb & Hughes, *Housing: Past and Futures*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 31, 32 (F. Schnidman & J. Silverman eds. 1983). Family households with children under 18 declined from about 25 million to about 21 million households between 1970 and 1980, the only household type to experience a decline in real numbers during this period. *Id.*

101. BUREAU OF THE CENSUS, *supra* note 95, at 2.

102. According to Census Bureau data for 1979, there were over 51 million owner-occupied housing units and only about 21 million family households with children under 18. G. STERNLIEB & J. HUGHES, *supra* note 66, at 88; Sternlieb & Hughes, *supra* note 100, at 32.

103. G. STERNLIEB & J. HUGHES, *supra* note 66, at 25.

104. Nuclear family (husband and wife present) households in owner-occupied units between 1970 and 1980 increased at a rate of 20.3% compared to an increase of

nonfamily households are increasingly present in neighborhoods of detached single-family homes. The high cost of new detached homes, declining birth rates among young married women, high divorce rates, and the increasing number of unmarried young and elderly persons are eroding the former dominance in many older single-family neighborhoods of the household composed of a nuclear family with children.[105]

Changing social values, the high cost of homeownership, and stagnation in real incomes have spurred unprecedented increases in numbers of nonfamily households. Between 1970 and 1980, the number of nonfamily households consisting of two or more unrelated persons increased 162%,[106] a greater increase than in any other kind of household. Zoning restrictions on household composition have apparently failed to promote the "family character" of neighborhoods; "family character" has been eroded by increased numbers of homes shared by unrelated persons, and by the declining numbers of traditional nuclear families. The tenuousness of the "family character" justification for restrictions on household composition is accentuated by the fact that more than one-half of married women now work outside the home.[107] Preschool-age children presumably spend their days at day-care centers instead of playing in the local neighborhood.

B. Legal Erosion of Single-Family Zoning

The changes described above are reflected in recent legal developments. These legal developments may well signal an approaching change in the accepted wisdom concerning the efficacy and legal validity of restrictive residential zoning.

1. Deregulation of New Housing Development

An increasing awareness that local land use controls may substantially increase housing costs has developed in recent years.[108]

48.8% for male head only families, an increase of 46.9% for female head only families, and an increase of 67.7% for single-person households. *Id.* at 88.

105. *See, e.g.*, Day-Lower, Bryant & Mullaney, *Shared Housing*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 225, 225-26 (F. Schnidman & J. Silverman eds. 1983).

106. *See* G. STERNLIEB & J. HUGHES, *supra* note 66, at 25.

107. According to Census Bureau data 59.9% of working women are married and 51.7% of all married women work outside the home. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, *Marital Status of Women in the Civilian Labor Force* 383 (1982-83).

108. *See, e.g.*, Dowall, *Reducing the Cost Effects of Local Land Use Controls*, in

Restrictive single-family zoning ordinances, developer exactions, and other environmental controls significantly increase the cost of new detached homes and alternative forms of housing in many areas.[109] Restrictive single-family zoning ordinances, particularly when coupled with growth management controls, limit the supply of building sites available for alternative forms of residential development. Such ordinances may also require expensive low-density single-unit development through restrictions on building type, architectural style, lot size, yards, and household composition.[110] These and other restrictive land use controls have been widely implemented in an attempt to protect communities' fiscal interests by enhancing property values.[111] With costs of new housing skyrocketing in an era of income stagnation, residents in some local communities have begun to realize that these land use policies not

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URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 81, 82 (F. Schnidman & J. Silverman eds. 1983).

> Local land use controls directly affect the cost of land and new housing. By restricting the supply of developable land through the use of open space acquisition and agricultural zoning, or by limiting the extension of public facilities, land prices and new housing costs rise. Local regulations can also affect housing costs by placing onerous subdivision requirements on builders. Extensive review procedures, subdivision requirements, and limited land supplies may greatly affect the operation of many communities' land and housing markets.
>
> . . . .
>
> Besides regulating the physical stock on residential land, zoning ordinances directly affect the number of residential lots. Density and lot size requirements implicitly determine the supply of developable lots. Changes in local zoning ordinances, minimum lot size requirements, and other policies which affect the density of residential development, translate directly into lot supply changes.

Id. at 82-83. For a discussion of studies relating the cost of housing to local zoning policies, *see* D. MANDELKER, *supra* note 50, at 445-53.

109. Council on Development Choices, *supra* note 74, at 5. *See generally* G. STERNLIEB & L. SAGALYN, ZONING AND HOUSING COSTS (1972); B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE 119-38 (1979). Local land use controls can increase the cost of new residential development by as much as 33%. U.S. Department of Housing and Urban Development, *Housing Cost Reduction Demonstration*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 213, 216 (F. Schnidman & J. Silverman eds. 1983) (price of new homes reduced by as much as 33% through minor changes in restrictions, innovative design, and rapid processing of development applications). *See* S. SIEDEL, HOUSING COSTS AND GOVERNMENT REGULATION 188 (1978); Einsweiler, *Is There a Shortage of Land for Housing?*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 79, 80 (F. Schnidman & J. Silverman eds. 1983) (pointing out that the price of housing increased by 25% within four months after a limit on building permits was established in Boulder, Colorado); Porter, *Home Builders Advance on Affordability*, URB. LAND, Oct. 1982, at 6.

110. Dowall, *supra* note 108, at 82-83; Nolon, *supra* note 72, at 176-77; Council on Development Choices, *supra* note 74, at 5.

111. *See, e.g.*, Sager, *supra* note 7; *Suburban Zoning*, *supra* note 7. *See also* F. POPPER, *supra* note 45, at 67-70.

only deny housing opportunities to middle- and low-income nonresidents but also to the residents' own parents and children.[112]

A major obstacle to more acceptance of revision of local land use policies is the popular assumption that Americans prefer to live in detached single-family homes on large lots in neighborhoods of similar homes and that they are able to afford such housing.[113] These assumptions, however, have never been less true. Changing economic conditions and increasingly diverse household types have introduced new preferences into the housing market. While the detached single-story ranch-style home is the traditional favorite, first-time buyers prefer two-story houses and are more likely than homebuyers in general to buy attached housing.[114] Younger singles and couples as well as older persons increasingly prefer small units in convenient locations.[115] Neighborhoods designed for raising children, as, for example, those made up of homes with several bedrooms and large yards, make up a reduced share of the new housing market, reflecting the dramatic decrease in the proportion of households with children.[116] The market share of traditional three- or four-bedroom detached single-family homes on large lots will likely continue to decline as new households and homeseekers adjust their housing preferences to fit their needs and budgets, and as many homeseekers choose to give greater emphasis to maintenance time and costs, and to amenities such as location, design, and recreational features.[117]

The need to deregulate and revise land use controls to accommodate the increasing new demand for less expensive forms of housing is clear and immediate.[118] The extent to which new households and homeseekers will realize their dreams of home-

112. *See* Council on Development Choices, *supra* note 74, at 5.
113. *Id.* at 7.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 5.
118. Sternlieb & Hughes, *supra* note 100, at 39.

> [T]he future is clearly defined by present experience—a substantial diminishing of the level of housing amenity, a return to the square footage standards of a generation ago, and an increase in the proportion of units with party wall construction to the pattern of two generations ago. Whether cloaked by the euphemisms of "townhouses" or "villas," or obscured by a focus on "community facilities," the reality is one masking reduced quality. The process of *shock cushioning*—of adapting the expectations of the housing consumer to the new limitations of their buying power—is well at work. We do not have to invent the 1980s, they are at hand.

Id.

ownership in the future will depend on whether local communities act to make housing more affordable.[119]

Restrictive single-family zoning ordinances and other local land use controls discourage construction of the very types of housing needed most by today's smaller households with decreased home buying power.[120] Many local communities have mandated or encouraged the development of large detached homes on large lots, have imposed excessive density limits and excessive requirements for facilities and amenities, and have established development procedures burdened with delays and uncertainties. In this way, many local communities have created a system of land use development that could not be more inappropriate for accommodating the increasing demand for less expensive alternative forms of new housing.[121] To accommodate the increasing need for less expensive homes, communities must revise zoning codes to provide a greater range of costs and options in new housing development.

Local communities are increasingly responding to pressure to deregulate new residential development to accommodate the new demand for smaller and less expensive housing.[122] Reports and recommendations on deregulating new housing development generally emphasize the need to remove limitations on alternative forms of housing while regulating such development through more sophisticated operating, site, and density controls. Such reports also emphasize the need to revise zoning and development standards to allow increased densities and to reduce the size, amenities, and cost of new detached single-family homes.[123]

The pressure for deregulation of new housing development has already affected some local communities. At least 250 communi-

119. Nolon, *supra* note 72, at 177.

120. Dowall, *supra* note 108, at 82-83.

121. *Id.*

122. *See, e.g.*, J. VRANICAR, W. SANDERS & D. MOSENA, STREAMLINING LAND USE REGULATION (1980) (American Planning Association); W. SANDERS & D. MOSENA, CHANGING DEVELOPMENT STANDARDS FOR AFFORDABLE HOUSING (1982) (American Planning Association); P. HARE & L. HOLLIS, ECHO HOUSING (1983) (American Association of Retired Persons); National League of Cities, *supra* note 13; COUNCIL ON DEVELOPMENT CHOICES, THE AFFORDABLE COMMUNITY: ADAPTING TODAY'S COMMUNITIES TO TOMORROW'S NEEDS (1982) (Urban Land Institute); CENTER FOR URBAN POLICY RESEARCH, HOUSING REHABILITATION (D. Listokin ed. 1983); E. HOWENSTINE, ATTACKING HOUSING COSTS (1983) (Center for Urban Policy Research); PACIFIC INSTITUTE FOR PUBLIC POLICY RESEARCH, RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST (M. Johnson ed. 1983).

123. *See, e.g.*, P. HARE & L. HOLLIS, *supra* note 122; F. BLAIR, REGULATING MOBILE HOMES (1983); W. SANDERS, ZERO LOT LINE DEVELOPMENT (1982).

ties across the country have revised their zoning codes by reducing lot size and standards for site design, sidewalks, and streets, by allowing cluster development, and by utilizing incentive zoning techniques to provide less expensive detached homes for middle-income buyers.[124] In Dade County, Florida, for example, builders can now reduce the cost of new houses by an estimated $7,000 to $15,000 as a result of new zoning laws that allow smaller lots.[125] Similarly, the zoning code in Phoenix, Arizona, contains no side yard requirements and allows housing to be built in tighter clusters.[126] Communities in California and Washington have revised their local zoning codes to allow mobile homes to be placed on lots in single-family areas.[127] Some communities which imposed stringent limits on housing growth a number of years ago have recently abolished or revised these limitations.[128] High taxes, caused by slow growth, may now be a serious problem for such communities.[129]

Owners of land in largely undeveloped areas who are interested in development may exert political pressure to deregulate low-density zoning and other land use controls that have been enacted in recent years to preserve "open-space" or "agricultural land."[130] For example, in Tehama County, California, a primarily agricultural and timber area, citizens recently voted to approve an initiative measure creating a Landowners' Bill of Rights ordinance that abolishes the power of that county to zone or impose other types of land use controls.[131] The initiative measure was passed in response to the county's attempt to limit development by establishing strict agricultural preservation policies. The emphasis in local land use regulation in the 1980's is likely to shift from the focus of the 1970's on protecting the "natural environment" to "a new interest" in enhancing and stimulating the "built environment."[132]

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124. *First Home Buyers Get Help Across USA*, U.S.A. Today, Apr. 15, 1983, at 3A.

125. *Id.*

126. *Id.*

127. *See* Jaffe, *Mobile Homes In Single-Family Neighborhoods*, LAND USE L. & ZONING DIG., June 1983, at 4, 9-10.

128. *See* Wall St. J., Aug. 31, 1983, at 23, col. 1 (Ramapo, New York, and Petaluma, California).

129. *Id.*

130. Local land use restrictions relating to preservation of open-space and agricultural land are discussed in F. STEINER, ECOLOGICAL PLANNING FOR FARMLANDS PRESERVATION (1981) and C. THUROW *et al.*, PERFORMANCE CONTROLS FOR SENSITIVE LANDS: A PRACTICAL GUIDE FOR LOCAL ADMINISTRATORS (1975).

131. PLANNING, Mar. 1983, at 5.

132. Seattle, Wash. Post-Intelligencer, Apr. 19, 1983, at 10.

The 1982 Report of the President's Commission on Housing[133] found that the rationale of the Supreme Court in *Village of Euclid v. Ambler Realty Co.*[134] has been abused by discriminatory and exclusionary zoning practices.[135] The Report recommends that states adopt new zoning enabling laws to prohibit restrictive local zoning except where land use regulation is necessary to achieve "a vital and pressing governmental interest."[136]

This recommendation would make new housing more affordable by allowing market conditions to determine location, lot size, and size and type of housing within the community. Market control would be superseded only where local regulation could be justified by a " 'vital and pressing' governmental interest,"[137] defined as an interest in "protecting health and safety, remedying unique environmental problems, preserving historic resources, or protecting investment in existing public infrastructure [resources]."[138] Thus, the exclusion of alternative housing to suit the subjective preference of existing residents would not be deemed an acceptable governmental interest. The Report recommends that new state enabling legislation place on local communities the burden of showing that local zoning complies with this standard.[139] These recommendations would substantially limit the extent to which zoning could exclude or restrict less expensive housing options.[140] The Report also recommends a reexamination of the *Village of Euclid* "presumption of validity" rule in cases involving local zoning restrictions.[141] The Report recommends that the United States Attorney General, if he concludes that a change in the *Village of Euclid* standard should be sought, "seek an appropriate case for urging the Supreme Court to adopt a new test [for

133. THE PRESIDENT'S COMMISSION ON HOUSING (1982) *discussed in* Siegan, *The President's Commission on Housing: Zoning Recommendations*, URB. LAND, Nov. 1982, at 24.

134. 272 U.S. 365 (1926).

135. Siegan, *supra* note 133, at 25.

136. *Id.* at 24.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 25-26. The Commission Report does not recommend that the proposed "vital and pressing" standard be applied to already developed neighborhoods. *Id.* at 24. The U.S. Department of Housing and Urban Development is reported to be considering a draft model zoning code incorporating the "vital and pressing" standard proposed in the Commission Report. DIVISION OF PLANNING AND LAW OF THE AMERICAN PLANNING ASSOCIATION, NEWSLETTER, Jan. 1984, at 13.

141. Siegan, *supra* note 133, at 25. The *Village of Euclid* decision is discussed *supra* at text accompanying notes 37-43.

validity]."[142]

While the zoning recommendations of the President's Commission on Housing have not been widely endorsed,[143] they may well reflect the sentiments of an increasing number of frustrated new households and homeseekers. Aspirations for homeownership in whatever form "are not likely to diminish casually; and their political repercussions will be proportional to the size of the population unable to board the 'housing train.' "[144] As the deregulation movement intensifies, restrictive single-family zoning will increasingly become the focus of reform. As one observer has pointed out, "No other single act of government can enable the construction industry to produce affordable housing more than zoning an adequate amount of land at appropriate densities."[145]

If local communities refuse to meet the need for less expensive alternative housing by deregulating zoning and other local land use controls, there may be increasing political pressure for intervention at the state level.[146] Several states have granted to state authorities some form of prescriptive or zoning override powers[147] or have established state administrative procedures to hear appeals from local land use decisions in certain instances.[148] Similarly, several states now require that local planning and zoning practices consider and embody the regional need for housing or the need for low- and moderate-income housing.[149] At least ten

142. Siegan, *supra* note 133, at 25.

143. *See, e.g.*, PLANNING, Sept. 1982, at 9-10.

144. Sternlieb & Hughes, *supra* note 100, at 37.

145. Nolon, *supra* note 72, at 177.

146. *See generally* D. BERGER & D. BERTSCH, *supra* note 62.

147. *See, e.g.*, OR. REV. STAT. §§ 197.320 (1981) (Land Conservation and Development Commission authorized to order local compliance with state land use goals); FLA. STAT. ANN. § 380.05 (West 1982) (State Land Planning Agency authorized to order local compliance with state standards for development of land in areas of critical state concern); N.Y. EXEC. LAW § 805 (McKinney 1983) (Adirondack Park Agency authorized to establish land use regulations in multi-county area); HAWAII REV. STAT. § 359G-4.1 (1976) (State Housing Authority's housing projects exempt from local land use and zoning restrictions); N.J. STAT. ANN. § 13.19-5 (West 1979) (Department of Environmental Protection regulation of land development in coastal areas).

148. *See* MASS. GEN. LAWS ANN. ch. 408, § 22 (West 1979) (State Housing Appeals Committee authorized to override local zoning decision in regard to low-or moderate-income housing); OR. REV. STAT. §§ 197.320, 197.350 (1981) (authorizing appeal of local land use decisions to Land Conservation and Development Commission to determine compliance with state goals); FLA. STAT. ANN. § 380.07 (West 1982) (authorizing appeal from local development decisions in areas of critical state concern or in regard to developments of regional impact to Florida Land and Water Adjudicatory Commission).

149. *See* CAL. GOV'T CODE § 65580(b)(c) (West 1983); N.J. STAT. ANN. § 40:55D-

states have adopted mandatory "maximum" statewide building codes preempting local codes and allowing developers to use the same materials and standards in housing construction throughout the state.[150] Though none of these state laws expressly prohibits restrictive single-family zoning ordinances, they clearly evidence the possibility of more substantial state intervention, particularly where increasing numbers of frustrated homeseekers are unable to acquire acceptable and affordable housing. For example, a number of states have enacted legislation which promotes the use of mobile homes as least-cost housing and which overrides local single-family zoning ordinances that exclude or otherwise unreasonably discriminate against mobile homes.[151] Similar legislation also exists in many states with respect to certain types of "group homes"[152] and may well be enacted in the future to permit alternative housing and living arrangements such as "ECHO housing" and "accessory apartments."[153]

Even in the absence of explicit state legislative intervention, several state courts in recent years have demonstrated a sensitivity to the housing affordability problem by mandating local revision of single-family zoning ordinances that are found to severely restrict or prohibit less expensive alternative forms of housing.[154] Relying on state "due process" provisions or interpretation of the "general welfare" clause of a zoning enabling statute, state courts

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28(d) (West 1979); OR. REV. STAT. §§ 197.175, 197.307 (1981). Recent legislation in Oregon may be the most explicit yet enacted. Declaring that the "availability of housing opportunities for persons of lower, middle, and fixed income is a matter of state wide concern," Oregon statutes expressly require that local zoning in urban growth areas meet the demand for "needed housing" by permitting such housing in zones with sufficient buildable land to satisfy that need. *Id.* at § 197.307. Needed housing is defined to include manufactured housing, detached and attached single-unit housing, and multi-unit housing for both owner and renter occupancy. *Id.* at § 197.303.

150. D. BERGER & D. BERTSCH, *supra* note 62, at 53-54.

151. A discussion of recently enacted state statutes which promote the use of mobile homes or prohibit local exclusion of mobile homes is found in Jaffe, *supra* note 127, at 5.

152. A discussion of recently enacted state statutes providing for the establishment of group homes in residential neighborhoods is found in Jaffe, *Group Homes and Family Values*, LAND USE L. & ZONING DIG., Mar. 1982, at 4, 9.

153. In 1981, legislation was enacted in California expressly authorizing and encouraging local zoning to promote the use and development of both ECHO housing and accessory apartment units on already developed lots in single-family areas. CAL. GOV'T CODE § 65852.1 (West 1983). *See infra* note 239. Accessory apartments and ECHO housing are discussed *infra* at text accompanying notes 200-43.

154. A discussion of recent court decisions invalidating restrictive residential zoning ordinances is found in D. MANDELKER, *supra* note 15, at 201-14.

in New Jersey,[155] New York,[156] and Pennsylvania[157] have held invalid local zoning practices that unduly discriminate against less expensive alternative housing in controlling future land development. These state courts have not invalidated the concept or practice of restrictive single-family zoning, but have struck down zoning ordinances that impose excessive restrictions on single-family housing development or that severely restrict or prohibit alternative forms of housing development such as apartments, condominiums, and mobile homes.[158]

The Supreme Court of New Jersey has taken the lead in these exclusionary zoning cases by emphasizing the need to eliminate "undue cost-generating" zoning restrictions.[159] The Supreme Court of New Jersey in *Mount Laurel II*[160] reaffirmed its earlier ruling that local communities in their zoning codes must realistically accommodate the need for low- and moderate-income housing. *Mount Laurel I* ruled that local communities in regulating land development must meet their "fair share" of the "regional need" for low- and moderate-income housing.[161] In *Mount Laurel II*, the New Jersey court reaffirmed its earlier "fair share" ruling and further held that satisfying this duty might require local communities to do more than simply eliminate zoning restrictions that unnecessarily increased housing costs. The court held that local communities might be required to provide a realistic opportunity for the development of low- and moderate-income housing through such devices as mandatory set-asides and low-income density bonuses.[162] The New Jersey court also prohibited the local exclusion of less expensive alternative housing, such as manufactured housing and mobile homes, where the exclusion is based largely on the housing preferences of existing residents.[163] *Mount*

155. *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983).

156. Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

157. Surrick v. Zoning Hearing Bd., 476 Pa. 182, 382 A.2d 105 (1977)

158. *See*, D. MANDELKER, *supra* note 15, at 201-02.

159. *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977). The Supreme Court of New Jersey in this case ruled that "it is incumbent on the [local] governing body to adjust its zoning regulations so as to render possible and feasible the 'least cost' housing, consistent with minimum standards for health and safety . . . ." *Id.* at 512, 371 A.2d at 1207.

160. *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983).

161. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 174, 336 A.2d 713, 725, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) [hereinafter cited as *Mount Laurel I*].

162. 92 N.J. at 260-74, 456 A.2d at 442-50.

163. *Id.* at 274-75, 456 A.2d at 450.

Laurel II also authorized trial courts in New Jersey to use a variety of sanctions to enforce compliance with the New Jersey court's mandate. Such sanctions include site-specific developer relief or, if a local community fails to adequately revise its zoning code, delaying certain projects and eliminating application of zoning restrictions until the zoning code is adequately revised.[164]

The Supreme Court of New Jersey relied in *Mount Laurel II* on "the underlying concepts of fundamental fairness" in the due process clause of that state's constitution.[165] The court stated:

> The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality to which this control over land has been constitutionally delegated.[166]

The New Jersey court refused to grant to the challenged zoning restrictions the presumption of validity traditionally accorded local police power enactments.[167] The court did not give great weight to the planning studies relied upon by Mount Laurel to justify its zoning.[168] The court found that Mount Laurel's plan for meeting its "fair share" obligation was "little more than a smoke screen" masking the community's underlying exclusionary purposes.[169] As to charges of judicial usurpation of the legislative function, the New Jersey court stated, "while we have always preferred legislative to judicial action in this field, we shall continue—until the Legislature acts—to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, however, but we do enforce the Constitution."[170]

Mount Laurel II has been the subject of widespread discussion

164. *Id.* at 278-86, 456 A.2d at 452-55.
165. *Id.* at 209, 456 A.2d at 415.
166. *Id.*
167. *Id.* at 222-23, 456 A.2d at 422.
168. *Id.* at 299-305, 456 A.2d at 463-65.
169. *Id.* at 295, 456 A.2d at 460.
170. *Id.* at 213, 456 A.2d at 417.

and comment[171] and "is likely to have national ramifications."[172] The New Jersey court's decision is unlikely to have a significant impact on housing opportunities for the very poor. The significance of the court's decision for most new households may be its acknowledgment of the need for higher-density residential zoning and "least cost" housing—defined as "the least expensive housing that builders can provide" after a municipality has removed all excessive restrictions and after thorough use of "all affirmative devices that might lower costs."[173] If these principles are accepted, even in part, by other state courts, *Mount Laurel II* could help create a greater supply of affordable homes. In this respect, *Mount Laurel II* may prove to be "the most important zoning opinion since the Supreme Court's initial validation of local zoning in 1926."[174]

2. Manufactured Housing—Mobile Homes

In the past, mobile homes have been the stepchild in new housing development due largely to the historic negative image of this type of housing.[175] Such housing traditionally has been perceived "as cheap, flimsy, and unattractive housing intended for undesirable markets."[176] This attitude is reflected in local zoning codes which have treated mobile homes as second-class housing for second-class citizens. Restrictive single-family zoning codes typically either exclude this form of housing from the community or limit its location to mobile-home parks in less desirable buffer zones.[177] Mobile home owners usually rent lots in mobile-home parks. The parks are often subject to zoning controls more appropriate for junk yards or sewage treatment plants than for residential

171. *See, e.g.*, *Mount Laurel II, A Case of National Significance*, LAND USE L. & ZONING DIG., Mar. 1983, at 3.

172. Franklin, *The Most Important Zoning Opinion Since Euclid*, PLANNING, Nov. 1983, at 10.

173. 92 N.J. at 277, 456 A.2d at 451.

174. Franklin, *supra* note 172, at 12.

175. *See* Nutt-Powell, *Manufactured Housing: Issues for a Housing Opportunity*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 217, 218 (F. Schnidman & J. Silverman eds. 1983).

176. *Id.*

177. State courts traditionally have upheld the negative treatment accorded mobile homes by local zoning codes by relying upon a nuisance analogy not unlike that used earlier in this century to uphold restrictions on urban tenements. *See* 2 N. WILLIAMS, *supra* note 48, § 57.08, at 456.

A criticism of traditional zoning restrictions on mobile homes and a proposal to accommodate the increasing demand for this form of housing through more sophisticated land use controls is found in F. BLAIR, *supra* note 123.

areas.[178]

Despite the traditional negative image of mobile homes, market demand for this type of housing is increasing dramatically. Between 1970 and 1980, the number of mobile homes increased much more rapidly than any other type of housing (84%), at a rate over three times that for single-unit homes (23%), and nearly three times that for units in multi-unit dwellings (29%).[179] In 1981, sales of manufactured housing had increased to 36% of the sales of all new single-unit housing in this country.[180] Clearly, this form of housing is becoming increasingly popular as perhaps the least unattractive alternative for new households and homeseekers looking for smaller and affordable housing.[181]

The growing market for manufactured housing has prompted efforts to improve construction standards and to legitimize more widespread use of mobile homes. At the federal level, the National Manufactured Housing Construction and Safety Standards Act of 1974[182] provided for the establishment of preemptive national standards, administered by the U.S. Department of Housing and Urban Development, for the construction of manufactured dwellings that have a wheeled chassis. Mobile homes built in accordance with these national standards (usually referred to as "the HUD Code")[183] are deemed to be decent, safe, and sanitary. Improvements in size and appearance of HUD-Code-approved mobile homes have increased the attractiveness of this housing alternative. Mobile homes now offer options such as traditionally styled porches, pitched roofs and the use of conventional building materials on facades.[184] With improvements in construction and amenities, many mobile homes are now comparable in appearance and durability to site-built single-family

178. *See* Jaffe, *supra* note 127. Jaffe gives as an example, the zoning restriction in San Luis Obispo which requires that mobile home parks be surrounded by a wood or masonry fence at least six feet in height. *Id.* at 4.

179. LAND USE DIG., Mar. 1982, at 3.

180. LAND USE DIG., *supra* note 68, at 1.

181. According to a recent report, the profile of owners of mobile homes is changing. *See* Nutt-Powell, *Mobile Homes Are Getting Classier*, PLANNING, Feb. 1982, at 20. "While empty nesters, retired people, and young couples without children continue to compromise a large segment of buyers and residents, an increasing number are families in the 35-to-54-year-old age bracket who are seeking permanent homes in which to raise their children." *Id.* at 23.

182. 42 U.S.C. §§ 5401-5425 (1976 & Supp. V 1981).

183. *See* 24 C.F.R. §§ 3280.1-.903 (1983) *discussed in* Nutt-Powell, *supra* note 175, at 218.

184. *See, e.g.*, Nutt-Powell, *supra* note 181, at 21.

homes. Such mobile homes should be considered appropriate for any site on which comparable conventional housing is permitted.[185] Today, most mobile homes are purchased and used as permanent dwellings and are likely to move only once, from factory to site.[186]

Recently, organizations such as the Manufactured Housing Institute,[187] the American Planning Association,[188] and the MIT-Harvard Joint Center for Urban Studies[189] have begun to focus on the need to revise single-family zoning ordinances that prohibit or severely restrict the availability of mobile home sites. A number of local communities have already revised their zoning codes to accommodate the growing demand for mobile homes by allowing HUD-Code-approved mobile homes to be sited on permanent foundations on individually owned lots in areas zoned for single-family use.[190] Opposition to revision of local zoning codes to accommodate the market demand for mobile homes is likely to lessen in the years ahead as the realities of mobile home tenure become more widely known and as increasing numbers of middle-income homeseekers choose as affordable housing new forms of mobile home development, such as the mobile-home subdivision where residents own their own lots.[191] At least twelve states have

185. *See* Jaffe, *supra* note 127, at 9 (citing F. BLAIR, PLANNING ADVISORY SERVICE REPORT NO. 360, *Regulating Mobile Homes* (1981)).

186. *See* Nutt-Powell, *supra* note 181, at 21 (97% of mobile homes are never moved after the first trip from plant to site). The average stay in one location by mobile home owners is 58 months, approximately the same residency duration as in conventional housing. Neithercut, *The Mobile Home: Problems with its Recognition as a Valid Housing Source*, NEWSLETTER, Dec. 1975, at 25 (Real Property Section, State Bar of Michigan), *cited in* Jaffe, *supra* note 127, at 5 n.4.

187. The Manufactured Housing Institute, a trade association which promotes the use of this form of housing, has mounted a nationwide public information campaign to educate local public officials and urban planners concerning improvements in the style and quality of new mobile homes and of their availability as an affordable housing option. For an example of the Institute's promotional advertising in connection with its "Let's Save the American Dream" campaign, *see* PLANNING, Apr. 1983, at 7.

188. *See* F. BLAIR, *supra* note 123.

189. *See* Nutt-Powell, *supra* note 175, at 217.

190. *See, e.g.*, Jaffe, *supra* note 127, at 10; Nutt-Powell, *supra* note 181, at 21.

191. The traditional association of mobile homes with poverty and transiency may be expected to change with the development of mobile home condominiums and subdivisions where the unit residents own their own lots and tend to be moderate- to upper-income households who cannot afford a detached on-site-built new home. *See* Jaffe, *supra* note 127, at 10; Nutt-Powell, *supra* note 181, at 23. According to a recent report of the Manufactured Housing Institute nearly 46% of all new manufactured home buyers are between the ages of 30 and 60 and have a median household income higher than the national average for all American households, PLANNING, Dec. 1983, at 27.

enacted legislation significantly restricting local power to discriminate against mobile homes through zoning.[192] Generally, these state statutes require that communities allow mobile homes to be sited on individual lots within their boundaries. The statutes, however, do not require that mobile homes be treated in all respects as site-built housing. The state laws, to one degree or another, allow local restrictions on mobile home use and development, including the establishment of zoning districts in which mobile homes may be located.[193]

Judicial attitudes toward mobile-home discrimination in restrictive single-family zoning ordinances are also changing. Several recent state court decisions have cast doubt on the due process validity of zoning restrictions which limit the availability of sites for this type of housing to protect the "subjective sensibilities" of established residents.[194] For example, in *Robinson Township v. Knoll*,[195] the Michigan Supreme Court invalidated on due process grounds a zoning restriction limiting mobile homes to designated mobile home parks. The court found that, in view of the improvements in size, quality, and appearance of mobile homes, no reasonable basis existed to exclude this type of housing from other residential areas in the community.[196] According to the Michigan Supreme Court, due process prohibits a local community from excluding a mobile home from an individually owned lot in a single-family area merely because the dwelling is a mobile home.

While the different treatment of mobile homes and conventional site-built homes in local zoning codes has been upheld in some recent court decisions,[197] state courts are likely to view total exclusion of mobile homes from a community as an unreasonable exercise of the police power, because mobile homes today are so similar in use and appearance to site-built housing.[198] Recent

192. *See* Jaffe, *supra* note 127, at 5. According to this report, statutes recently have been enacted which prohibit local communities from excluding mobile homes in the states of California, Florida, Indiana, Kansas, Minnesota, Nebraska, New Hampshire, Oregon, South Dakota, Tennessee, Vermont, and Virginia. *Id.*

193. *Id.*

194. *See, e.g., Mount Laurel II*, 92 N.J. 158, 277, 456 A.2d 390, 451 (1983) ("subjective sensibilities" of present residents not a sufficient basis to exclude mobile homes); Robinson Township v. Knoll, 410 Mich. 293, 302 N.W.2d 146 (1981).

195. 410 Mich. 293, 302 N.W.2d 146 (1981).

196. *Id.* at 314, 302 N.W.2d at 154.

197. *See, e.g.*, Martz v. Butte-Silver Bow Government, 641 P.2d 426 (Mont. 1982) (exclusion of mobile homes from residential district upheld).

198. *See, e.g.*, Little Britain Township Supervisors v. Sheetz, 69 Pa. C. 295, 450 A.2d 1092 (1982).

state court decisions indicate that courts are increasingly aware of and sensitive to problems of housing affordability in zoning litigation involving mobile homes. As Martin Jaffe, in his recent survey of court decisions in this area, points out:

> Courts are beginning to recognize that mobile homes are a legitimate form of least-cost housing, a perspective that is quite different from looking at mobile homes as a land use issue involving a community, a developer, and opposing neighbors. Now, courts are beginning to bring the low- or moderate-income mobile home resident into the equation.[199]

3. Accessory Apartments and ECHO Housing

Single-family homes across the country are increasingly being converted into two-unit dwellings by accessory apartments.[200] Accessory apartments are being added to existing single-family homes at a rate unprecedented since World War II.[201] Unlike the World War II period, when very large older homes in urban areas were converted into three or four or more apartments, accessory apartments are now being added to moderate-size homes in newer suburban areas.[202] Because single-family zoning restrictions often prohibit such conversions, the exact number of home conversions is unknown. Census data indicate that between 1970 and 1980 as many as 2.5 million single-family houses may have been converted to create accessory apartments.[203] The National Association of Home Builders estimates that such conversions are occurring at a rate of 300,000 a year[204]—nearly one-half the estimated number of new houses sold in 1983.[205] A 1981 survey by the Tri-State Regional Planning Commission of local communities in New York, New Jersey, and Connecticut found that over 70% of the communities which participated in the survey reported

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199. Jaffe, *supra* note 127, at 5.

200. *See* Hare, *Carving Up the American Dream*, PLANNING, July 1981, at 14.

201. *See, e.g.*, *id.*; McFeatters, *In-Home Apartments Are Reemerging*, Columbus Citizen-Journal, Aug. 31, 1982, at 8; Newark Star-Ledger, Aug. 27, 1982, at 3; Boston, Mass. Herald American, Aug. 29, 1982, at 2; 8 Conn. Law Tribune, Oct. 18, 1982, at 5; Daniels, *High Costs Said to Force Illegal Conversions*, N.Y. Times, Jan. 18, 1981, at 30, col. 1; Dudar, *Home Conversions Increasing Phenomenally*, New Haven Register, Jan. 18, 1981, at F3; Zeldis, *The Hidden Rental Market*, Fairfax J., May 22, 1981, at 4.

202. Hare, *supra* note 16, at 196.

203. P. HARE, ACCESSORY APARTMENTS: USING SURPLUS SPACE IN SINGLE-FAMILY HOUSES 1 (1981).

204. Babcock, *supra* note 13, at 5.

205. Dayton Daily News, Nov. 3, 1983, at 20, col. 2 (annual sales of new single-family homes estimated at 632,000 for 1983).

a significant number of illegal conversions of single-family homes to create accessory apartments.[206] The Tri-State Commission's report, based on this survey, concluded that the creation of accessory apartments in single-family homes is "a sweeping new phenomen[on]" that "touches all types of localities—large and small; suburban and exurban; old and young; wealthy and not-so-wealthy."[207]

A number of factors contribute to the widespread creation of accessory apartments in single-family homes. Severe cutbacks in new residential construction and an accelerated rate of household formation have created a large pool of tenants for accessory units.[208] Costs of buying and maintaining homes also have increased, and many homes have surplus space due to declining household size, particularly in elderly "empty-nest" households. These factors have caused an increasing number of homeowners to view the creation of an accessory apartment, with the rental income that it provides, as an attractive and often necessary alternative to single-unit occupancy.[209] The increase in surplus space in homes has not been as well recognized as the underlying socio-economic and demographic factors involved. An estimated 18.3 million American homeowners live in households of two persons or less in homes of five rooms or more.[210] Fifty-seven percent of homeowners fifty-five years of age and over live in such circumstances.[211] Suburbs were originally designed for young families to "procreate, educate, recreate, and move on."[212] However, more and more elderly persons choose to remain in their homes or find it difficult to sell their homes and retire elsewhere.[213]

The importance of accessory apartments to many homeowners is reflected in the fact that homes are often converted in single-family neighborhoods subject to restrictions which prohibit such conversions.[214] Restrictive single-family zoning ordinances are

206. Hare, *supra* note 200, at 14 *discussing* P. SANTRY, LEGALIZING SINGLE-FAMILY CONVERSIONS, Jan. 1981 (Tri-State Regional Planning Commission, New York City).

207. New Haven Registry, Jan. 18, 1981, at F6 (citing P. SANTRY, *supra* note 209).

208. *See* Hare, *supra* note 16, at 196.

209. *Id.*

210. P. HARE, *supra* note 203, at 1-2.

211. *Id.* at 2.

212. PLANNING, May 1983, at 22.

213. *See* Smart, *With a Maturing Population Age is Only Part of the Future*, URB. LAND, May 1983, at 32, 33.

214. P. HARE, *supra* note 203, at 4. Long Island, alone, was estimated to have as many as 15,000 illegal accessory apartments in 1980. *Id.*

not thought to significantly impede creation of accessory apartments. Such conversions are often difficult to detect and tend to be "victimless crimes."[215] Accessory apartments have not caused significant noise or traffic problems or a precipitous decline in property values.[216] In some local communities, city officials simply overlook such conversions in the absence of neighbors' complaints.[217] This "do-nothing" attitude probably results from fear of facing the political repercussions which might arise from enforcing a zoning ordinance prohibiting such conversions or from revising a zoning ordinance to legalize such conversions.

Recent reports by urban planning commissions and other organizations emphasize the potential advantages of accessory apartments.[218] Accessory apartments increase a community's stock of moderate-cost rental housing. Older homeowners and divorced persons may need the rental income from accessory apartments to remain in their homes; rental income from accessory apartments may make homeownership affordable for middle-income homebuyers.[219] Allowing but regulating accessory apartment conversions maintains the quality of residential areas, particularly in older neighborhoods with large homes. Property values may actually increase in areas where accessory apartments are added.[220] Reports by urban planners generally suggest that local communities allow apartment conversions but regulate them by controls such as site-plan review or special permit procedures.[221]

An increasing number of communities are recognizing the advantages of allowing and regulating accessory apartments in sin-

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215. *Id.* at 4.

216. *Id.* at 3, 5.

217. *Id.* at 4.

218. WESTCHESTER COUNTY DEPARTMENT OF PLANNING, A GUIDE TO ACCESSORY APARTMENT REGULATIONS: MEETING SMALLER HOUSEHOLD NEEDS, Apr. 1981 (432 County Office Bldg., White Plains, N.Y., 10601); METROPOLITAN WASHINGTON COUNCIL OF GOVERNMENTS, DEPARTMENT OF NATURAL RESOURCES, ACCESSORY APARTMENTS: A LOCAL HOUSING ALTERNATIVE, Sept. 1981 (1875 Eye St., N.W., Wash. D.C., 20006); MARIN COUNTY COMPREHENSIVE PLANNING DEPARTMENT, SECOND UNITS: ONE SOLUTION TO MODERATE-COST HOUSING NEED, CPA 1036.202, Apr. 1978 (Civic Center, San Rafael, Cal., 94903); Connolly, *Single-Family Housing Conversions: A Strategy for Increasing the Housing Supply*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 221 (F. Schnidman & J. Silverman eds. 1983).

219. *See* Connolly, *supra* note 218, at 222-23.

220. P. HARE, *supra* note 203, at 5.

221. A collection of local zoning ordinances allowing but regulating accessory apartments is found in P. HARE, *supra* note 203, at 10-23.

gle-unit homes.[222] For example, the recently revised New Castle, New York zoning ordinance, which now allows and regulates apartment conversions, states that:

> It is the specific purpose and intent of allowing accessory apartments on one-family properties in all one-family residence districts to provide the opportunity and encouragement for the development of small, rental housing units designed, in particular, to meet the special housing needs of single persons and couples of low and moderate income, both young and old, and of relatives of families presently living in New Castle. Furthermore, it is the purpose and intent of this provision to allow the more efficient use of the town's existing stock of dwellings and accessory buildings, to provide economic support for present resident families of limited income, and to protect and preserve property values.[223]

Communities that have recently revised their zoning codes to allow accessory apartments in single-family homes impose a number of restrictions on such conversions to protect the residential character of neighborhoods.[224] Owners usually must occupy such housing, and codes often restrict eligible tenants, lot and apartment size, exterior appearance, and parking.[225] Although accessory apartments are usually still prohibited in new single-family homes, pressure will likely increase to permit such apartments in new homes.[226] Accessory apartments designed into new homes are already allowed in some areas, such as the San Leandro Valley in California and Weston, Connecticut.[227] Even in some areas where such apartments are prohibited in new homes, wiring and plumbing in new single-family houses is being installed in a manner that facilitates later conversion of the home into an accessory apartment.[228] Due to the housing affordability problem, the largest single increase in the stock of housing in the 1980's may well be secured "through the partitioning of extant one-family units."[229]

The addition of accessory apartments in single-family homes is likely to continue. More surplus house space will become available, as a significant rise in the number of elderly households is

222. *Id.*
223. *Id.* at 10.
224. *Id.* at 5-8.
225. *Id.*
226. *Id.* at 8.
227. *Id.*
228. *Id.*
229. Sternlieb & Hughes, *supra* note 100, at 39.

expected. The housing affordability problem will also make the accessory apartment a financially attractive homeownership option for younger homeowners with few or no children.[230] As a result, suburban and urban communities will probably increasingly revise zoning codes to allow and regulate apartment conversions. As Richard Spiro, Commissioner of Planning and Development in Babylon, New York, points out, "[i]n terms of the number of people involved, this isn't a minority issue. It's a majority issue, and suburban cities and towns are going to have to come to grips with it."[231]

A similar but less significant development is "ECHO housing" (Elder Cottage Housing Opportunity). ECHO housing consists of a small factory-built or conventionally constructed dwelling unit placed on the same lot with an existing single-family home.[232] ECHO housing provides homeowners with many of the benefits afforded by accessory apartments. However, some homeowners may prefer ECHO housing over accessory apartments because ECHO housing allows more independent living or because easily convertible accessory structures may already be in place. ECHO housing provides affordable and independent nearby housing for younger family members while allowing elderly persons to remain in their neighborhoods when economic pressures or declining physical abilities might otherwise force them to move.[233] In many instances this form of housing would prevent the imposition on elderly homeowners of "the psychological shocks and losses that result from severing ties with their home and community."[234]

While ECHO housing generally is prohibited in areas subject to restrictive single-family zoning, the benefits of this housing arrangement are increasingly being recognized and promoted, particularly by the American Association of Retired Persons.[235] This organization is now promoting the revision of local zoning codes to allow ECHO housing and has drafted a model ordinance for use by local communities in implementing the ECHO housing

230. *See* Hare, *supra* note 16, at 196-97.

231. N.Y. Times, Jan. 18, 1981, § 1, at 30, col. 4.

232. The concept of ECHO housing originated in Australia where it is known as "granny flat" development. Hare, *supra* note 16, at 196.

233. *Id. See also Alternative Approaches to Housing Older Americans: Hearing Before the Senate Special Committee on Aging*, 97th Cong., 2d Sess. 39-49 (1982).

234. L. AIKEN, LATER LIFE 157 (1978) *cited in* Hare, *supra* note 16, at 197.

235. P. HARE & L. HOLLIS, *supra* note 122.

concept.[236] The purported benefits of the model ordinance will probably be widely embraced by the increasing number of elderly households in this country, a group widely recognized to have significant political clout.

ECHO housing has been placed on lots in Frederick County, Maryland, and Lancaster County, Pennsylvania.[237] A number of other communities now allow ECHO housing on lots formerly subject to restrictive single-family zoning ordinances.[238] Recently the California state legislature enacted a statute endorsing and promoting the ECHO housing concept in residential areas zoned for single-family use.[239] Local zoning ordinances which now allow ECHO housing typically impose conditions on this type of development to preserve the residential character of the area. Owner ocupancy of one of the units usually is required, and restrictions often are placed on eligible tenants, lot and dwelling size, exterior appearance, and parking.[240]

In the years ahead, the housing affordability problem and the substantial and increasing amount of surplus space in many homes are likely to cause increasing numbers of homeowners to double up on developed lots in single-family areas either through accessory apartments or accessory dwelling units.[241] Urban planners are increasingly recommending that restrictive single-family zoning ordinances be revised to allow and regulate these forms of development in view of the benefits of such development and to maintain the residential character of neighborhoods.[242] Where such changes in zoning do not occur and restrictive single-family

236. P. HARE & L. HOLLIS, A MODEL ORDINANCE FOR ECHO HOUSING (1983) (American Association of Retired Persons).

237. P. HARE & L. HOLLIS, *supra* note 122, at 5.

238. *Id.* at 7-20.

239. CAL. GOV'T CODE § 65852.1 (West 1983). This statute authorizes local zoning to promote the development of ECHO housing and accessory apartment units on developed lots in single-family areas. Under the statute, such units are limited to persons age 60 or over and the floor space may not exceed 640 square feet. *Id.* The units may be subject to height, setback, and parking requirements. *Id.* at § 65852.2(a). However, the statute expressly provides that no ordinance may prohibit second units unless the locality makes specific findings that the exclusion of such units is necessary to avoid or mitigate certain adverse impacts upon the public health, safety, or welfare, and only if the locality acknowledges that such action may limit housing opportunities in the region. *Id.* at § 65852.2(c).

240. *See* P. HARE & L. HOLLIS, *supra* note 122, at 14-20, 26-29.

241. Smart, *supra* note 213, at 33; Hare, *supra* note 16, at 195-96.

242. *See, e.g.*, AMERICAN PLANNING ASSOCIATION, NEWS RELEASE (Apr. 8, 1983), *discussing* the American Planning Association's 1983 National Planning Conference in Seattle, Washington.

zoning ordinances are enforced, many existing single-family houses in urban and suburban neighborhoods are likely to become functionally outmoded and take on "a 'dinosaur' aura presently associated with Chevy Impalas and rocket-finned Cadillacs."[243]

4. Shared Housing and Group Homes

Single-family zoning ordinances frequently restrict the persons who may occupy single-unit dwellings in an area.[244] Typical restrictions limit occupancy to family members—persons related by blood, marriage, or adoption—or permit only a limited number of unrelated persons to occupy a single-unit dwelling.[245] Such restrictions allegedly serve to control population density but are primarily intended to promote neighborhood homogeneity and traditional family values and living patterns. Also, it is often argued that such restrictions prevent declines in property values that might result from the supposedly more transient and non-traditional lifestyles of persons living with non-relatives.[246] Many zoning restrictions on household composition were enacted during a period in the 1960's when local communities attempted to prevent the establishment in their neighborhoods of "counter-culture" or "hippie" households.[247] When enforced, such restrictions are often challenged in court as either an unwarranted infringement on the individual values of personal privacy and family choice or as an impediment to the public policy of establishing "group homes" for dependent children or adults.[248]

Zoning restrictions on household composition no longer reflect the reality of household formation patterns due to changing economic conditions and social values.[249] Married couples living with a child or children under eighteen years of age now comprise only 30.3% of all households[250] and occupy less than one-half of all owner-occupied housing units.[251] Recent census data indicate that nonfamily households are increasing more than ten times as

243. Hare, *supra* note 16, at 197.
244. *See* 2 A. RATHKOPF, *supra* note 2, §§ 17A.01-.06, at 17A-1 to 17A-53.
245. *Id.* § 17A.02, at 17A-4.
246. *Id.* § 17A.05, at 17A-23.
247. *Id.* § 17A.01, at 17A-3.
248. *See infra* text accompanying notes 264-87.
249. A discussion of the changing nature of households in America is found *supra* at text accompanying notes 89-107.
250. BUREAU OF THE CENSUS, *supra* note 95, at 2.
251. *See supra* note 102.

fast as traditional married-couple households (73.1% versus 7.7%) and more than five times as fast as all types of family households (73.1% versus 13.5%).[252] Nonfamily households increased from 18.8% of all households in 1970 to 26.1% of all households in 1980.[253] During this same period, nonfamily households of two or more persons increased by 162%.[254] Nonfamily households and non-nuclear-family households (family households with no spouse present) together will comprise over 43% of all households by 1990.[255] The declining importance of the household of a nuclear family with children and the recent dominance of atypical households suggest that increasing numbers of urban and suburban areas lack any distinctive "family" neighborhood character for zoning restrictions on household composition to protect.

Changing household formation patterns clearly indicate that shared housing (unrelated persons sharing a single-unit dwelling) is increasing. Although exact numbers are unavailable, the 1980 census recorded nearly three million nonfamily shared households.[256] As house sharing is unlawful in many neighborhoods and unlikely to be voluntarily reported, the exact number is probably much higher. In the years ahead, the housing affordability problem and declining household size will probably contribute to an increase in shared housing in single-unit dwellings among younger nuclear family households that are otherwise unable to afford homeownership, as well as many nonfamily and non-nuclear-family households. The benefits of shared housing for one-parent families, the divorced or widowed, single persons, young families, and the elderly are increasingly being recognized.[257] Nu-

252. *See* G. STERNLIEB & J. HUGHES, *supra* note 66, at 25.

253. *Id.* at 26.

254. *Id.* at 25.

255. *Id.* at 35.

256. *Id.* at 26.

257. *See, e.g.*, Pollak & Malakoff, *Home-Sharing for the Elderly*, PLANNING, July-Aug. 1983, at 16; King, *Costs and Social Changes Promote Shared Living*, N.Y. Times, July 28, 1981, at A12, col. 2.

> Socially it offers a peer, care-giving support system of mutual benefit. For older homeowners who experience the pressures of maintaining large homes it is a means of remaining in their neighborhood and maintaining community connections. It can further aid in preventing premature institutionalization. When a house is co-owned and shared, it is a means for a young family to build equity. For those who have physical health problems it is a means of maintaining independence through interdependence. Where old and young share a dwelling, age-integration occurs. The shared housing approach focuses on utilizing existing housing stock in a most efficient manner. It takes a scattered site vs. congregate approach to making more units available to the public, thus preserving a "textural integrity" in the commu-

merous local community organizations are now actively promoting shared housing, particularly for the elderly.[258] Urban planning commissions across the country and national organizations emphasize the availability of shared housing as an important alternative housing option.[259]

Shared housing will probably grow in popularity among elderly empty-nest households in the years ahead as the number of persons over sixty-five years of age increases from 25.5 million in 1980 to nearly 32 million by the year 2000 and as the house sharing concept becomes more widely accepted.[260] Recent reports indicate that shared housing has also become more prevalent among younger persons. Fifty percent or more of shared households are intergenerational, with age differences ranging from twenty years to fifty-five years.[261] Upper-income persons as well as those of low to moderate income share houses.[262] Developers in several states have responded to this demand for shared housing and are now building tandem houses with dual master bedroom suites that lack common walls and that have larger than normal kitchens and other shared living areas. The homes are designed to allow the owners to share common areas without sharing styles of living. Prices of such tandem houses range from $142,000 to $236,000.[263]

Recent state court decisions indicate that restrictions on household composition are unlikely to be literally interpreted and enforced. State courts have held such restrictions invalid on state constitutional grounds or have interpreted them as allowing a "family of choice" to live together as a single housekeeping unit.[264] Where a zoning restriction on household composition

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nity. There are important economic, social, political, and psychological benefits to residents, developers, communities, and government when shared housing is promoted and realized.

Day-Lower, *supra* note 105, at 226. (A copy of the complete report can be obtained by writing the Shared Housing Resource Center, Inc., 6344 Greene Street, Philadelphia, Penn. 19144.)

258. *Id.* at 226.

259. *See, e.g.*, Day-Lower, *supra* note 105 (Shared Housing Resource Center); AMERICAN PLANNING ASSOCIATION, OHIO CHAPTER, NEWSLETTER, Dec.-Jan. 1983-84, at 1, 1; AMERICAN PLANNING ASSOCIATION, NEWS RELEASE, *supra* note 242.

260. *See* G. STERNLIEB & J. HUGHES, *supra* note 66, at 16.

261. Day-Lower, *supra* note 105, at 226; Babcock, *supra* note 13, at 7.

262. King, *supra* note 257.

263. Wall St. J., July 28, 1982, § 2, at 19, col. 1.

264. An analysis of several state court decisions invalidating zoning restrictions on household composition is found in D. MANDELKER, *supra* note 15, at 101-02. *See also* Special Project, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1568-78 (1978).

does not define "family," an increasing number of state courts define "family" to include a "functional family" of unrelated persons living together as a single housekeeping unit when the housekeeping unit has a fair degree of stability or family-type structure.[265] A number of these recent court decisions have involved married couples living with unrelated foster children or developmentally disabled children.[266] However, several state court decisions have applied this "functional family" concept to households comprised of a number of unrelated adults.[267]

Similarly, despite the earlier decision of the Supreme Court in *Village of Belle Terre v. Boraas*,[268] several recent state court decisions have held that zoning restrictions on household composition expressly prohibiting households of persons unrelated by blood, marriage, or adoption are unconstitutional on state "due process" or "privacy" grounds.[269] These cases have involved a group of twelve unrelated adults,[270] two married couples living together with their children,[271] and married couples or surrogate live-in parents with foster or developmentally disabled children.[272]

While a number of these state court decisions continue to recognize the legitimacy of zoning to control population density and to promote "family values," recent state court decisions have ruled that household restrictions based on legal relationship are an impermissible means of accomplishing these objectives or are discriminatory and unnecessarily burdensome in view of these zoning objectives.[273] These state court decisions often reflect the

265. *See, e.g.*, Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981); Hopkins v. Zoning Hearing Bd., 423 A.2d 1082 (Pa. Commw. 1980); State *ex rel.* Region II Child and Family Servs., Inc. v. District Court, 609 P.2d 245 (Mont. 1980).

266. *E.g.*, State *ex rel.* Catholic Family & Children's Servs. v. City of Bellingham, 25 Wash. App. 33, 605 P.2d 788 (1979).

267. *E.g.*, Douglas County Resources, Inc. v. Daniel, 247 Ga. 785, 280 S.E.2d 734 (1981).

268. 416 U.S. 1 (1974) (upholding family-based restriction on household composition).

269. *See* City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980); State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981); Children's Home of Easton v. City of Easton, 53 Pa. Commw. 216, 417 A.2d 830 (1980).

270. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

271. State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

272. Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981).

273. *See, e.g.*, State v. Baker, 81 N.J. at 107, 405 A.2d at 371-72; City of Santa Barbara v. Adamson, 27 Cal. 3d at 132-33, 610 P.2d at 441, 164 Cal. Rptr. at 544.

view that communities should accommodate the non-traditional household of unrelated members as well as the traditional family household, at least where the non-related household is relatively permanent and stable.[274] These recent state court decisions focus on whether the shared house living arrangement constitutes a relatively stable and bona fide household unit.[275]

In limiting the reach of restrictions on household composition, recent court decisions have also emphasized that less burdensome means of controlling population density and of promoting the residential character of an area are available. For instance, codes could contain restrictions on transient or commercial residential uses, density restrictions based on floor space or facilities, and restrictions on cars and parking to further these zoning objectives.[276] Courts seem increasingly aware of the changing nature of American households and sensitive to the unnecessary discrimination inherent in zoning restrictions which are not "lifestyle neutral." As a New York court stated in upholding the adoption of one male adult by another to avoid a family-based restriction on household composition: "[t]he 'nuclear family' arrangement is no longer the only model of family life in America. The realities of present day urban life allow many different types of nontraditional families."[277]

Restrictions on household composition have resulted in a significant amount of "group home" litigation. In recent years, there has been a widespread movement to either deinstitutionalize or rehabilitate disabled or dependent persons through the normalization process of a "group home" living environment in a residential neighborhood. Family-based zoning restrictions on household composition are often enforced in an attempt to prohibit group homes in residential neighborhoods. With a few exceptions, state courts have not enforced these restrictions in such circumstances.[278]

Where "family" is undefined or loosely defined in a zoning restriction on household composition, a number of state courts have

274. *See, e.g.*, Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d at 263-65, 421 N.E.2d at 155-56.

275. *See, e.g.*, State v. Baker, 81 N.J. at 107, 405 A.2d at 372.

276. *See, e.g.*, *id.* at 109-11, 405 A.2d at 372-73; City of Chula Vista v. Pagard, 115 Cal. App. 3d 785, 792-93, 171 Cal. Rptr. 738, 742-43 (1981).

277. In Re Adult Anonymous II, 88 A.D.2d 30, 35, 452 N.Y.S.2d 198, 201 (1982).

278. A survey on state court decisions involving zoning restrictions on group homes is found in Jaffe, *Group Homes and Family Values*, LAND USE L. & ZONING DIG., Mar. 1982, at 4.

applied the "functional family" approach[279] to permit group homes in residential neighborhoods.[280] These cases have defined "family" to include married couples or live-in surrogate parents caring for dependent foster children or developmentally disabled adults.[281] Other state court decisions have held on state constitutional grounds that group homes are protected "functional families" where the group home has the stability and structure of a traditional family.[282] However, not every group home has been considered a "functional family." Group homes not considered to be protected functional families include: living arrangements where there is no stable adult supervision[283] or a group home which primarily provides a location for treatment rather than the support of a family-like living arrangement.[284]

Courts have also found in some cases that a strong state public policy of providing the least restrictive residential environment for developmentally disabled persons overrides the policy underlying composition restrictions.[285] Similarly, where a state or other governmental entity owns or operates the group home, state courts have ruled that the group home is entitled to some degree of immunity from local zoning restrictions.[286] These court decisions frequently apply a balancing test to determine whether the group home may be permitted in the residential area. Courts usually consider the importance of the state purpose furthered by the group home, the degree to which this purpose would be frustrated by the zoning restriction, and the adverse impact of the facility upon surrounding property and on the local interests.[287]

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279. *See supra* text accompanying notes 265-72.

280. *See, e.g.*, State *ex rel.* Region II Child and Family Servs., Inc. v. District Court, 609 P.2d 245, 247-48 (Mont. 1980).

281. *See, e.g.*, Costley v. Caromin House, Inc., 313 N.W.2d 21, 25-26 (Minn. 1981); State *ex rel.* Catholic Family and Children's Servs. v. City of Bellingham, 25 Wash. App. 33, 37-38, 605 P.2d 788, 791 (1979).

282. *See, e.g.*, Saunders v. Clark County Zoning Dep't, 66 Ohio St. 2d 259, 263-64, 421 N.E.2d 152, 155-56 (1981).

283. *See, e.g.*, Penobscot Area Housing Development Corp. v. City of Brewer, 434 A.2d 14, 21-23 (Me. 1981).

284. *See, e.g.*, Culp v. City of Seattle, 22 Wash. App. 618, 590 P.2d 1288 (1979).

285. *See, e.g.*, Northern New Hampshire Mental Health Housing, Inc. v. Town of Conway, 435 A.2d 136 (N.H. 1981).

286. *See, e.g.*, City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 322 So. 2d 571 (Fla. App. 1975), *aff'd* 332 So. 2d 610 (1976) (home for the mentally retarded); Brownfield v. State of Ohio, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980) (halfway house for patients discharged from psychiatric institutions).

287. *See, e.g.*, Brownfield v. State of Ohio, 63 Ohio St. 2d at 286-87, 407 N.E.2d at 1368.

State legislatures as well as courts have been active with regard to group homes. Sixteen states have enacted statutes expressly preempting local zoning restrictions on certain types of group homes—primarily homes for developmentally disabled children or adults.[288] These statutes usually require state licensing of the homes, limit the number of residents, have mandatory dispersal requirements, and specify the degree of control a local community may exercise over the group homes.[289]

Even in the absence of state legislation, many local communities are revising their zoning codes to permit group homes as conditional uses in neighborhoods of single-unit dwellings—an approach that provides flexibility in allowing but regulating group homes in residential neighborhoods.[290] Where this permit procedure is established, court decisions have tended not to give great weight to citizen opposition to group homes and, in some instances, have mandated that a group home permit be issued despite strong citizen opposition.[291]

IV

ACCOMMODATION THROUGH REGULATION: TOWARDS A CONCLUSION

A. The Emerging Context

In the late 1920's and 1930's ownership of detached single-family homes was officially acknowledged and promoted as the cornerstone of the American way of life.[292] Public policy and official attitudes emphasized, in the words of Herbert Hoover, that "nothing contributes more to happiness or sound social stability than . . . homes."[293] The focus of public policy regarding ownership of real property shifted from rural concerns to an emphasis on the built environment in urban and suburban areas. As the vision of the independent farmer faded into the past, the sense of dignity

288. *See* Jaffe, *supra* note 278, at 9.

289. *Id.* To a significant degree, these statutes are based on model legislation developed by the American Bar Association's Commission on the Mentally Disabled. *Id.* The model act allows group homes of six or fewer persons in all residential districts and bans requirements for conditional or special use permits as a precondition for siting approval. *Id.*

290. *Id.* at 7.

291. *See, e.g.*, Warren County Probation Ass'n v. Warren County Zoning Hearing Bd., 50 Pa. Commw. 486, 414 A.2d 398 (1980) (group home for youths convicted of minor criminal offenses).

292. Sternlieb & Hughes, *supra* note 61, at 17-18.

293. *Id.* at 17.

and honor associated with homeownership made the detached single-family house a vital part of the new American vision.[294]

Ownership of detached single-family housing became the prevailing form of housing only in the post-World War II period.[295] After 1945, steady and significant increases in the real income of households and relatively stable monetary conditions produced an unprecedented boom in the housing industry. Between 1950 and 1970, the nation's overall housing inventory increased by 50%.[296] Homeownership rates increased from 43.6% in 1940 to 62.9% of all households in 1970.[297] During this period "we expanded our Bill of Rights, by implication, to include single-family housing as an inalienable American privilege."[298] Moreover, the size and amenities of housing increased substantially; total footage per home nearly doubled between 1948 and 1978, and homes in suburban areas were built on large lots.[299]

During this period the goal of homeownership fit nearly perfectly with long-term, fixed-low-interest rate, high-loan-to-value residential mortgages.[300] This system of financing provided substantial house-buying leverage to purchasers moving up the economic scale. Further, the financing system was subsidized by the passbook accounts of small savers who had little choice but to accept the low interest returns offered by savings institutions even when inflation rose above the interest rate on passbook accounts.[301] Financing institutions could make long-term mortgage loans with confidence, at fixed rates a few percentage points above what they were paying passbook depositors.[302]

In the late 1970's this financing arrangement became unraveled. Inflation caused savings to move from passbook accounts to money-market mutual funds and then, with the deregulation of

294. *Id.* at 18.

295. Kuklin, *The Housing Market—Boom or Bust?*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 57, 58 (F. Schnidman & J. Silverman eds. 1983).

296. Sternlieb & Hughes, *supra* note 61, at 17.

297. *Id.* at 19.

298. Kuklin, *supra* note 295, at 58.

299. *Id.*; Porter, *Home Builders Advance on Affordability*, URB. LAND, Oct. 1982, at 6, 8.

300. Sears, *supra* note 78, at 11.

301. Downs, *The Revolution in Real Estate Finance*, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 151, 152 (F. Schnidman & J. Silverman eds. 1983); Currier, *Bright Economy Small Comfort to Homebuyers*, Dayton Daily News, Jan. 1, 1984, at 3E, col. 1.

302. *See* Sears, *supra* note 78, at 12-14.

the banking industry, to certificates of deposit.[303] As the primary source of mortgage funds shifted to money invested in certificates of deposit and other types of money market funds bearing interest at open-market rates, the fixed-low-interest-rate mortgage quickly became a thing of the past.[304] The passing of this financing arrangement, as well as stagnation and slowed growth in real incomes and the increasing cost of housing, brought the price of new detached single-family homes in the 1980's to a level well out of the reach of most new households.[305]

Today, the housing affordability problem and the changing nature of American households and housing preferences cast serious doubt on the wisdom and efficacy of restrictive single-family zoning, both in established neighborhoods and in undeveloped areas. In the past the discriminatory impact of restrictive single-family zoning generally fell on low-income households. Today, a broad range of new middle-income households are effectively being shut out of the housing market due in part to the loss of housing options resulting from restrictive zoning. Now only those persons with a "trade-in" have a realistic chance of affording new detached single-family homes.[306] To the extent that restrictive single-family zoning makes available only high-cost new homes that are unaffordable for most new households and restricts the availability of less expensive alternative housing, it tends to undermine the social harmony which has characterized the last half century. As Sternlieb and Hughes observe:

> Housing is not merely a refuge from the elements; it is an essential tool binding together an America of enormously varied humanity. Home ownership glues people to the system. There is an implicit promise that if we maintain the work and thrift habits of yore, we can enjoy the central material symbols of belonging—and

303. *Id.* at 12; Sternlieb & Hughes, *supra* note 61, at 19.

304. Sternlieb & Hughes, *supra* note 61, at 19; Sears, *supra* note 78, at 12-13. Lenders now realize that they must predict the impact of inflation by including risk premiums in setting interest rates. These higher inflation premiums increase the nominal interest rate, even if the real interest rate is steady or declining. What this means to the borrower is that at high rates of inflation the real cost of debt is "tilted" towards the early years of the mortgage term. Mortgage payments become unaffordable because salaries are not rising at the same rate. The higher interest rate costs cannot be immediately offset with increases in revenue. In short, it is not possible to pass these costs "onto the consumer," as is done in business. At the consumer level, the costs are absorbed; the inflated buck momentarily stops here. *Id.* at 12.

305. The housing affordability problem is discussed *supra* at text accompanying notes 72-88.

306. PLANNING, May 1983, at 22.

chief among them is the real potential of home ownership.[307]

If restrictive single-family zoning continues to limit the availability of less expensive alternative housing and living arrangements, such zoning will adversely affect many homeowners: homeowners who cannot relocate to better jobs elsewhere because of the lack of affordable housing; elderly homeowners trapped in homes bigger than they can afford to maintain but unable to find affordable housing where they wish to retire; and homeowners who are finding it difficult to move because of the declining market for large older single-unit homes.[308] Communities where restrictive single-family zoning provides for the development of only high-cost detached single-unit houses may face the prospect of economic and fiscal decline as more and more young homeseekers—often the children of current residents—who would add social and economic vitality to the community are forced to seek affordable housing elsewhere.[309] With this exodus, many suburbs may become communities of primarily elderly fixed-income households.[310]

In recent years there has been increasing awareness of the hidden costs of suburban sprawl caused, to a significant degree, by low-density and large-lot single-family zoning.[311] The additional costs of detached single-unit housing compared with multi-unit housing in regard to building materials, roads, energy and water consumption, and sewer and other utilities, are clearly evidenced in a number of recent reports.[312] The demise of restrictive single-family zoning by itself will not solve the housing affordability problem. However, its demise would seem to be a necessary step towards making available less expensive new single-family homes and alternative forms of new housing and towards increasing the opportunities for less expensive alternative living arrangements in existing neighborhoods.

As discussed earlier, the integrity of single-family zoning already has been eroded by a number of recent developments. Ac-

307. Sternlieb & Hughes, *supra* note 61, at 17.

308. Council On Development Choices, *supra* note 74, at 5.

309. *Id.*

310. *See generally* Smart, *supra* note 213, at 32-33.

311. REAL ESTATE RESEARCH CORP., THE COSTS OF SPRAWL: ENVIRONMENTAL AND ECONOMIC COSTS OF ALTERNATIVE RESIDENTIAL DEVELOPMENT PATTERNS AT THE URBAN FRINGE (1974).

312. *See, e.g.*, NATIONAL ASSOCIATION OF HOMEBUILDERS, COST EFFECTIVE SITE PLANNING 119 (1976) *cited in* Babcock, *supra* note 13, at 7 n.15; W. P. O'MARA, RESIDENTIAL DEVELOPMENT HANDBOOK 120 (1978) (Urban Land Institute).

cessory apartments, group homes, and shared housing now exist in newer suburban areas as well as in established neighborhoods of older homes. In suburban areas, public officials and community residents are becoming less hostile to the development of less expensive alternative forms of housing.[313] A number of communities across the country are revising their zoning codes in an attempt to make more affordable housing available by allowing multi-unit housing and manufactured housing where such housing had previously been prohibited.[314] Some state legislatures have already intervened with statutes establishing maximum statewide building codes or promoting the use of manufactured housing, group homes, and even ECHO housing.[315] State courts have opened legal cracks in the validity of the single-family zone by striking down zoning enactments which severely restrict or prohibit group homes,[316] shared housing,[317] manufactured housing,[318] and least-cost housing.[319]

The socio-economic and demographic changes discussed above and the developments they have brought about have just begun to influence conventional thinking concerning the wisdom and efficacy of single-family zoning. Widespread restriction and exclusion appears to be giving way to an emerging policy of accommodation through regulation. Sound planning and land-use regulation are increasingly perceived as compatible with the development of less expensive alternative forms of housing and living arrangements.[320] The housing affordability problem, the decline of the nuclear family, the decline in family size, and the changing nature of households and housing preferences are likely to affect traditional thinking concerning the wisdom and validity of single-family zoning. As the presuppositions supporting the concept of single-family zoning are undermined by these changes and developments, new strategies for infilling and adaptive re-use of housing in both urban and suburban neighborhoods are now

313. *See* Brown, *Acceptance Eased in Suburban Areas*, N.Y. Times, Oct. 9, 1983, § 12 (Real Estate Report), at 20, 20-21 (one reason condominiums are gaining acceptance is that their owners have a stake in the home, unlike apartment dwellers, who are viewed as transients).

314. *See supra* text accompanying notes 124-27.

315. *See supra* text accompanying notes 150-53.

316. *See supra* text accompanying notes 278-87.

317. *See supra* text accompanying notes 265-77.

318. *See supra* text accompanying notes 194-99.

319. *See supra* text accompanying notes 154-64.

320. *See* Hadley, *Relax Rules on Homes, Say Planners*, Seattle, Wash. Post-Intelligencer, Apr. 20, 1983, at 9.

emerging—including group homes, shared housing, accessory apartments, and ECHO housing. In developing areas there will be mounting pressure to revise local zoning ordinances to permit development of new single-unit housing which is smaller and located on smaller lots, has fewer amenities and is subject to "lifestyle-neutral zoning."[321] Pressure will likely increase to accommodate less expensive alternative housing such as manufactured housing and various forms of smaller multi-unit housing. Where local communities fail to respond by zoning to accommodate this new market, the state may well intervene through preemptive legislation, as many states have intervened with respect to group homes and manufactured housing.

Further intervention by state courts may also be expected. Without directly challenging the legislative wisdom or efficacy of single-family zoning, courts may strike down single-family restrictions with either the "taking theory" or the "substantive due process as applied" analysis. Moreover, state courts may be inclined to follow the lead of the New Jersey court in *Mt. Laurel II* and hold that restrictive single-family zoning in a local community is facially invalid on due process grounds.

B. The Taking Issue

Under the "taking theory" of the fifth and fourteenth amendments of the United States Constitution and similar taking provisions in state constitutions, a local police power regulation will be held invalid when it is found to constitute a "taking" of private property for public use without the payment of just compensation.[322] The Supreme Court and state courts have never set out any "fixed formula" for applying the taking theory to zoning. Court decisions on taking depend on each case's regulatory context and facts.[323] With respect to zoning enactments, courts tend to find that mere diminution in the value of land does not constitute a taking[324] and have upheld the validity of regulations found to substantially promote public health or safety.[325] If a land use

321. Hadley, *supra* note 320.

322. *See generally* D. MANDELKER, *supra* note 15, at 15-36.

323. *Id.* at 22.

324. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

325. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Subaru of New England v. Board of Appeals of Canton, 8 Mass. App. Ct. 483, 395 N.E.2d 880 (1979); Consolidated Rock Products

restriction merely promotes the general welfare, it must afford the owner reasonable beneficial use of his property.[326]

Today, most residential use classifications and restrictions are held to promote general welfare purposes. Courts have decided the taking issue in particular zoning cases by examining the reasonable use requirement in view of various factors, including whether there is a realistic market demand for the residential use allowed the owner.[327] A number of state court decisions have held zoning residential use restrictions to be a taking and confiscatory where they have resulted in little or no market demand for the residential use afforded a landowner.[328] As the market demand for detached high-cost single-family housing declines due to the housing affordability problem and changing housing preferences, the taking argument may prove to be particularly effective in challenging both zoning residential use classifications and costly zoning restrictions, such as those often imposed on house size, design, and lot size.[329] This would seem to be especially true in those states where courts decide the taking issue by independently reviewing the facts and by balancing the regulation's public benefits with the adverse impact on the landowner.[330] As the steady erosion of single-family zoning becomes more apparent, courts may well find the taking argument an appropriate vehicle for invalidating residential zoning restrictions.

C. Due Process Validity

The "due process as applied" ground for invalidating a land use restriction has a long and established tradition in the courts.[331] Though a zoning restriction may be valid on its face, due process requires that there be a reasonable basis to believe that the pur-

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Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

326. *See, e.g.*, *Penn Central*, 438 U.S. at 137-38; Stevens v. Town of Huntington, 20 N.Y.2d 352, 299 N.E.2d 591, 283 N.Y.S.2d 16 (1967).

327. *See, e.g.*, Tomasek v. City of Des Plaines, 26 Ill. App. 3d 713, 325 N.E.2d 345 (1975); Socha v. Smith, 33 A.D.2d 885, 306 N.Y.S.2d 551 (1969), *aff'd*, 26 N.Y.2d 1005, 259 N.E.2d 738, 311 N.Y.S.2d 306 (1970).

328. *See, e.g.*, Tomasek v. City of Des Plaines, 26 Ill. App. 3d 713, 325 N.E.2d 345 (1975); Socha v. Smith, 33 A.D.2d 885, 306 N.Y.S.2d 551 (1969); Summers v. City of Glen Cove, 17 N.Y.2d 307, 207 N.E.2d 663, 270 N.Y.S.2d 611 (1966); Bartlett v. City of Chicago, 55 Ill. App. 2d 314, 204 N.E.2d 780 (1965).

329. *See* Negin v. Board of Bldg. and Zoning Appeals, 69 Ohio St. 2d 492, 433 N.E.2d 165 (1982) (minimum lot size of 15,000 square feet confiscatory because lot rendered useless for any practical purpose) (alternative holding).

330. *See* D. MANDELKER, *supra* note 15, at 22, 35-36.

331. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928).

pose asserted in support of the restriction will be furthered by the restriction as applied to a particular tract of land. A number of court decisions have relied on this ground to invalidate both general residential use classifications and particular residential use restrictions.[332] Restrictive single-family zoning of undeveloped land would seem to be particularly susceptible to invalidation on this due process ground particularly where the amount of land subject to such zoning clearly exceeds market demand for such use or where it can be shown that accommodation and regulation of alternative forms of development would have no significant adverse impact on nearby developed land.[333] This due process argument also may be used with increasing success in challenging the validity of a zoning restriction on single-unit development, such as a restriction on house or lot size, on the ground that the restriction is unduly costly or excessive in view of its purpose as courts become more sensitive to the housing affordability problem and changing housing preferences.[334]

The due-process-as-applied argument also seems particularly appropriate for application to zoning restrictions on residential use in established neighborhoods where what might be called the "synergistic effect" of existing uses in the neighborhood negates the relationship between the zoning restriction in question and the alleged public purpose for the restriction. For example, is a zoning restriction reasonable that prohibits shared housing in a neighborhood where either group homes, accessory apartments, or ECHO housing already exist or are allowed, if the purpose for the restriction is either to promote the family character of the area or serve as a control on density of population? Similarly, is a zoning restriction reasonable that excludes accessory apartments where either shared housing, group homes, or ECHO housing already exist or are allowed in the neighborhood? State court decisions indicate that such a zoning restriction in this context might well be found to be unreasonable.[335]

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332. *See, e.g.*, Michaels v. Village of Franklin, 58 Mich. App. 665, 230 N.W.2d 273 (1975) (single-family zoning restriction unreasonable as applied); Metzger v. Town of Brentwood, 117 N.H. 497, 374 A.2d 954 (1977) (200-foot road frontage requirement unreasonable as applied).

333. *See, e.g.*, Town of Vienna Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (1978) (single-family zoning restriction excluding townhouses unreasonable as applied).

334. *See, e.g.*, Negin v. Board of Bldg. and Zoning Appeals, 69 Ohio St. 2d 492, 433 N.E.2d 165 (1982) (minimum lot size of 15,000 square feet unreasonable as applied) (alternative holding).

335. *See, e.g.*, Douglas County Resources, Inc. v. Daniel, 247 Ga. 785, 280 S.E.2d

An "equal protection" analysis might also form the basis for a judicial finding of unreasonableness in such a situation. Courts have held that equal protection requires zoning classifications and the different treatment accorded various land uses to be reasonably justified in view of the public purposes for regulation.[336] In this regard, the application of a zoning restriction on residential use might be held to be arbitrary and capricious in view of other residential uses already existing or allowed in the same neighborhood—in effect, an equal protection ruling based on the discrimination of underinclusiveness.[337] Changes occurring in established neighborhoods with respect to shared housing, accessory apartments, ECHO housing, and group homes could thus have a more significant impact on housing options in an area than the individual impact of any one or more of these changes as a result of judicial invalidation of seemingly unreasonable distinctions in residential use restrictions.

State courts may also be receptive to a due process argument which directly challenges the facial validity of restrictive single-family zoning. To the extent that the changes and developments discussed earlier come to be recognized as undermining the presuppositions supporting this zoning concept, state courts might well begin to find that such zoning has little or no relationship to a legitimate public purpose.[338] Restrictive single-family zoning, substantially excluding or prohibiting less expensive or alternative forms of housing or living arrangements, may come to be viewed as lacking any reasonable connection with the "general welfare."[339]

As a constitutional precept, due process has long been held to

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734 (1981) (unreasonable to exclude home for retarded adults in single-family area where homes allowed for foster children or for unrelated people living together); Women's Kansas City Saint Andrews Soc'y v. Kansas City, 58 F.2d 593 (8th Cir. 1932) (unreasonable to exclude a charitable home for the elderly in an area where apartments and public halls already exist); Harmon v. City of Peoria, 373 Ill. 594, 27 N.E.2d 525 (1940) (unreasonable to exclude two-unit dwellings in a residential district where up to four boarders are allowed).

336. *See* D. MANDELKER, *supra* note 15, at 41.

337. *See, e.g.*, Janas v. Town Bd. & Zoning Bd. of Appeals, 51 A.D.2d 473, 382 N.Y.S.2d 394 (1976) (zoning restriction limiting use of mobile homes to only relatives and employees of landowner violates equal protection); McMinn v. Town of Oyster Bay, 111 Misc. 2d 1046, 445 N.Y.S.2d 859 (1981) (zoning restriction limiting shared housing to persons age 62 or older violates equal protection).

338. *Mount Laurel II*, 92 N.J. 158, 456 A.2d 390 (1983).

339. *See* Builder's League of South Jersey v. Westhampton Township, 188 N.J. Super. 559 (1983) (ordinance providing for minimum floor space requirements invalid on its face because bears no relation to health, safety, morals, or general welfare).

preserve freedom from all substantial arbitrary impositions and purposeless restraints.[340] The meaning of due process as a limitation on police power regulation is relative to existing conditions and social values. As Justice Sutherland observed in *Village of Euclid v. Ambler Realty Co.*,[341] "[t]he line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation" but "varies with circumstances and conditions."[342] If due process, as Justice Frankfurter once stated, "is that which comports with the deepest notions of what is fair and right and just,"[343] reviewing courts may no longer find reasons sufficiently cogent to preclude a ruling that restrictive single-family zoning is clearly arbitrary and unreasonable. In view of the extent to which the interests of prospective land users have been ignored in the zoning process and of the history of abuse and discrimination with respect to residential zoning, courts may shift to local communities the burden of demonstrating the reasonableness of residential use classifications and restrictions. Arguments in support of restrictive residential zoning based on "general welfare purposes" may meet increasing judicial skepticism where such zoning severely restricts or prohibits less expensive and alternative housing and living arrangements.

V

CONCLUSION

It is ironic that urban planning experts significantly influenced the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[344] Today, many experts in urban planning urge changes in zoning to allow the development of less expensive smaller homes and alternative forms of housing and living arrangements.[345]

340. *See, e.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).

341. 272 U.S. 365, 387 (1926).

342. *Id.*

343. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

344. *See* Tarlock, *supra* note 8, at 5.

345. *See* U.S. Dep't of Housing and Urban Development, *Housing Cost Reduction Demonstration*, in Urban Land Institute, Housing Supply and Affordability 213 (F. Schnidman & J. Silverman eds. 1983).

> Somehow the regulations that may have been appropriate for yesterday's development must be geared to the needs of today and tomorrow. Standards for lot sizes, building sizes, site design, facilities, and other aspects of design should be modified to provide a range of costs and options. Limitations on types of development should be relaxed to allow more diverse forms and more mixtures of uses.

National League of Cities, *supra* note 13, at 180-81.

While it is probably too early to signal the imminent demise of restrictive residential zoning, we may have already witnessed its last gleaming. Justice Sutherland viewed multi-unit dwellings as near nuisances with parasitic tendencies.[346] Today, persons skilled in urban planning and design increasingly emphasize the advantages of and need for higher density residential use. Higher density residential use and less expensive housing options through adaptive re-use of exisiting dwellings would promote more efficient use of housing space and infrastructure resources. Such housing would also provide opportunities for employment and necessary support services, promote community continuity and diversity, and provide the conditions necessary for neighborhood businesses, efficient services, and a lively and urbane community.[347] The emerging policy of accommodating less expensive alternative housing and living arrangements will certainly require rethinking and reshaping of long-established zoning policies and residential restrictions. But the potential benefits of this policy are significant and far-reaching; it would enhance the meaning of equal justice in our private-market economy and facilitate the full and efficient utilization of resouces in providing for basic human needs.

346. *See supra* text accompanying notes 39-40.

347. Bender, *Affordable Housing: Ideas We Can Live With*, AMERICAN PLAN. ASS'N NEWS, May 1983, at 4, col. 1. Richard Bender is Dean of the College of Environmental Design, University of California at Berkeley.