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Addressing the Workforce Housing Crisis in Maryland and throughout the Nation: Do Land Use Regulations That Preclude Reasonable Housing Opportunity Based upon Income Violate the Individual Liberties Protected by State Constitutions?

John J. Delaney
Linowes and Blocher LLP

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**ADDRESSING THE WORKFORCE HOUSING CRISIS IN
MARYLAND AND THROUGHOUT THE NATION:**

**DO LAND USE REGULATIONS THAT PRECLUDE
REASONABLE HOUSING OPPORTUNITY BASED UPON
INCOME VIOLATE THE INDIVIDUAL LIBERTIES
PROTECTED BY STATE CONSTITUTIONS?**

John J. Delaney, AICP†

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† B.S.S., 1954, Georgetown University; L.L.B., 1960, Georgetown University Law Center; Senior Counsel and Founding Partner, Linowes and Blocher LLP, Bethesda, Md.; Member, American Institute of Certified Planners. The author gratefully acknowledges Richard J. Thometz, a graduate of Georgetown University Law Center and a member of the Maryland Bar, for his leadership over many years on affordable housing issues, as well as Erin E. Girard, an Associate Attorney at Linowes and Blocher LLP, and Zach S. Burroughs, a third year student at Vermont Law School and an Intern at Linowes and Blocher LLP, for their substantial assistance in preparing this paper. Additionally, the author would like to express his gratitude to the members of the University of Baltimore Law Review for their devotion to the quality of this article.

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I. INTRODUCTION

The lack of inexpensive housing in suburbia is not only the result of market forces but also of local practices which limit low-cost dwellings or exclude them altogether. The motivation behind these restrictions is complex, with racial and economic motivations intertwined. The exclusion of low- and moderate-income housing not only assures open space, uncrowded schools and streets, and more favorable tax revenues; it also excludes low-income families.¹

If this sounds familiar, it should, because it is not a new idea. These comments first appeared in a United States Commission on Civil Rights report dated July 1974, entitled *Equal Opportunity in Suburbia*.² Despite evidence of progress, these statements currently ring true in Maryland as well as many other states. Indeed, the lack of conveniently located “inexpensive,” or as we often refer to it today, “affordable” or “workforce,” housing in Maryland’s suburbs, and similarly situated communities throughout much of the nation, has greatly affected an ever-growing class of citizens, including those who work in these communities.

This paper presents an overview of the problem as well as the lack of political will to address it. It also examines the feasibility of possible litigation alternatives to affect a solution. Choosing the most appropriate federal or state judicial forum for a broad-based legal challenge is a critical component of this analysis. As a result, the state constitution is suggested as a basis for asserting that local governments may not adopt land use regulations or policies that deny housing opportunities to citizens based upon their income or economic status.

In the federal forum, the United States Supreme Court and other federal courts have generally been unreceptive to suits under the Fourteenth Amendment’s Equal Protection or Due Process Clauses

1. U.S. COMM’N ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN SUBURBIA* 7 (1974).

2. *Id.*

that challenge comprehensive economic or social legislation that “draw[s] lines.”³ Moreover, there appears to be no “fundamental right” to housing under the United States Constitution.⁴ Additionally, crippling standing barriers are often erected.⁵ Even when the most exclusionary land use regulations are examined on their merits, deferential standards of review are often applied to uphold them.⁶ Often, plaintiff’s challenging land use regulations based on economic status assert racial discrimination because courts require them to prove that the failure to provide adequate housing was motivated by a racially discriminatory intent, regardless of its impact upon a specific minority.⁷

An effect test can be used to prove discrimination in suits under the federal Fair Housing Act (FHA).⁸ If the plaintiffs are, however, the victims of exclusionary zoning based upon their economic status, but do not belong to one of the protected classes enumerated in the FHA, they have no recourse.⁹

State courts address these issues in a different manner. Some state courts—most notably those in New Jersey, Pennsylvania and New Hampshire—have examined local land use regulations and housing patterns under the equal protection and due process requirements of their state constitutions or the “general welfare” provisions of their state planning and zoning enabling acts, and found them to be exclusionary.¹⁰ Moreover, these courts have not limited their inquiries to the relatively narrow classes of citizens protected under the FHA and instead have addressed the broader issue of exclusion based upon lifestyle or economic class.

The Supreme Court of New Jersey, for example, in its famous series of *Mount Laurel* decisions,¹¹ relied upon substantive due process and equal protection provisions of the New Jersey Constitution to impose

3. See *Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

4. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); see also *Belle Terre*, 416 U.S. at 8 (holding that there is no fundamental right at issue when a local zoning law prohibited a group of people from living together because they were not family members).

5. See *Warth v. Seldin*, 422 U.S. 490 (1975).

6. See *id.* at 520 (Brennan, J., dissenting).

7. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

8. *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996). The FHA states that it is unlawful to make housing unavailable based upon one’s race, color, sex, religion, national origin, familial status or handicap. 42 U.S.C. § 3604 (2001).

9. See *James v. Valtierra*, 402 U.S. 137, 143 (1971).

10. See *infra* Part VIII.C.2.

11. *S. Burlington County NAACP v. Mount Laurel*, 336 A.2d 713 (N.J. 1975) [hereinafter *Mt. Laurel I*]; *S. Burlington County NAACP v. Mount Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mt. Laurel II*]; *Hills Dev. Co. v. Bernards*, 510 A.2d 621 (N.J. 1986); *Toll Brothers v. West Windsor Township*, 803 A.2d 53 (N.J. 2002).

a “presumptive obligation” on each developing municipality. This presumptive obligation forced municipalities to regulate their land in such a manner as to permit residential development for a “fair share” of their region’s affordable housing needs.¹² In addition, the New Jersey Constitution was interpreted as requiring local governments to exercise their police power to promote the “general welfare” of their regions, not merely to increase their tax base.¹³ Further, “a developing municipality . . . must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, . . . including those of low and moderate income.”¹⁴ In effect, when access to affordable housing is at issue, the due process and equal protection requirements of the New Jersey Constitution may be more demanding than those of its federal counterpart.¹⁵

The constitutions of several states—including California, Illinois, Massachusetts, Ohio, Pennsylvania and Wisconsin—afford equal protection and due process rights in language that is identical or nearly identical to that used in the New Jersey Constitution.¹⁶ Maryland’s Declaration of Rights provides for equal protection and due process rights in terminology that is similar - although not identical, to that in the New Jersey Constitution.¹⁷ Further, Maryland’s planning and zoning enabling acts are generally similar to those in New Jersey, Pennsylvania and New Hampshire.¹⁸ This paper evaluates the viability of a “*Mount Laurel*” challenge to exclusionary housing regulations in Maryland after comparing Maryland’s constitutional, statutory and standing requirements with similar provisions in other states.¹⁹

II. MARYLAND’S AFFORDABLE HOUSING CRISIS

The affordable housing crisis affecting many Maryland jurisdictions has worsened significantly over the past few years. A corollary of this

12. *Mt. Laurel I*, 336 A.2d at 724.

13. *Id.* at 726.

14. *Id.* at 731-32.

15. *Id.* at 725; see *infra* Part IX.D.1.

16. See, e.g., N.J. CONST. art. 1, ¶¶ 1, 5 (including the pursuit and obtainment of “safety and happiness” as an “unalienable” right); CAL. CONST. art. 1, §§ 1, 7 (including the pursuit and obtainment of “safety and happiness” as an “unalienable” right); ILL. CONST. art. 1, §§ 1, 2 (including the “pursuit of happiness” as an inalienable right); MASS. CONST. pt. 1, art. 1 (including the “seeking and obtaining” of “safety and happiness” as an inalienable right); OHIO CONST. art. 1, §§ 1, 2, 16 (including the “seeking and obtaining” of “safety and happiness” as an inalienable right); PA. CONST. art. 1, §§ 1, 26 (including “pursuing their own happiness” as “inherent indefeasable rights”); WIS. CONST. art. 1, § 1 (including the “pursuit of happiness” as an inherent right).

17. See discussion *infra* Part IX.D.1.

18. See *infra* Part VIII.C.2.

19. See *infra* Part VIII.

crisis is the problem of sprawl, an octopus that has spread its tentacles throughout many suburban areas within the state and beyond.²⁰ For example, eighty miles from Washington, D.C., in Liberty Township, Pennsylvania, a “suburb of Washington,” a development of 1,100 homes is under review.²¹ If approved, the development will add about two thousand residents, nearly tripling the size of the township.²² In projecting a sale price of approximately three-hundred thousand dollars compared to eight hundred thousand dollars in Rockville, Maryland, the developer is responding to a need for more affordable housing that is unavailable in Washington’s closer-in suburbs.²³ Meanwhile, township residents opposed to the project are concerned about its compatibility with the area’s idyllic character and the adverse economic impact it could have upon their community.²⁴ According to one resident, “[t]he development is parachuting a large number of people into an area with very, very few facilities.”²⁵

The Liberty Township story is not atypical. Instead, it is a stark reflection of an ongoing trend. Local governments in Maryland and throughout the country have joined the effort to “manage” growth, including planned growth, primarily through rewriting their zoning and subdivision regulations and imposing various forms of development caps, surcharges and moratoria.²⁶ Their actions are specifically aimed at *residential* growth, particularly higher density single-family and multiple-family housing.²⁷

“For local governments in the throes of rapid growth, ‘[housing] density is a four-letter word The consequence is they’re pushing the problem to their neighbor, and developers are having to go further and further away because they can’t meet the demand for housing closer in.”²⁸

The justification for housing restrictions is often that roads and other public facilities—such as sewer and water facilities, schools and fire suppression—are not adequate to keep up with planned and ongoing development.²⁹ At the same time, local governments make

20. David Snyder, *D.C. Sprawl Crosses into a New State*, WASH. POST, Nov. 2, 2003, at A1; see also Peter Whoriskey, *Density Limits Only Add to Sprawl, Large Lots Eat Up the Countryside*, WASH. POST, March 9, 2003, at A1.

21. Snyder, *supra* note 20, at A1. To place this problem in perspective, the proposed Liberty Township suburb is a two-hour commute from the Washington suburb city of Rockville during peak commuter travel periods. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See *infra* Part IV; see also *The Moderately Priced Dwelling Unit Program Narrative*, at <http://www.inhousing.org/mpdunarr.htm> (last visited Jan. 27, 2004).

27. These types of housing shall hereinafter be referred to as “affordable” or “workforce” housing.

28. Snyder, *supra* note 20.

29. See *infra* Part IV.

few efforts to harness non-residential development, despite the fact that office, retail, or industrial uses often have at least the same, if not greater impacts upon roads and other public infrastructure.

Local governments apparently assume that non-residential development has little or no impact upon schools, however, that is not always the case. When a new jobholder with a family arrives in the community, that family's children will likely be attending primary or secondary schools in the region, and in some states that "linkage" has been recognized.³⁰ Nevertheless, many local municipalities continually fail to correlate the supply of workforce housing to jobs, and often make little or no attempt to hide their antipathy toward workforce housing.³¹ Many governments openly seek to attract more employment, to protect or enhance their real property tax base, while eschewing any responsibility for providing housing and schools for the families of new jobholders.³² As a result, these employees must seek housing elsewhere, often at great distances from their jobs and are forced to commute to and from work over substandard or inadequate roads.

The reality is that some local governments have succeeded in attracting a disproportionate share of their region's job base, while failing to provide their own fair share of workforce housing for the region.³³ Moreover, local governments are imposing moratoria and

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30. Some states have recognized the existence of a linkage between non-residential development—office, retail, and commercial—and the need for school facilities. *See, e.g.*, *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (upholding a fee on non-residential building permits to be applied to housing for new low-income members of the workforce who would be attracted to the city as a result of such new development); *see also* *Holmdel Builders Ass'n v. Holmdel*, 583 A.2d 277, 288 (N.J. 1990) (upholding fees on commercial and non-exclusionary housing development to support the township's *Mt. Laurel* obligations). Boston and San Francisco impose fees on new office development to provide housing for low-income workers attracted to newly created jobs. DANIEL R. MANDELKER & JOHN M. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 611 (5th ed. 2001).
31. *See, e.g.*, John McClain & Stephen S. Fuller, *Future Housing Supply and Demand Analysis for the Greater Washington Area* (The Ctr. for Reg'l Analysis, Sch. of Pub. Pol'y, George Mason Univ., Wash., D.C.), Nov. 2002 [hereinafter *GMU Analysis*]. John McClain is currently a senior fellow at the Center for Regional Analysis, School of Public Policy, while Stephen S. Fuller, Ph.D, serves as the director of the center. The executive summary of this analysis is reprinted in the Appendix, *infra*, at 229-36. Assertions to the executive summary will reference the Appendix.
32. *See* *GMU Analysis, infra* Appendix, at 232-36; Kathleen Johnston Jarboe, *Stretching For a Home*, *DAILY RECORD* (Md.), Mar. 4, 2004, at 1A. *But see* S.A. Miller, *Loudoun is Fastest Growing*, *WASH. TIMES*, Apr. 9, 2004, at B1. "Being number one is nothing to brag about unless you are thrilled to death about having to build 28 schools in the last eight years and 23 more schools over the course of the next six years. *Id.* (quoting the Chairman of Loudoun County, Va., Board of Supervisors). *See also infra* Part VII.C, D, E.
33. *See generally* Part IV; *GMU Analysis, infra* Appendix, at 232-36. *See also* David Cho, *Study Pinpoints Affordable Housing Crunch*, *WASH. POST*, Apr. 15, 2004, at

other constraints upon residential development.³⁴ These practices do not amount to responsible planning. Furthermore, these actions may be harmful to the basic rights of citizens, under the United States and Maryland Constitutions, because they deny workers access to affordable, decent housing in reasonable proximity to their places of employment.

III. THE GEORGE MASON UNIVERSITY ANALYSIS

The growing disparity in local jurisdictions in Maryland between jobs and the supply of workforce housing will likely foster even greater sprawl, exacerbate current levels of unacceptable traffic congestion, and harm local economies. Persuasive authority for these conclusions can be found in the George Mason University Analysis (the "GMU Analysis"), a November 2002 report prepared for Building Industry Associations of the District of Columbia, Suburban Maryland, and Northern Virginia.³⁵ The GMU Analysis is entitled "Future Housing Supply and Demand Analysis for the Greater Washington Area."³⁶

Major findings of the GMU Analysis include:

- As suburban D.C. communities increasingly call for new planning, zoning and environmental policy actions to further restrict residential development, an existing deficit of housing will increase significantly.³⁷
- As of 2000, the D.C. region already had a deficit in housing of over 43,000 units.³⁸
- Although by the 1990s each new household supplied the workforce with only 1.4 jobs, a factor of 1.6 jobs per household was used by local governments in their planning projections.³⁹
- Even using the more optimistic 1.6 jobs per household factor, by 2025, the demand for new households to supply the workforce for the job forecast will exceed by 175,000 the number of available housing units. This is based upon the collective expectations of the region's local governments.⁴⁰

B1 (citing a 52 page report by the D.C. based Washington Regional Network for Livable Communities stating that "in the western suburbs[, including Fairfax and Montgomery Counties,] there are more jobs, expensive homes and road projects, and the eastern suburbs have cheaper housing, but fewer jobs and transportation projects").

34. See, e.g., *infra* Part IV.C, E; see also *The Moderately Priced Dwelling Unit Program Narrative*, at <http://www.inhousing.org/mpdunurr.htm> (last visited Jan. 27, 2004).

35. GMU Analysis, *infra* Appendix.

36. *Id.*

37. See *id.*

38. *Id.* at 233.

39. *Id.* at 232.

40. *Id.* at 233.

- When added to the existing deficit of over 43,000 housing units as of 2000, the total 2025 housing deficit will be over 218,000 units.⁴¹
- Thus, the adopted plans of many jurisdictions will achieve build-out long before 2025. This will dramatically increase the number of workers commuting from outer areas of the region into central employment areas.⁴²

The GMU Analysis concludes that a housing deficit of this magnitude could require “doubling up” in poorer neighborhoods where low-income members of the workforce cannot afford to rent houses for their own families, and could further mean:

- “Higher housing prices, and an increasingly inadequate supply of housing affordable for low and moderate income households.”⁴³
- “More developments occurring further out in order to attain some affordability, putting increased suburban growth and cost pressures on now rural counties.”⁴⁴
- “Longer, even more congested, and odd-hour commutes.”⁴⁵
- “All of these would eventually mean a stagnant or declining economy and quality of life.”⁴⁶

The GMU Analysis further concludes that based on the correlation between economic and job growth with housing prices, the median housing value in the D.C. region will rise to \$415,000 in 2025, compared to \$177,000 in 2000.⁴⁷

The findings of the GMU Analysis are amply supported by events affecting the D.C. region’s housing market in recent years.⁴⁸ For example:

41. *Id.*

42. *Id.*

43. *Id.* at 235.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* See Gerrit Knaap et al., *Smart Growth, Housing Markets, and Development Trends in the Baltimore-Washington Corridor* (Nat. Ctr. for Smart Growth Research and Educ., Univ. of Md., College Park, Md.), Nov. 2003 (finding studies similar to the GMU Analysis); see also Ezra Fieser, *Smart Growth Failing*, DAILY RECORD (Md.), Nov. 10, 2003, available at 2003 WL 10169281 (discussing the University of Maryland study); see generally Trif Alatzas, *Region’s Homebuyers Run a Trying Marathon: Many Hindered by Curbs on Growth, Soaring Prices*, BALT. SUN, Oct. 26, 2003, at 1A (providing examples of homebuyers difficulties due to restrictions on development and increasing costs); Robert J. Samuelson, *Is Housing Headed for a Fall?*, WASH. POST, Apr. 15, 2004, at 25A (reporting that as of 2003 the median price of homes in the D.C. area had risen \$286,000, an increase of 57% since 2000).

48. See Whoriskey, *supra* note 20; see also James Upchurch, *Setting Maryland’s Houses in Order*, WASH. POST, Oct. 12, 2003, at B8 (discussing problems that affect the Maryland housing market). 1000 Friends of Maryland, a coalition of business, community, historic preservation and environmental groups interested in curbing “sprawl” and achieving “directed growth,”

More than half of the land surrounding the nation's capital is now protected from typical suburban housing development, according to a Washington Post review of land plans in 14 counties in Virginia and Maryland. Restrictions in these 'rural' areas limit homebuilders to no more than one house for every three acres, with several counties curtailing development even more.

....
No other U.S. region of comparable size has protected so much land this way, according to a survey of urban planners.

But while the limits on rural building are supposed to be saving farmland, forests and meadows, a regional view of development patterns indicates that many of these anti-sprawl measures have accelerated the consumption of woods and fields and pushed developers outward in their search for home sites.

....
"If you restrict supply in the face of growing demand, and if the supply is less than demand, you are going to have higher housing prices," said Chris Nelson, a planning professor at Virginia Tech and co-author of a study on the subject.

....
Rising prices add to sprawl by pushing affordable housing farther out, to places as distant from Washington as Hagerstown, Md., Charles Town, W.Va., and York, Pa.

....
One of the most frequently cited measures of suburban sprawl, automobile travel per capita, continues to rise. From 1990 to 2000, the area's population grew 15 percent, while the number of miles traveled grew about 27 percent, according to figures from the Texas Transportation Institute.

Similarly, land consumption is outpacing population growth, studies show. In the 1990s, the developed areas in suburban Virginia grew nearly three times as fast as the population; in Maryland, they grew more than twice as fast.⁴⁹

IV. MARYLAND'S HOUSING CRISIS IS STATEWIDE

As indicated, the problems described in the GMU Analysis affect not only Washington, D.C., but also Maryland.⁵⁰ Local governments throughout Maryland have recently implemented or are attempting to

predicts that "[t]he million additional Marylanders expected in the next twenty years will consume one-half million acres of open space . . . if current sprawl trends continue." 1000 Friends of Maryland at <http://www.friendsofmd.org/friends2.html> (last visited Jan. 28, 2004).

49. Whoriskey, *supra* note 20.

50. *See id.*

implement selective restrictions on residential development.⁵¹ This has exacerbated the deepening shortage of “buildable lots” in many counties. Proposed state legislation to require counties to maintain buildable lot inventories has not been welcomed by the Maryland Association of Counties.⁵² A review of what is occurring in a select number of counties follows.

A. Anne Arundel County

Anne Arundel County has historically restricted residential development based upon manipulation of its school capacity policies to result in findings of inadequacy on a case-by-case basis. The county is also considering increases in impact fees and is reviewing its growth control ordinance.⁵³ Whether non-residential development will be affected remains to be seen.

B. Baltimore County

Baltimore County imposes a strict urban-rural demarcation line—somewhat analogous to Portland, Oregon’s “urban growth boundary” concept—and its agricultural zone, allows only one house per twenty acres.⁵⁴ A May 7, 2001 report, conducted by Towson University’s Regional Economic Studies Institute and commissioned by the Home Builders Association of Maryland, found that there were less than 5,700 available residential parcels in the county.⁵⁵ At Baltimore County’s current build-out rate of 1,800 dwelling units per year in its “Priority Funding Area” for public infrastructure, the county has less than a four-to-seven year supply of buildable lots remaining, well short of the number needed to support the workforce expected to fill the county’s future planned employment base.⁵⁶

C. Carroll County

Newly elected Carroll County Commissioners have enacted a number of moratoria, lasting from nine months to a year, aimed primarily

51. Jamie Smith Hopkins, *Suburbs in Fight to Curb Growth*, BALT. SUN, May 18, 2003, at 1A.

52. *See id.* *See also infra* notes 55, 72, 73 and accompanying text.

53. Hopkins, *supra* note 51. *See also* Tracey Swartz, *Fee Has an Impact on Housing Market*, BALT. SUN, Mar. 14, 2004, at L1 (explaining Anne Arundel County’s \$4,361 impact fee is allotted \$3,388 for schools, \$862 for transportation and \$111 for public safety).

54. Childs Walker, *Carroll Halts Much Home, Commercial Development: Developers Had Sought More Moderate Measures*, BALT. SUN, June 6, 2003, at 1A. *See* Knaap et al., *supra* note 47, at 2.

55. RESI Research & Consulting, *A Study of Available Residentially Zoned Land in Baltimore County* (Towson University, Towson, Md.) May 7, 2001 (this study was presented at the 4th Annual Maryland Conference on Growth, May 23, 2001).

56. *See id.*

at 1,700 proposed residential lots that had already passed earlier stages of review.⁵⁷ The stated purpose of one of the moratoria is to “prevent residential growth from overwhelming schools, roads and the water supply.”⁵⁸ A number of lawsuits have been filed challenging the validity of the moratoria.⁵⁹

D. Cecil and Talbot Counties

Cecil and Talbot Counties are considering adequate public facilities ordinances to restrict home building in order to address overcrowded schools and congested roads.⁶⁰ There is little indication that non-residential development will be similarly affected. Cecil County recently contemplated adopting a “six-month moratorium on new subdivision applications,” but that proposal was narrowly defeated.⁶¹ Once again, overcrowded schools were cited as the culprit.⁶²

E. Frederick County

In Frederick County, moratoria on housing construction in both the county and the City of Frederick have slowed countywide home building to its slowest pace in twenty years.⁶³ New home building in the unincorporated county and its municipalities is projected to total just over 1,260 units in 2003, the lowest number since 1982.⁶⁴ Its impact fees on housing—more than \$7,000 for a detached home and almost \$5,000 for a townhouse—are already among the highest in the state, and face substantial increases.⁶⁵ Prior restrictions have been based upon inadequate water supplies, while inadequate schools are of current concern.⁶⁶ Again, there is little indication that non-residential development will be required to bear similar burdens. Meanwhile, according to a recent report in *The Washington Post*, Frederick is ranked as “the most sprawling county” in the Washington area.⁶⁷

57. Walker, *supra* note 54, at 1A.

58. *Id.* Carroll County has also placed moratoria on certain industrial developments in order to prevent industrial land from being devoted to retail uses. *Id.*

59. *Id.*

60. Hopkins, *supra* note 51, at 1A.

61. *Id.*

62. *Id.*

63. Sean Barry, *Development Slows Down*, FREDERICK NEWS POST (Md.), May 30, 2003.

64. *Id.*

65. *Id.*

66. *Id.*

67. Rob Stein, *Suburbia USA: Fat of the Land?: Report Links Sprawl and Weight Gain*, WASH. POST, Aug. 29, 2003, at A3. According to researchers, “[s]uburban sprawl appears to be contributing to the nation’s obesity epidemic” because residents in sprawling areas tend to walk less. *Id.* Among the researchers cited is Reid Ewing of the University of Maryland’s National Center For Smart Growth. *Id.*

F. Harford County

Harford County, citing overcrowding schools, is contemplating restrictions upon home building, even though, according to a May 18, 2003 article in *The Baltimore Sun*, the county “built eight elementary schools in the [1990s] to keep up with growth.”⁶⁸ Only one middle school has been added in the last ten years to accommodate the children who would be moving through the new elementary schools and yet no new high schools have been built in the past quarter-century.⁶⁹

G. Howard County

Due to crowded schools, Howard County has imposed growth restrictions on over one-thousand proposed homes even while acknowledging that the primary source of new students is from long-existing homes into which young families have moved, “replacing empty nesters.”⁷⁰ No restrictions are imposed on non-residential development. Meanwhile, the county has zoned more than half of its land area for sprawl development at one dwelling per 4.25 acres, and the inventory of homes in the county continues to decrease.⁷¹ Indeed, the number of homes sold in Baltimore City and the counties surrounding it fell by nearly ten percent in April 2003 due in part to the decreased inventory of homes.⁷² The number of active listings in the Baltimore region in April 2003 was just under 6,600 available homes, a decrease of more than fifteen percent as compared to April 2002.⁷³

H. Montgomery County

In October 2003, Montgomery County adopted, as part of its Annual Growth Policy (AGP), transportation and school impact taxes of a minimum of \$13,500 per home, the highest in the state.⁷⁴ When combined with a potential school facilities surcharge of \$12,500 per student in overcapacity districts, plus regulatory exactions that may be imposed for road improvements, the total development tax upon a single-family dwelling could easily exceed \$25,000.⁷⁵

This is not good news for workforce families in search of affordable housing near the location of their work. These families, however, are

68. See Hopkins, *supra* note 51, at 1A.

69. *Id.*

70. *Id.*

71. Whoriskey, *supra* note 20; Alatzas, *supra* note 47.

72. Alatzas, *supra* note 47.

73. *Id.*

74. Md.-Nat'l Cap. Bldg. Indus. Ass'n, *Council Approves Highest Impact Tax in State*, 14 LEGIS. & REG. REP. 11 (Nov. 2003); see also Catherine Dolinski, *Business Split Over Fallout From Development Taxes*, MONTGOMERY GAZETTE, Oct. 31, 2003, available at http://www.gazette.net/200344/weekendsa_section/185706-1.html (last visited Jan. 25, 2004).

75. See *AGP Will Not Cap Development, Will Require School Test* (Md. Nat'l Cap. Bldg. Indus. Ass'n), 14 LEGIS. & REG. REP. 11 (Nov. 2003).

an unrepresented constituency in Montgomery County, and thus were not at the table when important decisions concerning their future were made. On the other hand, the two major constituent groups that most actively participated in the process—homebuilders and existing residents of the county—complained mildly but were generally satisfied with the outcome of the review.⁷⁶ Homebuilders will not be able to build as many homes, but in a skyrocketing, short supply market they will likely earn significantly higher profits. Residents opposed to “growth” (with a major economic stake in holding down the supply of housing) would have preferred that the moratoria not be lifted, but will nevertheless continue to enjoy exponential increases in the value of their homes. Meanwhile, county decisionmakers predictably lamented the lack of sufficient affordable housing, while doing little in the way of effective land use regulatory reform to increase densities or to promote more efficient use of land in planned growth areas.

The county’s public housing agency, the Housing Opportunities Commission (HOC), reacting to increases of more than \$100,000 in the average cost of a county home during the past three years, has reduced its interest rates from approximately 6% to 4.5% and relaxed income restrictions for its clientele.⁷⁷ Specifically, a family of four seeking HOC housing in 2002 was allowed to have a maximum income of only \$58,055; whereas in 2003, that number had soared to \$97,520.⁷⁸ The county has also created a Moderately Priced Dwelling Unit (MPDU) program under which developers are required to provide fifteen percent MPDUs in any development over thirty five units.⁷⁹ The MPDU program has been moderately successful, although the number of MPDUs produced annually has shrunk from 945 in 1987 to 208 in 2002.⁸⁰

76. Steve Elmendorf, *Montgomery’s Winners and Losers*, MONTGOMERY GAZETTE, Nov. 14, 2003 (describing the fallout on citizens, developers, and workforce housing from the County’s amendment to its Annual Growth Policy).

77. Robyn Lamb, *Montgomery County Home Aid Grows as Market Soars*, DAILY RECORD (Md.), Aug. 5, 2003, at A1.

78. *Id.*

79. Bruce Romer, *Montgomery County, Maryland’s Moderately Priced Dwelling Unit Program* (Nat’l Ass’n of Co. Admin.), Dec. 2003, available at <http://www.countyadministrators.org> (last visited Jan. 25, 2004). Developers are supposed to receive “density bonuses” to offset this obvious taking of their private property for public use, but individual applicants for subdivision approval often receive no bonus. *Id.* Nevertheless, the MPDU requirement is still imposed on them. *Id.*

80. *Moderately-Priced Dwelling Units Completed Montgomery County, Md. 1976-2002* (Montgomery County Planning Bd.), Nov. 2003, at http://www.mc-mncppc.org/research/data_library/real_estate_development/housing/hc07b.shtml (last visited Feb. 6, 2004).

I. Prince George's County

The Prince George's County government, with its emphasis on executive housing, is currently pondering limitations upon the number of homes that may be built in its "rural tier," which consists of "land east of Route 301 near Charles and Calvert counties."⁸¹ Development would be "no more than [one] percent of the annual number of houses projected to be built countywide."⁸² Inadequate roads, schools and police facilities are cited as the reasons for the limitations.⁸³ Moreover, the Maryland General Assembly recently enacted legislation authorizing the county to more than double its current \$5,000 surcharge on housing units.⁸⁴

J. Queen Anne's County

In 1987, Queen Anne's County adopted a comprehensive plan designating specific growth areas where infrastructure exists and is adjacent to municipalities.⁸⁵ This plan was updated and revised in 1993 and 2002, reconfirming the specific growth areas.⁸⁶ In the interim, the county undertook to develop Growth Sub-Area Plans for each of the growth areas. These Sub-Area Plans established growth policies and were followed by amendments to the land use regulations in order to implement the growth areas.⁸⁷ In 1991, the county enacted a development impact fee ordinance⁸⁸ and, in 2001, an interim adequate public facilities ordinance.⁸⁹ Presently included in the county's proposed zoning ordinance update is an inclusionary-housing provision.

Despite the fact that land use regulations allow for planned developments and multi-family housing at moderate densities within the

81. Ovetta Wiggins, *Prince George's Aims to Ease Development; Measure Targets Growth in Swelling Rural South*, WASH. POST, July 14, 2003, at B1.

82. *Id.*

83. *Id.*

84. *See id.* The new surcharge allowed is \$12,000. *Id.*

85. *See Policies, Implementing Strategies and Priorities, Vol. 2: 2002 Comprehensive Plan for Queen Anne's County, Maryland* (Dep't of Planning and Zoning, Queen Anne's County, Md.), at 9-10, available at <http://www.qac.org/depts/planzone/cpvolume2.htm> (last visited Apr. 14, 2004).

86. *Id.* at 13.

87. *Id.* at 15, 17.

88. CODE OF QUEEN ANNE'S COUNTY, MD., § 18-304 (2004) (effective Sept. 1991), available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=169136&infobase=qu1770.nfo&softpage=Browse_Frame_Pg42 (last visited Apr. 14, 2004); Interview by Erika Schissler with Queen Anne's County Planning Office (Feb. 9, 2004).

89. CODE OF QUEEN ANNE'S COUNTY, MD., § 28-101 (2004) (effective March 20, 2001) available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=169136&infobase=qu1770.nfo&softpage=Browse_Frame_Pg42 (last visited Apr. 14, 2004); Interview by Erika Schissler with Queen Anne's County Planning Office (Feb. 17, 2004).

growth areas, very little development is being approved.⁹⁰ Citing perceived environmental impacts, a lack of sewer capacity and quality of life concerns, officials have refused to give final approval to any of the major planned developments that provide for multi-family or workforce housing.⁹¹ County officials have demonstrated a willingness to withhold discretionary approvals unless developers eliminate the use of apartments in planned developments.

V. THE SOURCE OF TRAFFIC CONGESTION IN MARYLAND: EXISTING VS. NEW DEVELOPMENT

One of the major sources of traffic congestion in Maryland is the state's failure to provide roads to accommodate its growing population. According to a national engineering survey, Maryland ranks either 47th or 48th among the states in building new roads.⁹² Furthermore, Maryland spends substantially less than its neighboring states—New Jersey, Pennsylvania, Virginia and Delaware—on road construction.⁹³

Although restrictions on new housing are being imposed throughout Maryland, many acknowledge that new residential development contributes but a small fraction of the need for new roads.⁹⁴ Furthermore, irrefutable evidence indicates that *existing households* with three or more vehicles have increased dramatically in the past several years, and are also a major source of increased congestion.⁹⁵ Over twenty percent of households in six Maryland counties possess at least three automobiles.⁹⁶ It is not at all unusual to see four to five vehicles parked around such households. Indeed, while the Washington re-

90. Interview by Erika Schissler with Queen Anne's County Planning Office (Feb. 17, 2004). Gibson Grant Development is waiting for approval by the County Commissioner. *Id.* The application for approval was first filed in June 2001 and there is no indication of when approval might occur. *Id.*

91. *Id.*

92. Tim Maloney, *Headed for the Breakdown Lane*, WASH. POST, Sept. 7, 2003. Anecdotal evidence supports this assertion, for example, on October 14, 2003, Washington, D.C. radio station WTOP, in its morning "sprawl and crawl" traffic report, stated that Maryland ranks 47th or 48th among all states in building roads.

93. David Abrams, *State Lags in Highway Spending*, BUS. GAZETTE, Aug. 15, 2003, available at http://www.gazette.net/200333/weekend/a_section/173391-1.html (last visited Mar. 1, 2004) (stating that Maryland spends \$134 per vehicle compared to Delaware's \$303 per vehicle).

94. For example, a 1995 Report by a Citizens Advisory Committee appointed by the Montgomery County Council found that new development produced less than fourteen percent of traffic on an annual basis, while existing households and vehicles from other sources using county roads comprised the remaining eighty-six percent. *See infra* note 165 and accompanying text.

95. Lisa Rein & Robin Shulman, *The Rise of the Multi-Car Family; Homes with 3-Plus Vehicles Not Unusual in Region*, WASH. POST, July 19, 2003, at A1.

96. *See id.*

gion's population grew by sixteen percent from 1990 to 2000, the number of vehicles increased by twenty four percent to 4.7 million.⁹⁷ The D.C. region now has 861,700 more registered vehicles than licensed drivers, 1.2 vehicles for every driver, compared to a national average of 1.07 cars per driver.⁹⁸

The greatest increase in multi-vehicle households is occurring in outlying communities, such as Calvert, Charles and Frederick Counties.⁹⁹ This is a direct consequence of the shortage of workforce housing in reasonable proximity to jobs.¹⁰⁰ The shortage is due in part to the above-described exclusionary practices of many local governments, whose zoning regulations preclude opportunities for workforce housing. The resulting sprawl from these exclusionary land use practices requires longer commutes by the workforce on the region's already congested and aging highway system. Yet, no significant fees or impact taxes are proposed on *existing* development. In other words, existing development and existing motorists are receiving a "free ride" at the expense of new development.

VI. MARYLAND COUNTIES LEAD THE NATION IN FARMLAND PRESERVATION

Ironically, some of the Maryland counties discussed above are more successful in preserving farmland and other open space than in providing realistic opportunities for affordable housing for their workforces. There are claims that these Maryland counties are among the nation's leaders in preserving farmland.¹⁰¹ A recent report states:

Beyond its posh Washington suburbs, about 30 percent of Montgomery County is agricultural land. And, according to a new survey, the county is the nation's best at preserving the farmland and other open space. With 59,451 acres of farmland and open space preserved, the county reclaimed top billing on a national ranking of land preservation programs.

. . . .

97. *Id.*

98. *Id.* at A9. The counties surveyed include Anne Arundel, Calvert, Charles, Frederick, Howard, Montgomery, Prince George's and St. Mary's. *Id.* Calvert, Charles and Queen Anne's Counties are among Maryland's fastest growing counties, with a more than three percent annual growth rate. See Andrew R. Green, *Maryland's Fastest Growing Suburbs Get Further From Cities*, BALT. SUN, Apr. 9, 2004, at 1A. Cecil, Harford and Carroll Counties are close behind with annual growth rates of more than two percent. *Id.*

99. Rein & Shulman, *supra* note 95.

100. See *id.*

101. Robyn Lamb, *Montgomery County Tops in Land Protection*, DAILY RECORD (Md.), Aug. 6, 2003. See also *supra* note 48 and accompanying text.

Four other Maryland counties, Carroll (41,445 acres), Baltimore (39,435), Harford (35,438) and Frederick (25,787), landed in the top 12.¹⁰²

While farmland preservation is an important element of Maryland's "smart growth" programs, so too is affordable housing. There is a need for more even-handedness in the state's growth management programs: "The key is for Maryland to balance its approach. To complement its incentives and support for rural land preservation, the state must provide infrastructure for—and remove regulatory barriers to—urban development. Only then will Marylanders enjoy smart and sustainable growth."¹⁰³ These counties can fulfill their fair share of the region's affordable housing needs if they use a more balanced approach and put forth effort.

VII. RESTRICTIONS ON WORKFORCE HOUSING ARE A NATIONWIDE PROBLEM

Maryland is by no means alone in adopting regulations and policies against workforce housing. It has become a national phenomenon, illustrated by the following examples.

A. California

In California, not enough viable land is being provided for housing and, consequently, there is a present shortfall of approximately 100,000 housing units per year.¹⁰⁴ As in most jurisdictions, moratoria, growth caps, adequate public facilities ordinances, large lot zoning

102. *Id.* In the early 1980s, over 88,000 acres, about one-third of Montgomery County's land, were reclassified to agricultural and rural open-space zoning. A Transferable Development Rights (TDR) program created some 17,000 TDRs to be sent to "receiving areas" elsewhere in the county. The county, however, was slow in designating receiving areas and did not do so until after it was sued. The receiving areas were designated on master plans instead of the zoning map, and after an adverse court decision, the county corrected the problem. The TDR program, albeit one of the most successful in the country, has progressed slowly due in part to an inadequate supply of receiving areas. According to a recent survey, Montgomery County, although affected by sprawl, is rated as the least sprawling of the Maryland counties in the D.C. suburbs. Howard Libit, *Study Links Community Sprawl to Fat*, BALT. SUN, Aug. 29, 2003, at 1A.

103. John W. Frece & Gerrit Knaap, *Build a Better Free State*, WASH. POST, Jan. 4, 2004, at B8.

104. Michael M. Berger, *A Step Down*, DAILY JOURNAL (L.A., Cal.), Nov. 7, 2003, at 6 (noting that the state needs "250,000 new homes each year to meet its needs"; that the new home supply is "falling short by 100,000 or more each year"; that because the supply of housing lags far behind demand, "the cost of housing has escalated rapidly"; nine of the ten least affordable metropolitan areas in the country are located in California, and the Southern California Association of Governments gave a housing grade of D+ to the counties of Los Angeles, Orange, Riverside, San Bernardino, Ventura and Imperial).

and agricultural zoning are often the regulations of choice. There is also the problem, rampant in Maryland and throughout much of the country, of residents in existing suburban communities opposing residential densities that would make it possible to provide an adequate supply of affordable housing. These “NIMBYs”¹⁰⁵ often possess enormous political clout, and are motivated in no small part by their own financial stake in maintaining the status quo. Thus, when they oppose new development, including higher density development contemplated in approved master plans, their arguments become difficult to resist. As workforce housing is driven away, invariably in the name of advancing other ostensibly worthy planning goals, the cost of existing housing in close proximity to employment centers continues to rise.

In San Mateo County, for example, there has been an ongoing effort to “save Bay Meadows”—a dilapidated horserace track.¹⁰⁶ The real purpose, according to nationally syndicated columnist Thomas Sowell, has nothing to do with preserving the track, but everything to do with “preventing anything from being built in its place, least of all apartments or townhouses or whatever else passes for ‘high-density housing’ in California.”¹⁰⁷ Mr. Sowell further explains that most residents of the county are homeowners rather than renters and that both housing prices and rents “are astronomical.”¹⁰⁸ He states that “ordinary homes command [very high] prices because of severe restrictions on building.”¹⁰⁹ The black population comprises less than four percent of the county’s residents, and this number is falling.¹¹⁰ For many, arguments about saving wetlands or endangered species are “a way to keep out ordinary people from the enclaves of the elite.”¹¹¹ The lesson from this, according to Mr. Sowell is that:

Not just in California, but across the country, those who want to prevent other people—and especially other kinds of people—from living in the community where they live have created all sorts of red herring arguments and restrictive laws to deny others the same rights they claim for themselves. Since the 14th Amendment requires all people to be treated the same, why should what one group wants be enacted into law to override what other people want?¹¹²

105. Acronym for “Not In My Backyard.” This refers to any group of residents in opposition to certain changes in their area. See Berger, *supra* note 104.

106. See Thomas Sowell, *Saving Crusade with a Track Record*, TULSA WORLD, July 11, 2003, at A17.

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.*

111. *Id.*

112. *Id.* Mr. Sowell’s frustration would likely have been even greater if he had been a plaintiff in either the *Warth* or *Belle Terre* cases. See discussion *infra* Part VIII.B.1, 2.

B. Florida

In Florida, a petition drive has been "launched . . . for a Constitutional Amendment that would forbid land use changes without a referendum."¹¹³ "[O]ver-development is driving all the political issues, from overcrowded public schools to overcrowded roads."¹¹⁴ Promoters of the amendment are confident that they will achieve the 500,000 signatures necessary to put it on the ballot.¹¹⁵ If adopted, the amendment would take the power to regulate land use away from local government elected officials and give it to the voters.¹¹⁶ According to the National Center for Public Policy Research, anti-growth referenda and initiatives are proliferating around the country.¹¹⁷ Leading up to the 2000 election, "many affluent suburbanites [were] flocking behind the [anti-growth] banner."¹¹⁸

Meanwhile, Florida's heralded Local Government Comprehensive Planning and Land Development Regulation Act of 1985, also known as the "Growth Management Act" (GMA),¹¹⁹ is the subject of a critical report in the Summer 2003 Journal of the American Planning Association, indicating that the GMA has had a significant negative impact upon affordable housing.¹²⁰ It states in pertinent part:

[T]his research finds that Florida's GMA has had a statistically significant and negative effect on housing affordability in the state. Reduced housing affordability can have both short- and long-term negative social and economic consequences for affected households and for society in general. . . . It very significantly decreases opportunities for renters wanting to transition to homeownership and denies them the social and financial benefits associated with homeownership. . . . When housing mobility is restricted, cost-burdened households are forced to reduce critical non-housing expenditures or live in substandard housing.

. . . .

Florida's GMA is a well-intentioned effort to better manage the state's urban areas and natural resources. However, in state and local implementation of the GMA, affordable

113. Buddy Nevins, *Lawyers: Let Voters Have a Say on Land-Use Changes; Drive Aims to Put Amendment on the 2004 Ballot*, SUN-SENTINEL (Ft. Lauderdale, Fla.), July 22, 2003, at B6.

114. *Id.* (quoting Jim Kane, "a political pollster who has lobbied for development projects").

115. *See id.*

116. *Id.*

117. *See* Joseph Perkins, *Anti-Growth Furor*, WASH. TIMES, Aug. 13, 2003.

118. *Id.*

119. FLA. STAT. Ch. 163.3161 (2002); *see also* Jerry Anthony, *The Effects of Florida's Growth Management Act on Housing Affordability*, 69 J. AM. PLANNING ASSOC. 282 (2003).

120. *See id.*

housing has clearly not received adequate attention. Because of this neglect not only is social inequity fostered, but the legitimacy of the practice of planning as a means of increasing societal welfare is also called into question.¹²¹

The report concludes that these problems threaten the “long-term sustainability of Florida’s growth management efforts.”¹²²

C. Massachusetts

In Massachusetts, the state Affordable Housing Law was supposed to trump the state’s Planning and Zoning Enabling Act.¹²³ An affordable housing taskforce, appointed by Governor Mitt Romney, however, has recently learned that the reverse is true. Nevertheless, many efforts have been made in the state legislature to amend or “water down” the Affordable Housing Law as suburban communities continue to claim that they are being overrun with development and cannot properly plan for growth because of the law.¹²⁴ On the other hand, planners and land use lawyers across the nation contend that without fundamental reform of the Planning and Zoning Enabling Act, tinkering with the Affordable Housing Law is a useless endeavor.¹²⁵ The state’s affordable housing problems are described as “a largely invisible crisis,” which some communities are apparently perfectly willing to ignore.¹²⁶

Meanwhile, the fast-growing suburbs west of Boston are seeking alternatives to workforce housing, including developments with age restrictions in order to avoid paying for schools.¹²⁷ One state legislator described this tactic as “vasectomy zoning.”¹²⁸ The governor, however, wants more housing to be built and, specifically, “targeted in urban areas that are already ‘infrastructure rich,’ meaning near transit or commuter rail.”¹²⁹

121. *See id.* at 288-92 (emphasis added). The report is based on data collected over a fifteen year period by its author, Professor Jerry Anthony, Assistant Professor in the Graduate program in Urban and Regional Planning at the University of Iowa. *See id.* at 282. *See also* James Upchurch, *Setting Maryland’s Houses in Order*, WASH. POST, Oct. 12, 2003, at B8 (“Until we fix our growth-management policies, the greatest burden for fighting sprawl will fall on the poorest.”).

122. *See* Anthony, *supra* note 119, at 292.

123. *See* Anthony Flint, *Real Estate Roulette Why the State’s Red Hot Housing Market Could End Up Hurting the Economy, Harming the Environment, and Landing the Suburbs in Court*, BOSTON GLOBE, Mar. 9, 2003, (Magazine), at 10.

124. *See id.*

125. *Cap on Living Area Not Violation of Substantive Due Process; Dimensional Regulations*, 31 LAND USE L. REP. 59, 59 (2003).

126. *See* Flint, *supra* note 123.

127. *See* Laura Mansnerus, *Great Haven for Families, But Don’t Bring Children*, N.Y. TIMES, Aug. 13, 2003, at A1.

128. *See id.*

129. *See* Flint, *supra* note 123.

D. New Jersey

New Jersey Governor James McGreevey has embarked upon a program that threatens to severely curtail residential development throughout the state.¹³⁰ This is ironic because the Supreme Court of New Jersey, more than any other state court, has repeatedly sought to address the problem of exclusionary zoning policies against workforce and family housing over the past three decades.¹³¹ It has done this in a series of decisions under the famous "*Mount Laurel*" rubric.¹³²

While the governor seeks to limit residential development, a study by planning advocacy group, New Jersey Future, indicates that affordable housing is not occurring in towns where jobs are emerging.¹³³ More than fifty percent of shelter within reach of low-income households is concentrated in just a few communities statewide, including Camden, Atlantic City and Newark.¹³⁴ Conversely, other major job centers, such as Cherry Hill and Paramus, offer very few affordable housing options for low-income workers.¹³⁵ The study finds that forty-six towns that added two thousand or more private sector jobs during the 1990s accounted for more than twenty percent of the state's employment market, but only eight percent of its low-cost homes.¹³⁶ Five of these towns had no affordable housing whatsoever, and twenty of them paid other towns to assume their affordable housing obligations.¹³⁷

Meanwhile, sprawl zoning is present in New Jersey. Many towns "[i]n the development corridors in central and northwest New Jersey . . . have adopted . . . lot sizes of 5 or 10 acres."¹³⁸ One casualty of this "do-your-own-thing" approach is rural Lopatcong Township, a New Jersey town that faces a large school bill due to the hundreds of families that have moved there in recent years, nearly doubling the size of its elementary school.¹³⁹ In response, the township passed a new ordinance limiting new multi-family dwellings to two bedrooms.¹⁴⁰ The Town of Ventnor, in Ocean County, is offering owners of apartment buildings \$22,000 for each year-round apartment that is converted to

130. *McGreevey Convenes "Smart Growth" Summit* (Cap. Pub. Affairs, Inc., Trenton, N.J.), N.J. Cap. Rep., Oct. 23, 2002, available at <http://www.cpanj.com/capitalreportpages/mcgreeveywatch/october2002/MCGREEVEY%20CONVENES%20SMART%20GROWTH%20SUMMIT.htm>.

131. See Geoff Mulvihill, *Low-Cost Housing Not Following Jobs in N.J., Study Says*, THE REC. (Bergen County, N.J.), July 16, 2003, at L5.

132. See *infra* Part VIII.C.2.i.a.

133. See Mulvihill, *supra* note 131.

134. See *id.*

135. See *id.*

136. See *id.*

137. See *id.*

138. See Mansnerus, *supra* note 127.

139. See *id.*

140. See *id.*

a seasonal rental,¹⁴¹ and its mayor notes that if the result is two less high school students for the next four years, the town will save \$100,000.¹⁴²

E. Virginia

In Falls Church, Virginia—a Washington, D.C. suburb—the developer of an eighty-unit condominium has agreed to pay \$15,000 annually for every child in excess of eight living in its building, and to limit the number of three bedroom units to twelve.¹⁴³ It is questionable whether such a policy will comport with the FHA.¹⁴⁴ The mayor explains that “we have an exploding school population, and we are trying to come to grips with the cost of building a new school.”¹⁴⁵ Also, “[t]he city would like to share in [the developer’s] profit.”¹⁴⁶

In Fairfax County, Virginia, another D.C. suburb, developers must pay an impact fee of \$7,500 for each child expected to occupy the development.¹⁴⁷ Fairfax County, although ranked as the least sprawling county in the D.C. suburbs,¹⁴⁸ still has large areas affected by sprawl. In a six square mile area of Occoquan, five-acre lots predominate.¹⁴⁹ In neighboring Loudoun County, two-thirds of the county’s land area has been limited to one house per ten to twenty acres.¹⁵⁰ Fiscal reasons have figured in these policies, as Loudoun County planners have determined that a single-family house worth less than \$439,000 will not pay its own way.¹⁵¹

The combination of sprawl zoning, insufficient planned residential densities near employment centers to support workforce housing, and inadequate roads and public transportation networks in northern Virginia tend to confirm the predictions of the GMU Analysis and are of concern to public and private sector leaders.¹⁵² The Tysons Corner area of Fairfax County is emerging as a textbook example of the problem. Tysons Corner is home to the nation’s tenth largest shopping

141. *Id.*

142. *See id.*

143. *See* Peter Whoriskey, *No Kids? That’s No Problem; Falls Church’s Deal with Builder Highlights Area School Crowding*, WASH. POST, May 25, 2003, at A1.

144. *See Slants and Trends*, 31 LAND USE REP. 89, 89 (2003).

145. *See* Whoriskey, *supra* note 143.

146. *Id.*

147. *Id.*

148. *See* Stein, *supra* note 67.

149. *See* Whoriskey, *supra* note 20.

150. *See id.*

151. *Id.* The political winds, however, may be shifting in Loudoun County. *See* Michael Land & Gloria Glods, *Loudoun GOP Eases Growth Restraints*, WASH. POST, Jan. 6, 2004, at A1. The U.S. Census Bureau reports that Loudoun County has become the fastest growing county in the nation. *See* D’Vera Cohn and Michael Laris, *Loudoun Leads Nation in Growth*, WASH. POST, Apr. 9, 2004, at A8. *See also* Miller, *supra* note 32.

152. *See generally* Neil Irwin, *Change Around the Corner; Steep Rents, Traffic Threatens Tysons Status as Region’s Commercial Center*, WASH. POST, Dec. 22, 2003, at E1.

mall and more *Fortune 500* company headquarters than anywhere else in the Metropolitan area.¹⁵³ Serious questions, however, are being raised about the continued economic viability and livability of Tysons Corner, due in no small part to its 1960s-style suburban design.¹⁵⁴ Tysons' status as a commercial hub is in jeopardy "because businesses are balking at traffic congestion and high rents."¹⁵⁵ Approximately 100,000 people work in Tysons, but it has "only 5,700 homes and no rail transportation, resulting in hellacious traffic jams."¹⁵⁶ More than five million square feet of office space are vacant, as the owners and developers seek to make Tysons more urban by replacing the current crop of fifteen-story buildings with thirty-story structures.¹⁵⁷ Their plans are supported by the Coalition for Smart Growth.¹⁵⁸ The resistance to workforce housing in Maryland, California, Florida, Massachusetts, New Jersey and Virginia is typical of that being encountered in many states, and reflects a growing problem nationwide.

VIII. CHALLENGING EXCLUSIONARY ZONING REGULATIONS AND POLICIES IN THE COURTS

A. *Preliminary Considerations*

In examining possible judicial challenges to exclusionary zoning in Maryland, other responses, such as seeking relief in the state legislature or otherwise using the political process to achieve reform, should also be considered. This alternative is not discussed at length here because it is not within the scope of this inquiry. Based on prior experience, however, one could easily conclude that this is not a viable alternative for many reasons, not the least of which is the failure of the political process to adequately address, much less resolve, the problem over the last twenty-five years. A significant reason for this failure is the lack of political will. A quarter-century ago, speaking of the "fundamental values" inherent in the right to be free of "law-imposed discrimination based upon income," the ABA Advisory Commission on Housing and Urban Growth (the "ABA Advisory Commission" or the "Commission") reported:

History indicates the unlikelihood that these values will be satisfactorily vindicated in the absence of judicial intervention. State legislatures have shown little willingness to fashion political structures that permit effective representation of the interests of nonresident regional population in land-use planning and regulatory decisions having to do with

153. *See id.*

154. *See id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

housing. Rather, power has been vested, and remains, at the local level, and those adversely affected by parochial exclusionary decisions have little if any voice in their formulation and few effective political means to overturn them.¹⁵⁹

Moreover, the land use planning and zoning processes and the post-zoning development review process in Maryland are so open-ended as to make it virtually impossible to effect reform, or to apply “smart growth principles” in a meaningful way. The reality is that citizens opposed to sprawl are often also opposed to density. As previously noted, they are politically powerful, and can readily “game” the system in many ways to effect delay and otherwise undermine the process by which development applications are reviewed. This is not surprising in light of a recent poll paid for by the National Association of Home Builders, which found that approximately seventy percent of citizens nationwide prefer to live in a single-family dwelling on a half-acre lot in the suburbs (the “American dream”), rather than live in a more compact residence in compact urban surroundings.¹⁶⁰ All of this suggests that it is extremely unlikely that reforms can be achieved through the political process.

1. Evaluating a Local Government’s Receptivity to Workforce Housing

Before resorting to litigation, it is prudent to review the state planning and zoning enabling act as well as the local government’s plans, regulations, and policies to determine whether it is open to accommodating workforce housing. The following potential “danger signals” warrant special examination:

(1) **The State Planning and Zoning Enabling Act** – Does it contain a statement of purpose or a “vision statement” strongly asserting the need for housing in general, and affordable housing in particular?¹⁶¹

(2) **The Comprehensive Plan** – Does it include a housing element and an affordable housing element?¹⁶²

159. A.B.A., ADVISORY COMM’N ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER THE LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW, 136-37 (Richard P. Fishman ed. 1978) (citations omitted) [hereinafter HOUSING FOR ALL UNDER THE LAW].

160. See NAT’L ASS’N OF HOME BUILDERS, SMART GROWTH, SMART CHOICES, *Consumer Choices Shape Communities* 6 (2002), available at http://www.nahb.org/publication_details.aspx?publicationID=15 (last visited April 14, 2004).

161. For example, the “Visions” statement found at the outset of Maryland’s principal planning and zoning enabling act makes no reference whatsoever to housing or to affordable housing. See MD. ANN. CODE art. 66B, § 1.01 (2003).

162. Maryland’s principal planning and zoning enabling act, Article 66B, Section 3.05—entitled “The Plan”—does not include housing as a mandated element of a local government’s comprehensive plan; it simply authorizes such an element to be included at the discretion of the local government. *Id.* § 3.05.

(3) **Capital Improvement Program/Budget** – Is funding provided to *timely* implement the comprehensive plan recommendations regarding roads, schools and other infrastructure needed to support planned growth, including residential development?¹⁶³

(4) **Zoning Regulations** – Do the local zoning regulations and zoning map allow residential uses at sufficiently high densities in planned growth areas to support workforce housing—apartments, townhouses, and single-family dwellings on small lots?

- To promote efficient use of land, are “*minimum densities*” required in, *e.g.*, central business districts, areas adjacent to public transportation hubs, and subway stations; or
- Is the zoning map dominated by large lot “sprawl” zoning?

(5) **Growth Management Program** – Do the growth management plans and regulations restrict residential development while imposing few, if any restrictions upon non-residential development (*i.e.*, office, retail and industrial)?

(6) **Post-Zoning Development Review Process** – Do regulations and procedures pertaining to subdivision, site plan and related post-zoning reviews implement the comprehensive plan by prioritizing the processing of housing and affordable housing applications on sites located in planned high density growth areas?

(7) **Adequate Public Facilities Ordinances (APFO)**

- Does the APFO apply to *all* categories of development, or only to residential development?¹⁶⁴
- Does the APFO provide flexible criteria and/or waivers to facilitate development of workforce housing in planned high density growth areas?

(8) **Moratoria** – Is there a history of imposing development moratoria primarily upon residential development, while other use categories, such as office, retail and industrial, are not affected?

163. For example, to accommodate planned growth and relieve gridlock in the congested Washington, D.C. region, a “Proposed Outer Freeway,” located approximately four miles north of the existing Capital Beltway, with a bridge crossing into Virginia, was shown on the “Master Plan for Potomac-Traville and Vicinity,” *adopted* by the Maryland-National Capital Park and Planning Commission (M-NCPPC) on February 16, 1966, and *approved* by the Montgomery County Council on February 7, 1967 (copy on file at M-NCPPC and with the author). The Outer Freeway has yet to be funded or built.

164. Two widely heralded growth management cases exemplify this problem. *See, e.g.*, *Golden v. Planning Bd. of the Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972) (noting that the timed development control ordinance applied only to residential development); *Constr. Indus. Ass’n of Sonoma County v. Petaluma*, 522 F.2d 897 (9th Cir. 1975) (noting that growth cap ordinance applied only to residential development).

(9) **Development Taxes/Impact Fees** – Are these taxes and fees imposed disproportionately upon new residential development while existing residential and non-residential uses get a “free ride”?¹⁶⁵

(10) **Buildable Land Inventories** – Is the local government required to maintain an inventory of buildable residential land and establish a land market monitoring system to periodically evaluate the supply and availability of buildable land?¹⁶⁶

The answers to these questions will obviously reveal much about a local government’s willingness to provide meaningful opportunities for workforce housing.

2. Determining the Nature of the Challenge

In considering the litigation alternative, it is first necessary to determine whether a challenge should be mounted in federal court, state court, or possibly both. Then one must consider whether to file a facial challenge to a local government’s zoning regulations, or alternatively, to apply for approval of a site-specific housing development, obtain a “final” decision, and if that decision is a denial, initiate litigation by way of an appeal or a declaratory judgment action. This is known as an “as applied” suit.

A facial challenge would likely be decided more quickly, but the risk of an unsuccessful result is greater because such actions are less favored and the burden of proof is very high. Judges prefer to review a final decision indicating how the regulation has been *applied* to a specific property. On the other hand, as applied challenges can be time consuming and, if brought in a Maryland court, could involve the challenger in an on the record appeal. Often in Maryland, record appeals must first be filed with an administrative agency, such as a county board of appeals, and this administrative remedy must be ex-

165. New development is often responsible for only a small portion (often well under twenty percent) of the need for new schools, roads and infrastructure. *See, e.g.*, the 1994 Report to the Montgomery County, Maryland County Council of the Working Group On Infrastructure Financing appointed by the Montgomery County Council, available in the Council Office Building, Information Office, Rockville, Maryland. The report states that new development should contribute approximately fourteen percent of \$90 million to \$100 million to be raised annually to cover budget shortfalls for new road construction. *Id.* The remaining eighty-six percent was to be divided evenly between automobile users and general taxpayers via a statewide tax on automobiles and a transportation utility tax. *Id.* *See* John J. Delaney, *Roads And The Return Of The Three Legged Stool*, THE GAZETTE (Montgomery County, Md.), Oct. 18, 2002, at A11.

166. Maintaining a buildable lot inventory and a land market monitoring system are strongly recommended by the American Planning Association (APA). *See* AM. PLANNING ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK, § 7-204.1 (Stuart Meck, ed., 2002).

hausted before one may proceed to court.¹⁶⁷ In record appeals, as opposed to declaratory judgment suits, the court does not conduct a *de novo* trial or hear testimony, but merely reviews the record to determine whether the agency's decision was in accordance with applicable law and reasonable, whether there was substantial evidence to support it.¹⁶⁸ Deference is accorded to the agency's decision on the evidence, especially if it is a legislative one. Declaratory judgment actions can proceed directly to court, where the judge conducts a *de novo* hearing, is the trier of fact, and also determines issues of law.¹⁶⁹ We will first examine the federal courts.

B. The Federal Courts

As noted in the Introduction, federal courts have generally not afforded relief to challengers claiming that a local government's zoning laws exclude persons based upon their income in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In a number of important exclusionary zoning cases, the Supreme Court has either denied standing to the plaintiffs or, when considering the merits, has required proof of a governmental *intent* to make housing unavailable on racial grounds.¹⁷⁰ This imposes a virtually insurmountable burden of proof upon plaintiffs.¹⁷¹ As noted previously, the Court has determined that access to affordable housing is not among the "fundamental" rights protected by the Constitution.¹⁷² To date, no Fourteenth Amendment attack on an alleged broad-based exclusionary zoning scheme has been upheld in the high court.

Conversely, the Supreme Court, and lower federal courts, have favorably considered exclusionary suits filed under the FHA.¹⁷³ In these cases, an *effect*, rather than an *intent*, test is employed to determine if

167. *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 127, 829 A.2d 271, 276 (2003) (citing *McCullough v. Wittner*, 314 Md. 602, 614, 552 A.2d 881, 886 (1989)).

168. See *infra* Part IX.C & D.3.

169. See *infra* discussion Part IX.D.2, 3.

170. See *infra* Part VIII.B.1, 2.

171. See *infra* notes 219-221 and accompanying text.

172. See *supra* note 4 and accompanying text.

173. As described by Professors Daniel Mandelker and John Payne:

The Fair Housing Act, 42 U.S.C. §§ 3601-3617, generally forbids racial discrimination in housing. 42 U.S.C. § 3604(a) provides in part that "it shall be unlawful . . . [t]o make unavailable or deny . . . a dwelling to any person because of race, color, religion, or national origin." Although the statute does not explicitly mention zoning, the courts have held that discrimination in zoning ordinances makes housing "unavailable" under the statute. Much of the exclusionary zoning litigation in the federal courts has been based on allegations that local land use controls, *as applied*, violate the Fair Housing Act.

D. MANDELKER & J. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT; CASES AND MATERIALS* 404 (5th ed. 2001) (emphasis added).

there has been a disproportionate impact, for example, on families with children or persons of a particular race.¹⁷⁴ If so, a *prima facie* case of disproportionate impact is made and the burden shifts to the defendant government to justify its actions.¹⁷⁵ To date, no case has involved alleged violations of the FHA for making housing unavailable to persons based solely upon their income or economic status. The Supreme Court has also upheld a site-specific challenge, based on Fourteenth Amendment equal protection grounds, to a city's denial of a permit for a group home for mentally retarded persons.¹⁷⁶

A suit in federal court against a Maryland county, alleging federal due process and equal protection violations (because local zoning regulations improperly exclude citizens of modest economic means from accessing affordable housing in that county) would be problematic due to standing hurdles and case precedent. On the other hand, a site specific as applied suit under the FHA challenging the denial of a permit for a specific project could succeed if the plaintiff, in addition to being of modest means, was also a member of one of the classes of citizens protected by the FHA.¹⁷⁷

1. Standing in Federal Court

The question of standing has been a major problem for minorities and civil rights groups when attacking exclusionary land use practices in federal courts. Two legal foundations exist for the doctrine of standing in federal court. Article III of the U.S. Constitution, authorizes the federal judiciary to decide "only cases or controversies."¹⁷⁸ Thus, there must be an actual 'dispute' between two parties and the interest of the plaintiff will be affected by the judgment of the court:

When a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.¹⁷⁹

The Supreme Court's concept of its proper role within the framework of the Constitution has narrowed over the years:

174. *See* Huntington Branch, NAACP v. Huntington, 884 F.2d 926, 934 (2d Cir. 1988).

175. *Id.* at 936.

176. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

177. *Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 738 (1995) (holding that the city's ordinance which defined "family" so as to preclude group homes for recovering alcoholics and drug addicts in residential zones violated the FHA).

178. U.S. CONST. art. III, § 2, cl. 1.

179. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

- A party may assert rights under a statutory or constitutional provision only if the party lies within the “zone of interest” intended to be protected by said provision;¹⁸⁰ and
- Standing is denied to a party asserting “a generalized grievance shared in substantially equal measure by all or a large class of citizens.”¹⁸¹

i. The Warth Case

Due process and equal protection challenges under the Fourteenth Amendment are difficult to prove on their merits. Before reaching the merits, however, a litigant must have standing. The Supreme Court, in *Warth v. Seldin*, adopted extremely strict and controversial standing rules for exclusionary zoning cases.¹⁸² In *Warth*, various plaintiffs attacked a system of land use ordinances and plans for the Town of Penfield, near Rochester, New York, under §§ 1981-1983 of the Civil Rights Act of 1871.¹⁸³ Their claim was that “the town’s zoning ordinance, by its terms . . . effectively excluded persons of low and moderate income from living in the town.”¹⁸⁴

An array of plaintiffs were involved including: a local housing advocacy group representing residents and non-residents of the town; another association representing non-profit housing sponsors; individual taxpayers from the nearby City of Rochester (who claimed that as a result of the town’s policies, the city was required to build more low-income housing, thereby increasing their tax burdens); low and moderate-income residents from the Rochester area who were also members of minority racial or ethnic groups (who claimed that they had been unsuccessful in locating adequate affordable housing in the community); and the Rochester Homebuilders Association.¹⁸⁵ All were denied standing.¹⁸⁶

The Supreme Court, affirming the lower courts’ dismissal of all parties for lack of standing, held that low-income residents of Rochester did not have standing because they did not, and apparently could not, allege facts showing that the ordinances caused them concrete harm that judicial relief would personally benefit them in a tangible way.¹⁸⁷ They could not show the requisite causal connection because they had no interest in land subject to regulations and could not identify third

180. *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970).

181. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

182. *Id.*

183. 42 U.S.C. §§ 1981-83 (2001). A § 1983 claim, coupled with a request for damages and/or attorney’s fees, could also be included in an FHA challenge. *See infra* Part IX.B.

184. *Warth*, 422 U.S. at 493.

185. *Id.* at 493-94.

186. *Id.* at 517-18.

187. *Id.* at 507-08.

parties who might build low-income housing.¹⁸⁸ The developers of low-income housing in the region lacked standing because the complaint referred to no specific project that was currently precluded by the ordinances.¹⁸⁹ Thus, the developers “failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.”¹⁹⁰ The association, representing residents of the defendant town, had its claim of injury (based on preclusion from living in an integrated community) rejected because it was insufficient under prudential considerations to allow them standing.¹⁹¹

In a vigorous dissent, Justice Brennan criticized the *Warth* majority, stating in part:

Because of this scheme, those interested in building homes for the excluded groups were faced with insurmountable difficulties, and those of the excluded groups seeking homes in the locality quickly learned that their attempts were futile. *Yet, the Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation.* In effect, the Court tells the low income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.¹⁹²

As noted, *Warth* has been heavily criticized.¹⁹³ According to the ABA Advisory Commission, the *Warth* decision indicates that the Supreme Court will decline to adjudicate challenges to municipal land use regulations unless specific housing developments are being proposed.¹⁹⁴ *Warth* has been described as a disaster for exclusionary zoning challengers. One commentator notes that “[t]he majority in *Warth* strongly suggests that standing to challenge exclusionary zoning restraints will be recognized when, and only when, there is a specific housing project that is being denied development permission.”¹⁹⁵ That prediction appears to have been borne out by the Supreme Court’s decision in *City of Cleburne v. Cleburne Living Center*.¹⁹⁶ *Cleburne*

188. *Id.* at 505-07.

189. *Id.* at 516.

190. *Id.*

191. *Id.* at 512, 514.

192. *Id.* at 523 (Brennan, J., dissenting) (emphasis added).

193. See HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 79-84, 129-30, 136; Lawrence G. Sager, *Questions I Wish I Never Asked: The Berger Court in Exclusionary Zoning*, 11 SW. U. L. REV. 509, 517 (1979).

194. See HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 79.

195. See Sager, *supra* note 193, at 517.

196. 473 U.S. 432 (1985).

involved a denial of a special use permit to operate a group home for the mentally retarded.¹⁹⁷ The decision to deny the permit was held to have violated the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁸ The Court, however, has declined to rule that minimally decent housing opportunities are a fundamental interest worthy of Constitutional protection.¹⁹⁹

The ABA Advisory Commission concluded that the *Warth* Court "conceived too narrowly its role in land use litigation," and that while "state courts may be preferable forums for dealing with broad challenges to municipal land use regulations, it does not follow that the door to federal courts should be closed when federal constitutional or statutory rights are asserted."²⁰⁰ They further stated:

[We noted] with approval the recent critical findings of the Council for Public Interest law that:

A substantial number of important cases involving aggrieved parties prepared to litigate issues on the merits have been dismissed by the federal courts on technical grounds under new, shifting, and progressively more stringent procedural rulings. In consequence, many citizens, including minorities, the poor, and victims of official abuses, have been left without judicial remedies. As the courts have turned from the substance of justice to the niceties of pleading, citizens have found greater cause for dissatisfaction with the administration of justice.²⁰¹

The Commission's comments, made twenty-five years ago, are still relevant today. Except where denial of a specific development proposal on a specific site is at issue,²⁰² the Court will not entertain equal protection claims, and instead will relegate plaintiffs to the narrower channels of the FHA (where protected class status is not extended to persons who are denied access to affordable housing based upon their income or economic condition)²⁰³ or similar statutes, such as the Americans with Disabilities Act (ADA).²⁰⁴ Standing under the FHA

197. *Id.* at 435.

198. *Id.*

199. See *infra* Part VIII.B.2 (discussing *Belle Terre* and *Arlington Heights*).

200. HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 80.

201. *Id.* (citing COUNCIL FOR PUBLIC INTEREST, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 357 (1976)).

202. See, e.g., *Cleburne*, 473 U.S. 432 (holding that the denial of a special use permit for a group home for the mentally retarded violated the Equal Protection Clause).

203. See HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 81-83.

204. Americans with Disabilities Act, 42 U.S.C. § 12101 (2002). See JOHN D. DELANEY, S. ABRAMS & F. SCHNIDMAN, LAND USE PRACTICE AND FORMS: HANDLING THE LAND USE CASE, 22.3.1 (2d ed. 2003). "The Supreme Court has held that plaintiffs' filing suit 'under the ADA (and the Rehabilitation Act) are not entitled to punitive damages" *Id.* (citing *Barnes v. Gorman*, 536 U.S. 181 (2002)). Nevertheless, "they are meeting with success in en-

requires a showing of an injury in fact and the likelihood that court action can address the injury.²⁰⁵

2. Significant Decisions of the Supreme Court and Federal Courts in Exclusionary Zoning Cases

i. The *Village of Belle Terre* Case

The United States Supreme Court and federal district and appellate courts have not been overly receptive to exclusionary zoning challenges. One reason for this is that the Court does not consider the right to a house a fundamental right. It said as much in 1972 in *Lindsey v. Normet*,²⁰⁶ and repeated it two years later in the major Supreme Court decision *Village of Belle Terre v. Boraas*.²⁰⁷

Belle Terre was the Court's first review of a significant land use case since 1926, when it rejected a challenge to the validity of a local zoning ordinance in the landmark case of *Village of Euclid v. Ambler Realty Company*.²⁰⁸ In *Belle Terre*, the Court upheld two zoning ordinances that completely excluded apartments and boarding or lodging houses.²⁰⁹ Furthermore, the ordinances defined family to include unlimited numbers of persons living in a single household who are related by blood, adoption or marriage, while excluding more than two persons living together in a single household if they are unrelated.²¹⁰ The federal appellate court held that the ordinance was invalid based on equal protection grounds as an attempt to regulate lifestyle.²¹¹ The Supreme Court, however, reversed the appellate court, finding again "no fundamental right" to be involved, "such as voting, the right of association, the right of access to the courts," or, apparently, the right to a house.²¹²

Despite the obvious exclusionary effect of the ordinances, which Justice Marshall in his dissent characterized as an improper regulation of "lifestyle" and a violation of "fundamental" Constitutional interests

forcing the ADA in a growing number of cases." *Id.* For example, in *Bay Area Addiction Research and Treatment v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999), "the city's enactment of an 'emergency ordinance' prohibiting the operation of methadone clinics within 500 feet of residential areas" was found to be a failure to provide reasonable accommodation as required under Title II of the ADA and § 504 of the Rehabilitation Act. *Id.* "The Ninth Circuit has also held that sidewalk maintenance and accessibility . . . for people with disabilities fall within the scope of the ADA and the Rehabilitation Act." *Id.* (citing *Barden v. Sacramento*, 292 F.3d 1073 (9th Cir. 2002)).

205. See *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 100 (1979).

206. 405 U.S. 56, 74 (1972).

207. 416 U.S. 1, 7 (1974).

208. See 272 U.S. 365 (1926).

209. *Belle Terre*, 416 U.S. at 2 (1974).

210. *Id.*

211. See *Boraas v. Belle Terre*, 476 F.2d 806, 815-16 (2d Cir. 1973).

212. *Belle Terre*, 416 U.S. at 7.

including privacy and freedom of association,²¹³ the Court, speaking through Justice Douglas, deferentially noted:

The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

. . . . We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective."²¹⁴

In other words, the *Belle Terre* Court, in rejecting the plaintiffs' equal protection claims, viewed the case as merely involving social and economic legislation, not as presenting a civil liberties issue.

ii. The *Arlington Heights* Case

Similarly, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court faced another Fourteenth Amendment due process and equal protection challenge arising from the Village's disapproval of a proposed subsidized, racially integrated housing development.²¹⁵ The Court rejected the challenge, ruling that in order to prove a Fourteenth Amendment violation of equal protection, it must be demonstrated that the Village had an *intent* to discriminate on racial grounds.²¹⁶ In so ruling, the Court followed its decision a year earlier in *Washington v. Davis*, where it held that unintended racial consequences from official actions do not violate the Equal Protection Clause.²¹⁷ The *Arlington Heights* Court remanded the case for further consideration under the FHA, under which it is unlawful to make housing unavailable "because of race, color, religion, sex, familial status, or national origin [or handicap]."²¹⁸

For all practical purposes, an intent test, such as that in *Arlington Heights*, makes it virtually impossible to prove a violation of the Fourteenth Amendment because the local government can always cite a

213. *Id.* at 13 (Marshall, J., dissenting).

214. *Belle Terre*, 416 U.S. at 6, 8 (citations omitted).

215. 429 U.S. 252 (1977).

216. *Id.* at 265.

217. 426 U.S. 229, 244-46 (1976).

218. *Arlington Heights*, 429 U.S. at 271; see 42 U.S.C. § 3604 (2001); see also *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926 (2d Cir. 1988) (involving an FHA challenge, effect test; where the court applied a "disparate impact" or "disparate effect" test to determine whether a facially neutral practice under a zoning ordinance adversely impacted a specific group protected under the Act).

valid police power reason for its action. One commentator argues that there should be a "presumption that the decision is race dependent."²¹⁹

Respected commentators have interpreted *Arlington Heights* as an "implicit endorsement of economic exclusionary zoning."²²⁰ For example, Professor Daniel R. Mandelker has severely criticized the intent test and its impact upon litigants who challenge exclusionary zoning schemes:

*The Supreme Court's decision in Arlington Heights has foreclosed a finding of racially discriminatory intent in all but the most blatant cases. Unless a municipality has historically discriminated against zoning proposals for subsidized housing, or unless the municipality abruptly changes a zoning classification or otherwise acts affirmatively to frustrate the construction of a subsidized housing development, no opportunity for proving the existence of racially discriminatory intent appears present. Moreover, none of these events is likely to surface. Developers facing a hostile municipality are unlikely to challenge that municipality's zoning to any great extent, so that no "clear pattern" of discrimination is likely to emerge.*²²¹

3. The Referendum Cases

i. City of Eastlake v. Forest City Enterprises

Although not directly relevant to the principal inquiry in this paper, the manner in which the Supreme Court has responded to referenda attacking proposed housing projects for lower income citizens is both instructive and discouraging. The Court has been equally unsympathetic to the interests of builders, sponsors and erstwhile residents of these facilities. In *City of Eastlake v. Forest City Enterprises, Inc.*, a charter amendment authorizing a city-wide referendum on a proposed multi-family housing facility, which was pending review by the city, was hastily adopted.²²² Not surprisingly, the city rejected the project in the subsequent referendum.²²³ The charter amendment required the builder to pay for the referendum and to obtain a super-majority fifty-five percent vote in order to prevail.²²⁴ Nevertheless, the Court up-

219. See Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1037 (1979).

220. See DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 498 (3d ed. 1999).

221. Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217, 1239 (1997) (emphasis added).

222. 426 U.S. 668, 670 (1976).

223. *Id.* at 671.

224. See *Forest City Enters., Inc. v. Eastlake*, 324 N.E.2d 740, 743 (Ohio 1975).

held the referendum as a valid reservation of legislative power to the people.²²⁵ The Supreme Court of Ohio, which had rejected the charter amendment's obvious purpose to exclude low-income people as "crudely apparent," characterized the piecemeal rezoning process as legislative, and found the referendum to be an improper delegation of legislative authority to the people.²²⁶ In overruling the Ohio court, the Supreme Court also noted, without further explanation, that if the results of the referendum were unfair to the builder, it could bring a due process claim or apply for a variance.²²⁷ This decision has been heavily criticized.²²⁸

ii. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, the Supreme Court went even further by extending the right of referendum to *administrative as well as legislative decisions* of local governing bodies.²²⁹ A site plan application for an affordable housing project was approved by the city council through a city ordinance.²³⁰ A citizen group filed a petition for referendum pursuant to the City Charter, which was eventually passed, repealing the ordinance.²³¹ Buckeye contended that the Ohio Constitution does not authorize popular referendums on administrative matters.²³² The Supreme Court of Ohio, in an earlier state court proceeding, had agreed, ruling that the Ohio Constitution authorizes referendums only in relation to legislative acts, not administrative acts such as the site plan ordinance.²³³ By the time the matter was before the United States Supreme Court, Buckeye had been issued permits and had commenced construction.²³⁴ Buckeye had also initiated suit in federal court against the city, raising equal protection and due process claims as well as claims under the FHA, resulting from delays caused by the referendum.²³⁵

The Supreme Court, speaking through Justice O'Connor, held that the city's action in putting a site-plan ordinance to referendum did not violate equal protection because there was no evidence indicating that the city gave effect to any racial bias that may have motivated the citizens who sought the referendum.²³⁶ As to the referendum issue,

225. *See Eastlake*, 426 U.S. at 671-74 (1976).

226. *See id.* at 671-72, 689.

227. *See id.* at 677.

228. *See, e.g., HOUSING FOR ALL UNDER THE LAW*, *supra* note 159, at 274-76.

229. 538 U.S. 188, 198 (2003).

230. *Id.* at 191.

231. *Id.* at 191-92.

232. *Id.* at 198.

233. *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 697 N.E.2d 181, 184 (Ohio 1998).

234. *See Cuyahoga Falls*, 538 U.S. at 193.

235. *Id.* at 197-98.

236. *Id.* at 198.

the Court, citing *Eastlake*, held that subjecting the site-plan ordinance to the city's referendum process "regardless of whether that ordinance reflected an administrative or legislative decision" did not amount to *per se* arbitrary government conduct under the Due Process Clause.²³⁷ This was surprising to say the least. *No credence was given to the Supreme Court of Ohio's decision that the State Constitution's referendum provision did not apply to administrative acts.* Rather, the Court stated that by allowing the referendum process to proceed under its charter, the city "was advancing significant First Amendment interests."²³⁸ As previously noted, the use of initiatives and referenda to defeat affordable housing proposals is proliferating.²³⁹

C. Challenges to Exclusionary Zoning Under State Constitutions and Laws

1. Standing Requirements in State Courts

Although the Supreme Court's standing requirements in exclusionary zoning cases, as exemplified by *Warth*, are exceedingly strict, some state courts have taken a different view. A New York court had this to say:

Warth graphically illustrates that it is the policy of the United States Supreme Court to restrict access to the Federal judicial process under the case and controversy clause and the prudential limitation doctrine. The unmistakable current trend relative to standing in this State, however, is to depart from the harsh requirements of the past which limited access to the judicial forum of those seeking to redress the illegality of legislation and official action.²⁴⁰

In *Mount Laurel I*,²⁴¹ the Supreme Court of New Jersey liberally conferred standing to the plaintiff, NAACP, and associations representing builders and housing advocacy groups.²⁴²

2. Significant Decisions of State Courts

A small number of state courts, relying upon their state constitutions and laws, have favorably considered challenges to zoning laws that have had the effect of excluding citizens from having access to affordable housing because of their income or economic status. Most notable among these is New Jersey, where the state high court has addressed the issue of economic discrimination in housing in several

237. *Id.* at 199 (emphasis added).

238. *Id.* at 196.

239. See Perkins, *supra* note 117.

240. Suffolk Hous. Serv. v. Brookhaven, 397 N.Y.S.2d 302, 309 (N.Y. Sup. Ct. 1977), *modified*, 405 N.Y.S.2d 302 (N.Y. App. Div. 1978), *aff'd*, 70 N.Y.2d 122 (1987).

241. *Mt. Laurel I*, 336 A.2d 713 (N.J. 1975).

242. *Id.* at 717 n.3.

important decisions stretching over a quarter century.²⁴³ In one such case, a town enacted a zoning ordinance prohibiting more than four unrelated persons from sharing a single housing unit and cited *Belle Terre* in an attempt to justify it. The Supreme Court of New Jersey stated that while *Belle Terre* may have been dispositive of any federal questions, the decision it was making was based in part upon the *New Jersey Constitution*.²⁴⁴ The *Belle Terre* reasoning was rejected as “unpersuasive” and inconsistent with prior decisions of the Supreme Court of New Jersey.²⁴⁵

Pennsylvania and New Hampshire courts have also weighed in prominently to invalidate exclusionary land use policies under their state constitutions or zoning enabling acts. Thus, we will review decisions from New Jersey as well as Pennsylvania and New Hampshire.

i. New Jersey

a. *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*²⁴⁶

Whereas in *Belle Terre*, the Supreme Court confirmed its earlier holding in *Lindsey v. Normet*²⁴⁷ that the right to housing was not a “fundamental right,”²⁴⁸ it was regarded as a “most basic human need” in *Mount Laurel I*.²⁴⁹ Additionally, where *Arlington Heights* has been characterized as at least an “implicit endorsement of economic exclusionary zoning,”²⁵⁰ *Mount Laurel I* was a ringing refutation of this concept and invalidation of an entire system of land use regulation based upon economic class distinctions. Shortly after *Mount Laurel I* was decided, the Supreme Court of New Jersey undertook what the United States Supreme Court “eschewed” in *Warth*, namely a challenge “on exclusionary grounds, against the entire system of land use ordinances, plans, and policies of a jurisdiction.”²⁵¹ “[N]ot only was [the Supreme Court of New Jersey] willing to address income-related barriers, but it also refused to limit the judicial role to one of testing the validity of a particular regulation applied to a particular proposed development.”²⁵²

243. See, e.g., *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983); *State v. Baker*, 405 A.2d 368 (N.J. 1979); *Mt. Laurel I*, 336 A.2d 713; *Vickers v. Township Comm. of Gloucester*, 181 A.2d 129 (N.J. 1962), cert. denied and appeal dismissed, 371 U.S. 233 (1963).

244. See *Baker*, 405 A.2d at 373-74.

245. *Id.* at 374.

246. 336 A.2d 713 (N.J. 1975).

247. 405 U.S. 56 (1972).

248. *Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974).

249. 336 A.2d at 727.

250. DAVID L. CALLIES ET AL., *supra* note 220, at 498 n.1.

251. HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 136 (emphasis added).

252. *Id.* (emphasis added).

The Supreme Court of New Jersey based its *Mount Laurel I* holding on the substantive due process and equal protection provisions of the New Jersey—not the United States—Constitution.²⁵³ This was no accident; the Supreme Court had decided *Belle Terre* only a year before, and the Supreme Court of New Jersey in *Mount Laurel I* obviously recognized the importance of drawing a distinction on equal protection grounds between the requirements of the Fourteenth Amendment to the U.S. Constitution and the more stringent standards of the New Jersey Constitution.

The Township of Mount Laurel is located in close proximity to Philadelphia and Camden, and was characterized by the court as a developing community.²⁵⁴ Approximately two-thirds of its land was vacant, and approximately seventy percent of its land was zoned for low density, single-family detached homes on large lots.²⁵⁵ Most of the remaining land was zoned for industrial uses, with a tiny amount zoned commercial.²⁵⁶ None of the township's land was zoned for multiple-family housing or for mobile homes.²⁵⁷ The township candidly acknowledged that its land use regulations were intended to be exclusionary, but it asserted that these practices were in the best fiscal interest of the municipality and its inhabitants.²⁵⁸ The court noted that "[t]here cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on property . . . and that the policy was carried out without regard for non-fiscal considerations with respect to people, either within or without its boundaries."²⁵⁹

The *Mount Laurel I* opinion was authored by Supreme Court of New Jersey Justice Frederick W. Hall, who only a decade before in a famous dissent in *Vickers v. Gloucester Township*²⁶⁰ strongly criticized the use of zoning ordinances to regulate the lifestyle and housing choice of citizens. The ordinance in *Vickers* totally excluded mobile homes from the township and was upheld by the Supreme Court of New Jersey.²⁶¹ In his dissent, Justice Hall stated:

In my opinion, legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. *Nor does it en-*

253. *Mt. Laurel I*, 336 A.2d at 728.

254. *See id.* at 718.

255. *See id.* at 718-19.

256. *See id.* at 719.

257. *Id.*

258. *Id.* at 718.

259. *Id.* at 723.

260. 181 A.2d 129 (N.J. 1962), *cert. denied and appeal dismissed*, 371 U.S. 233 (1963).

261. *Id.* at 136.

*compass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation, deeper considerations intrinsic in a free society gain the ascendancy and courts must not be hesitant to strike down purely selfish and undemocratic enactments.*²⁶²

In 1975, writing for a unanimous Supreme Court of New Jersey, Justice Hall in *Mount Laurel I* invalidated Mount Laurel's general zoning ordinance, which permitted only single-family detached dwellings on large lots, because it failed to provide a "realistic opportunity" for the development of low and moderate-income housing.²⁶³ As noted, the court relied upon the substantive due process and equal protection provisions of the "more demanding" New Jersey Constitution,²⁶⁴ which states that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."²⁶⁵ The late Supreme Court Justice William J. Brennan, favorably cited Justice Hall's opinion in *Mount Laurel I* for the proposition that state court decisions based upon state constitutions "not only cannot be overturned by, but indeed, are not even reviewable by, the United States Supreme Court."²⁶⁶

A presumptive obligation was placed upon each "developing municipality," *i.e.*, municipalities in the path of growth, to enact zoning ordinances that would permit sufficient residential development to comprise a "fair share" of their region's housing needs.²⁶⁷ In addition to emphasizing that equal protection under the New Jersey Constitu-

262. *Id.* at 147 (Hall, J., dissenting) (emphasis added). In so stating, Justice Hall was echoing the words of Federal District Judge Westenhaver eighty years ago in *Ambler Realty Co. v. Euclid*, 297 F. 307 (N.D. Ohio 1924), striking down the discriminatory zoning ordinance of Euclid, Ohio. *Id.* His decision was later reversed by the U.S. Supreme Court in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 397 (1926), a landmark case first upholding comprehensive zoning against claims that they violated Fourteenth Amendment due process and equal protection rights. Judge Westenhaver observed:

The purpose to be accomplished [by the zoning regulation] is really to regulate the mode of living of persons who may hereafter inhabit [the Village]. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life

Ambler Realty Co., 297 F. at 316.

263. *Mt. Laurel I*, 336 A.2d at 722, 730.

264. *Id.* at 725.

265. N.J. CONST. art. I, ¶ 1.

266. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

267. *Mt. Laurel I*, 336 A.2d at 732-33.

tion extended to exclusionary zoning based upon economic class, the court also focused upon the concept of regional “general welfare” as a basic state constitutional principle.²⁶⁸ Accordingly, a local government’s land use regulations must also take into account the state’s important interest in having the housing needs of all income groups promoted.²⁶⁹ In other words, “general welfare” includes the welfare of the housing market of which the local government is a part.

The legal issue before the court was phrased by Justice Hall as:

[W]hether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of any obligation to make possible a variety and choice of types of living accommodations.²⁷⁰

In answering this question, the court pulled no punches. It said that providing adequate housing for “all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation.”²⁷¹ To do this, “a developing municipality . . . must, by its land use regulations, make realistically possible an appropriate variety and choice of housing” for low and moderate-income citizens.²⁷² The township must affirmatively afford that opportunity, at least to the extent of its fair share of the regional need for such housing.²⁷³

The court pointed out that zoning, as an exercise of the police power, must address itself to the general welfare.²⁷⁴ As to “[w]hose general welfare must be served and not violated in the field of land use regulation,” the court stated:

[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a *delegate* of that power and is restricted in the same manner as is the state. *So, when regulation does have a substantial external impact, the welfare of the state’s citizens beyond*

268. *See id.* at 728.

269. *Id.*

270. *Id.* at 724.

271. *Id.* at 727.

272. *Id.* at 731-32.

273. *Id.* at 732-33.

274. *Id.* at 725.

*the borders of the particular municipality cannot be disregarded and must be recognized and served.*²⁷⁵

Thus:

[T]he presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.²⁷⁶

The term "presumptive" was described as having both procedural and substantive aspects.²⁷⁷ Procedurally, it means that "when a developing municipality through its land use regulations has not made realistically possible" an adequate choice of housing, "a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden . . . shifts to the municipality to establish a valid basis for its action or non-action."²⁷⁸

The court then examined the fiscally based reasons advanced by the township to sustain its land use regulations:

In other words, the position is that any municipality may zone extensively to seek and encourage the 'good' tax ratables of industry and commerce and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.²⁷⁹

Emphatically rejecting this argument, the court had "*no hesitancy in now saying, and [doing] so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose.*"²⁸⁰

While fully recognizing the heavy burden of local taxes and school costs on homeowners, the court stated that relief from such burdens would have to come from other branches of government and could not be achieved by restricting certain types of housing.²⁸¹ The court concluded:

By way of summary, what we have said comes down to this. As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity

275. *Id.* at 726 (emphasis added).

276. *Id.* at 728.

277. *Id.*

278. *Id.*

279. *Id.* at 730-31.

280. *Id.* at 731 (emphasis added).

281. *Id.*

for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multifamily housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs. Certainly when a municipali[t]y zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses. . . . In other words, such municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.²⁸²

After *Mount Laurel I*, many hurdles were encountered in implementing the court's decision, including lengthy debates over what is a "developing community," what is the applicable "region," what is meant by a "realistic opportunity" for affordable housing, and what is a "community's fair share." After many years of unproductive debate over these issues, the Supreme Court of New Jersey, in its second decision—*Mount Laurel II*²⁸³—adopted inclusionary zoning techniques such as incentive zoning and mandatory set-asides keyed to construction of lower income housing.²⁸⁴ The court determined that every community designated on the State Development Guide Plan (SDGP) as a growth area will have *Mount Laurel* obligations and be subject to court-imposed "builder's remedies" (mandated building permits, variances) if it fails to meet them.²⁸⁵ In response to the court's recommendation in *Mount Laurel II*, the New Jersey legislature enacted fair housing legislation establishing a new state agency, the Council on Affordable Housing (COAH), with "primary jurisdiction for the administration of housing obligations in accordance with sound regional planning considerations in this State."²⁸⁶

b. *Toll Brothers v. West Windsor Township*

In 2002, in *Toll Brothers v. Township of West Windsor*, the New Jersey high court again reaffirmed the *Mount Laurel* doctrine and the importance of the builder's remedy as an enforcement tool.²⁸⁷ The *Toll Brothers* court concluded that when a municipality fails to participate in available options provided by the state, including the state's affordable housing certification program, it "remains vulnerable to a *Mount*

282. *Id.* at 731-32.

283. *Mt. Laurel II*, 456 A.2d 390 (N.J. 1983).

284. *Id.* at 419.

285. *Id.* at 418, 420.

286. N.J. STAT. ANN. §§ 52:27D-302(b), 304(a) (West 2001).

287. 803 A.2d 53, 76-77 (N.J. 2002).

Laurel challenge."²⁸⁸ There is no indication that the Supreme Court of New Jersey's continuing oversight of its *Mount Laurel* doctrine will slacken in the immediate future.

As noted, courts in other states, including Pennsylvania, New York, California, Washington, and New Hampshire, have emulated to varying degrees the *Mount Laurel* concept that zoning ordinances should take into account regional housing needs.²⁸⁹ We next review examples from Pennsylvania and New Hampshire.

ii. *Pennsylvania*

The Supreme Court of Pennsylvania has long been on record in holding that when a plaintiff establishes *prima facie* proof of the unreasonableness of a zoning ordinance, only "some extraordinary justification" will vindicate the ordinance.²⁹⁰ In *National Land and Investment Co. v. Kohn*, a famous case that predated *Mount Laurel I* by a decade, the court upheld a challenge to a zoning amendment imposing a four-acre minimum lot size in response to unusually rapid urban expansion.²⁹¹ To justify its actions, the municipality cited sewage and transportation inadequacies, buttressed by a desire to preserve rural and historic values.²⁹² The court reacted by saying that zoning is a device for facing the future, not denying it. It further stated that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid."²⁹³

Five years later, in *Appeal of Kit-Mar Builders, Inc.*, the Supreme Court of Pennsylvania, again invalidated zoning involving two- and three-acre minimum lot sizes, stating:

The implication of our decision in *National Land* is that communities must deal with problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. *It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.* If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live

288. *Id.* at 92.

289. *See, e.g.*, *Associated Home Builders of the Greater Eastbay, Inc. v. Livermore*, 557 P.2d 473, 483 (Cal. 1976); *Britton v. Chester*, 595 A.2d 492, 496 (N.H. 1991); *Berenson v. New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975); *Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466, 468 (Pa. 1975); *Save a Valuable Env't v. Bothell*, 576 P.2d 401, 405 (Wash. 1978).

290. *Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765, 767 (Pa. 1970).

291. 215 A.2d 597, 613 (Pa. 1965).

292. *Id.* at 608-11.

293. *Id.* at 612.

there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.²⁹⁴

A 2002 decision of the Supreme Court of Pennsylvania, however, modified the “extraordinary justification” rule regarding large lot zoning in favor of a rule that upholds such zoning unless it is unreasonable, arbitrary and not substantially related to legitimate government interests.²⁹⁵

The Supreme Court of Pennsylvania has critically reviewed other forms of alleged exclusionary zoning regulations. In *Surrick v. Zoning Hearing Board of Upper Providence*, the Supreme Court of Pennsylvania considered a challenge to a zoning board’s designation of only 1.14% of the town’s acreage in a zone allowing for multi-family dwelling units.²⁹⁶ Noting the general principle that zoning ordinances must bear a substantial relationship to the health, safety, morals, or general welfare of the community, the court stated that in prior cases it had employed a substantive due process analysis and had concluded that “exclusionary or unduly restrictive zoning techniques do not have the requisite substantial relationship to the public welfare.”²⁹⁷ The court ultimately adopted a “fair-share” requirement similar to that established in *Mount Laurel*.²⁹⁸

In a later case, *Fernley v. Board of Supervisors of Schuylkill*, Pennsylvania’s highest court considered an ordinance that totally prohibited multi-family dwelling units.²⁹⁹ Its analysis began by noting that where there is a total prohibition of a legitimate use, the burden of

294. 268 A.2d 765, 768-69 (Pa. 1970) (emphasis added).

295. *See C & M Developers, Inc. v. Bedminster Zoning Hearing Bd.*, 820 A.2d 143, 154 (Pa. 2002). For further discussion, see *infra* note 301 and accompanying text. In *Appeal of Girsh*, 263 A.2d 395 (Pa. 1970), where a zoning ordinance disallowing multiple family dwellings was struck down, the court found:

Nether Providence Township may not permissibly choose to only take as many people as can live in single-family housing, in effect freezing the population at near present level. . . . Municipal services must be provided somewhere, and if Nether Providence is a logical place for development to take place, it should not be heard to say that it will not bear its rightful part of the burden.

Id. at 398-99.

296. 382 A.2d 105, 106-07 (Pa. 1977).

297. *Id.* at 108.

298. *Id.* *See also* *Martin v. Millcreek*, 413 A.2d 764, 765 (Pa. Commw. Ct. 1980). The court held:

[Z]oning requirements can . . . be invalid because exclusionary or because unduly restrictive; . . . a zoning limitation may be improper because its effect is to exclude people (such as low and moderate income groups) entirely from the municipality, or because the severity of its restrictive impact on the owner of the regulated property is unjustified for police power purposes

Id.

299. 502 A.2d 585, 587 (Pa. 1985).

proof is on the municipality "to establish that the prohibition promotes public health, safety, morals and general welfare."³⁰⁰ Finding that the township had failed to provide evidence of how it was accommodating its "fair share" of affordable housing and had likewise failed to establish that the total exclusion served a legitimate public purpose, the court held the zoning ordinance to be unconstitutional.³⁰¹

iii. *New Hampshire*

In *Britton v. Town of Chester*, "a group of low- and moderate-income people who [had] been unsuccessful in finding affordable, adequate housing in the town, and a builder who . . . [was] committed to the construction of such housing," brought an action against the town for alleged exclusionary zoning practices.³⁰² The zoning ordinance at issue allowed multi-family housing only as part of planned residential developments, which in turn were only allowed on approximately 1.73% of the land in the town.³⁰³ In its reasoning, the court stated that "[t]he town of Chester appears willing to lower [the drawbridge] only for people who can afford a single-family home on a two-acre lot or a duplex on a three-acre lot" and that "[o]thers are realistically prohibited from crossing."³⁰⁴ The court found that the enabling legislation allowed the town to adopt or amend a zoning ordinance "for the purpose of promoting the health, safety, or *the general welfare of the community*" and that the general welfare provision should be interpreted to include the welfare of the broader "community," of which the municipality is only a part.³⁰⁵ The court, therefore, concluded that because the Chester Zoning Ordinance did not provide for the lawful needs of the community to provide affordable housing, it "[flew] in the face" of the general welfare provision of the enabling

300. *Id.*

301. *Id.* at 588. See also *C & M Developers, Inc. v. Bedminster Zoning Hearing Bd.*, 820 A.2d 143, 157-58 (Pa. 2002) (invalidating a one-acre minimum lot size requirement, coupled with other restrictions, as promoting an "exclusionary purpose" and having no "substantial relationship to the Township's interest in preserving its agricultural lands and activities or any other general welfare interest of the Township").

302. 595 A.2d 492, 493 (N.H. 1991).

303. *Id.* at 494.

304. *Id.* at 495.

305. *Id.* In some respects, the provisions of the New Hampshire planning and zoning enabling act are similar to Maryland's parallel provisions in Article 66B of the Maryland Code. See MD. ANN. CODE art. 66B, §§ 1.00(h)1, 2, 3.05, 4.10(b), 4.03, 4.05(a), 10.01, 12.01 (Supp. 2002). For example, Section 10.01 expressly provides that "[t]o encourage the . . . provision of affordable housing and to facilitate orderly development and growth," a local government "is encouraged to enact [provisions] providing for or requiring" planned unit developments. *Id.* § 10.01(a). Further, the authority provided in section 10.01 is expressly "not intended to limit a local jurisdiction's authority to . . . [p]rovide affordable housing." *Id.* § 10.01(c)(2)(iii). *But see infra* note 355 and accompanying text.

legislation and, thus, was an invalid exercise of the power delegated to the town.³⁰⁶

IX. LITIGATION OPTIONS

Based upon the foregoing analysis, several options exist for a plaintiff who desires to mount a judicial challenge to the exclusionary zoning regulations of a Maryland local government. Those options include the following:

- File a Fourteenth Amendment challenge in federal court for violations of due process and equal protection under the U.S. Constitution, premised upon the local government's failure to make reasonable housing opportunities available to all categories of citizens, including those of low and moderate income;
- File suit in federal court for violation of the federal FHA, for failure to make housing available "because of race, color, religion, sex, familial status, national origin [or physical handicap]";³⁰⁷
- File an "as applied" challenge in a Maryland court for violation of equal protection and due process under the Maryland Constitution (including a "*Mount Laurel*" challenge), based upon the denial by the local government of a permit or other development approval for a specific affordable housing project; and
- File a broad-based "*Mount Laurel*" challenge in a Maryland court for violation of equal protection and due process rights under the Maryland Constitution, premised upon the local government's failure to make reasonable housing opportunities available to all categories of citizens, including those of low or moderate income.

Each of these options is discussed in turn.

A. *Federal Court Challenge Under the Equal Protection and Due Process Clauses of the Fourteenth Amendment*

For the reasons previously discussed in Part VIII.B, mounting a federal equal protection or due process challenge in federal court does not appear to be a viable option. The Supreme Court's reluctance to even entertain such suits,³⁰⁸ let alone uphold them on the merits,³⁰⁹ is well known. The requirement that the plaintiff must prove a governmental intent to discriminate on racial grounds to violate an equal protection claim virtually eliminates any chance of succeeding.³¹⁰

306. *Britton*, 595 A.2d at 496.

307. 42 U.S.C. § 3604 (2003). FHA suits may also be filed in state courts. *Id.* §§ 3610(f), 3613(a)(1)(A).

308. *See* *Warth v. Seldin*, 422 U.S. 490 (1975). *See also supra* Part VIII.B.1.i.

309. *See* *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Belle Terre v. Boraas*, 416 U.S. 1 (1974). *See also supra* Part VIII.B.2.i.

310. *See supra* Part VIII.B.2.ii.

"[C]lever men may easily conceal their motivations."³¹¹ Further, the Supreme Court has yet to recognize housing as a fundamental right.³¹²

Although not directly germane, the Court's apparent lack of concern for the equal protection or due process rights of prospective residents of proposed affordable housing facilities that are petitioned to referendum³¹³ does not inspire confidence that the time is ripe for another *Village of Belle Terre* type of challenge. Of the four options for legal challenge to exclusionary zoning, this one is the least attractive.

B. An FHA Challenge

The FHA offers the best chance of succeeding in a federal court. As previously noted, however, suits under the FHA are generally "as applied" in nature, in that they usually involve the denial of, or failure to take action on, a specific housing development proposal.³¹⁴ The FHA only applies to those individuals who are part of a protected class and does not cover those who are denied access to housing based solely upon their economic status.³¹⁵ FHA lawsuits, therefore, are not appropriate in all instances where individuals are denied housing due to their income.

To have standing in an FHA action, the plaintiff must show that she has sustained an "injury in fact"—such as being denied housing due to the plaintiff's race or religion—and that it is likely that the court can provide redress for the injury.³¹⁶ Thus, in a situation where a Maryland local government is alleged to have violated the FHA, eligible plaintiffs might include citizens belonging to an FHA protected class who were denied access to housing because of the local government's disapproval of a zoning, subdivision or building permit for an apartment building in which the plaintiff sought to live. A builder denied such approval might also have standing if he were a member of an FHA protected class.

Also, as noted above, in FHA actions, as distinguished from equal protection suits under the Fourteenth Amendment, an *effect* test—as opposed to an intent test—would be used to determine whether the

311. *Huntington Branch NAACP v. Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (quoting *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979).

312. *See Belle Terre*, 416 U.S. at 7; *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). *See also supra* Part VIII.B.2.i. .

313. *See supra* Part VIII.B.3 (discussing the "Referendum Cases": *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003) and *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976)).

314. *See HOUSING FOR ALL UNDER THE LAW*, *supra* note 159, at 143.

315. *See* 42 U.S.C. § 3604 (2003) (extending the protections of the FHA only to victims of discrimination based on race, color, religion, sex, handicap, familial status, or national origin).

316. *See* DAVID L. CALLIES ET AL., *supra* note 220, at 512.

local government's actions with regard to housing unavailability have had a disparate impact, for example, upon persons of a particular race or religion.³¹⁷ Thus, if qualified plaintiffs are located, then an FHA action may be effective. Again, however, such an action is unlikely to remedy the pervasive problem of exclusionary zoning based upon income or economic status. The FHA option, therefore, has limitations.

1. Section 1983 Challenge

An FHA challenge could also be accompanied by a claim under § 1983 of the Civil Rights Act of 1871 for violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and [federal] laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an action or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.³¹⁸

A local government is deemed to be a "person" within the meaning of § 1983 and, therefore, can be sued under that statute.³¹⁹ In exercising its planning and zoning functions pursuant to Article 66B or Article 25A of the Maryland Annotated Code, a local government is acting under color of state law and, thus, is clearly a "person" within the meaning of § 1983. Furthermore, local governments are not entitled to qualified good faith immunity in § 1983 actions, even when they act reasonably under the circumstances and without knowledge of any wrongdoing.³²⁰

Violation of the Equal Protection Clause of the Fourteenth Amendment may impose § 1983 liability on the governmental agency responsible.³²¹ The Equal Protection Clause is violated if the actions taken

317. See *supra* note 307 and accompanying text.

318. 42 U.S.C. § 1983 (2003).

319. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 658-59 (1978).

320. See *Owen v. Independence*, 445 U.S. 622, 638 (1980).

321. See, e.g., *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (stating that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and

by a local government are irrational and arbitrarily discriminatory.³²² Similarly, violations of one's substantive due process rights are actionable under § 1983. One seeking approval of a workforce-housing development arguably has a "right to be free of arbitrary or irrational zoning actions."³²³ Bias, bad faith, or improper motives on the part of the local government may violate substantive due process rights.³²⁴ State courts have concurrent jurisdiction with federal district courts to hear and decide § 1983 actions.³²⁵ The prevailing party in a § 1983 action may also recover Attorney's fees.³²⁶

C. *An "As Applied" Challenge to a Denial of a Site Specific Housing Application in a Maryland Court*

An "as applied" challenge might include both due process and equal protection claims arising under the Maryland Constitution, with or without a *Mount Laurel* claim of discrimination based upon income or economic status. As further discussed in Part IX.D.3, one filing an "as applied" challenge based upon the local government's denial of a development application for an affordable housing facility must be concerned about requirements in state or local law for "exhaustion of administrative remedies."³²⁷ This requirement means that an appeal of an agency action must first be heard, usually on the record, by an administrative-law board, such as the local board of appeals.³²⁸ Only then may the appellant proceed to court. With the exception of zoning amendment decisions of the local governing body, exhaustion of administrative remedies is often required in counties which derive their zoning enabling authority from Article 66B or Article 25A of the Maryland Annotated Code.³²⁹ Thus, for example, in most counties a

arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents") (citations omitted).

322. *See, e.g., Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)).

323. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (citations omitted).

324. *See Midnight Sessions, Ltd. v. Phila.*, 945 F.2d 667, 683 (3d Cir. 1991).

325. *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citations omitted). *See also Mears v. Oxford*, 762 F.2d 368, 373 (4th Cir. 1985) (stating that "a Maryland state court has jurisdiction to hear § 1983 claims") (citations omitted).

326. 42 U.S.C. § 1988(b) (2000). *See also N.C. Dep't of Transp. v. Crest St. Cmty. Council*, 479 U.S. 6, 12 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 174 (4th Cir. 1994).

327. *See discussion infra* Part IX.D.3.i.

328. *See MD. ANN. CODE art. 66B, § 4.07(d)* (2003); *see also Wharf at Handy's Point, Inc. v. Dep't of Natural Res.*, 92 Md. App. 659, 669, 610 A.2d 314, 318-19 (1992) (citation omitted).

329. *See MD. ANN. CODE art. 66B, § 4.07(d)* (2003); *MD. ANN. CODE art. 25A, § 5(U)* (2001). Montgomery and Prince George's Counties derive their planning and zoning power from Article 28 of the Maryland Code. *See MD.*

county planning commission's decision on a subdivision or site plan application for residential development is subject to appeal to a county board of appeals before one may proceed to court.

Once in court, the appeal is still on the record.³³⁰ The court is not an independent trier of fact in these cases, and will disturb the agency decision only if there is an error of law, or if the decision is not supported by substantial evidence.³³¹ The latter is a very deferential test, as Maryland courts have interpreted "substantial evidence" to mean merely "more than a scintilla."³³² This is especially true when a legislative decision is involved. Moreover, boards of appeal are not appropriate forums in which to litigate constitutional claims, since only courts are empowered to decide constitutional questions or questions of law. Finally, the time required to pursue an appeal on the record can be lengthy, requiring several years in some cases, especially if an appeal is pursued all the way to Maryland's highest court. For all of these reasons, filing an on the record administrative appeal to resolve a constitutional issue is not recommended, but may nevertheless be necessary.

On the other hand, as set forth in Part IX.D.3, the exhaustion requirement is not always an absolute bar to gaining immediate court access.³³³ If no administrative remedy exists or if the administrative remedy is inadequate, an "as applied" challenge can proceed directly to court³³⁴ through a declaratory judgment suit and/or an action for injunctive relief.

D. *A Mount Laurel Challenge in Maryland*

1. Comparing the Constitutions of Maryland and New Jersey

The relevant constitutional provisions of New Jersey and Maryland are similar, although not identical. Specifically, Article I, Paragraph 1 of the New Jersey Constitution provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursu-

ANN. CODE art. 28, § 3-101 (2003). Since their planning agency—the Maryland National Capital Park and Planning Commission (M-NCPPC)—is a bi-county regional agency, its decisions on, *e.g.*, applications for subdivision or site plan approval, are not subject to review by either county's board of appeals.

330. *See Bd. of County Comm'rs of Prince George's County v. Oak Hill Farms, Inc.*, 232 Md. 274, 277, 192 A.2d 761, 763 (1963).

331. *See id.*

332. *See id.* at 280, 192 A.2d at 764; *Anne Arundel County v. A-PAC Ltd.*, 67 Md. App. 122, 126, 506 A.2d 671, 673 (1986).

333. *See discussion infra* Part IX.D.3.ii.

334. As discussed in Part IX.D.3.i, a facial challenge to an exclusionary zoning scheme would not be subject to the exhaustion of remedies requirement.

ing and obtaining safety and happiness.”³³⁵ Article 24 of the Maryland Declaration of Rights provides “[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”³³⁶

While the Maryland Constitution, like the New Jersey Constitution, does not contain an express equal protection clause,³³⁷ the concept of equal protection has been held to be embodied in Article 24.³³⁸ Courts have also held that equal protection under Article 24 applies “in like manner and to the same extent as” the Equal Protection Clause of the Fourteenth Amendment.³³⁹ Further research is needed to determine whether and to what extent a Maryland court would be inclined to afford greater protection to a plaintiff excluded from affordable housing on economic grounds due to a county’s zoning regulations than was afforded by the United States Constitution as interpreted by the Supreme Court in *Belle Terre*.

2. Standing Requirements in Maryland

*i. Assumed Facts*³⁴⁰

A development company (the “Developer”) is interested in challenging the exclusionary zoning practices of a Maryland County (the “County”), which result in the exclusion of people of low and moderate income from the County due to the lack of affordable housing. The Developer may or may not join as plaintiffs with a builders’ association, an affordable housing advocacy association, and individual citizens who have been unable to move into the County due to these exclusionary practices. The challenge would not necessarily be based

335. N.J. CONST. art. I, ¶ 1.

336. MD. CONST. art. 24. As noted, the constitutions of several states—including California, Illinois, Massachusetts, Ohio, Pennsylvania and Wisconsin—use language nearly identical to that in the New Jersey Constitution in describing equal protection and due process rights. See *supra* note 16 and accompanying text.

337. Article I of the New Jersey Constitution is similar regarding this omission. See N.J. CONST. art. I.

338. See, e.g., *Frankel v. Bd. of Regents of Univ. of Md. Sys.*, 361 Md. 298, 312-13, 761 A.2d 324, 332 (2000); *Maryland v. Good Samaritan Hosp., Inc.*, 299 Md. 310, 327 n.7, 473 A.2d 892, 900 n.7 (1984) (citation omitted).

339. See e.g., *Murphy v. Edmonds*, 325 Md. 342, 354, 601 A.2d 102, 108 (1992) (citing *Att’y Gen. v. Waldron*, 289 Md. 683, 704-05, 426 A.2d 929, 941 (1981)). See also *Morrow v. Farrell*, 187 F. Supp. 2d 548, 556 (D. Md. 2002) (stating that Article 24 applies “in like manner” as the Fourteenth Amendment) (citation omitted).

340. Additional facts and specifics would need to be alleged in describing the actions or inactions of the County, the effect of such action or inaction upon the Developer, and how such action or inaction may result in furthering an exclusionary scheme.

on the denial of a particular application, but could also be founded upon a history or pattern of discriminatory actions taken by the County under its planning and zoning regulations.

ii. Questions Presented

(1) Does the Developer have standing to challenge the exclusionary zoning practices in the County? Would a builders' association or people who cannot afford housing in the County have standing?

(2) Could a declaratory judgment action be brought immediately to challenge the County's practices or must an actual development application first be filed and denied?

iii. Short Answers

(1) While a good argument can be made that the Developer and citizens directly affected by the County's practices have standing to challenge the County's practices, the standing of the builders' association and affordable housing associations might be problematic.

(2) It appears that a declaratory judgment action could be brought directly, without the need to file a specific application on which the County must act.

- It might be prudent, however, to also initiate an "as applied" challenge by a prospective builder/developer who has filed for and been denied a building permit or other development request for affordable housing, or by a prospective home purchaser who has been unable to find affordable housing in the County.

iv. Discussion

When Maryland courts consider whether a party has standing to challenge a particular ordinance or action, they generally look to whether a plaintiff has suffered special harm or injury, over and above the impact of the proposed use upon the public generally.³⁴¹ Such adverse effect must be specifically alleged by the plaintiff and supported by facts. For example, in *Citizens Committee of Anne Arundel County v. County Commissioners of Anne Arundel County*, the Court of Appeals of Maryland held that a group of taxpayers did not have standing to challenge the constitutionality of a statute where "they . . . failed to prove or show any special damage or loss which is peculiar to themselves as taxpayers or otherwise."³⁴²

341. See, e.g., *Sugarloaf Citizens' Assn. v. Dep't of Env't*, 344 Md. 271, 288, 686 A.2d 605, 614 (1996); *Bryniarski v. Montgomery County Bd. of Appeals*, 247 Md. 137, 144, 230 A.2d 289, 294 (1967). An applicant for a development permit that is denied would almost certainly have standing under Maryland's aggrievement standards.

342. 233 Md. 398, 400, 197 A.2d 108, 109 (1964).

Maryland courts, however, appear to be receptive to the argument that "peculiar effect" may include an adverse economic impact upon a specific group of people. In *Bruce v. Director, Department of Chesapeake Bay Affairs*,³⁴³ the Court of Appeals of Maryland considered the standing of fishermen to challenge statutes restricting the taking and catching of crabs and oysters in Maryland.³⁴⁴ When examining the issue of standing, the court recognized the general principle that "if a person is directly affected by a statute, there is no reason why he should not be permitted to obtain a judicial declaration that the statute is unconstitutional."³⁴⁵ The court held that the fishermen had standing because the restrictions in the statutes at issue had a severe adverse economic effect on the fishermen.³⁴⁶

It should be noted that federal courts in the Fourth Circuit also appear willing to consider anticipated adverse effects, as well as actual effects, when determining standing. For example, in *Kirkley v. Maryland*,³⁴⁷ a declaratory judgment action was brought asserting the invalidity of a state election statute; the plaintiffs were a candidate for office and a registered voter, respectively, who had planned to vote for that candidate.³⁴⁸ Although the defendants in this case did not directly raise the issue of standing, the district court noted that as to both plaintiffs, including the plaintiff who had merely expressed her intention to vote in a certain manner, there was "a logical nexus between the status asserted and the claim sought to be adjudicated."³⁴⁹

Based on the foregoing, it could be argued that the Developer has standing because it has suffered, and will continue to suffer, adverse economic effects. These effects are due to the exclusionary zoning practices of the County because the Developer cannot obtain development approvals needed to build moderately priced dwellings. The Developer might further support its standing argument by asserting that, while no specific applications have been denied by the County, it is the intent and commitment of the Developer to build such units in the County, and that based upon the County's past actions or non-actions, it is unlikely that permits authorizing such construction will be approved. Likewise, individual plaintiffs who cannot live in the County due to the lack of affordable housing could argue that they

343. 261 Md. 588, 276 A.2d 200 (1971).

344. *Id.* at 594, 276 A.2d at 205.

345. *Id.* at 595, 276 A.2d at 205 (citing *Davis v. State*, 183 Md. 385, 389, 37 A.2d 880, 883 (1944)).

346. *Id.* at 595, 276 A.2d at 206.

347. 381 F. Supp. 327 (D. Md. 1974).

348. *See id.* at 328.

349. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 102 (1968)). It should be noted, however, that the court further stated that the voter's stake in the case was her fundamental right to vote, because if Kirkley's candidacy were declared illegal after the election, she would be denied her vote. *Id.* at 329. The Supreme Court does not yet consider the right to housing to be a fundamental right. *See discussion supra* Part VIII.B.2.i.

have tried to find such housing therein and have been particularly affected by their exclusion from the County. The builders' association and housing advocacy groups, on the other hand, would be less likely to be granted standing in a Maryland court. Although standing was granted to such groups in *Mount Laurel I* and *II*, in similar cases in Maryland and other jurisdictions, general associations usually have been found to lack standing.³⁵⁰

Such arguments in favor of standing would be further strengthened by arguing that public policy favors a finding of standing in this case. Maryland courts have recognized that the requirements for standing may be somewhat relaxed where the action involves a matter of great public concern. Although choosing not to apply this principle in the case before it, the Maryland Court of Appeals in *Citizens Committee of Anne Arundel County*³⁵¹ recognized prior cases of the court stating that "in exceptional cases, where great principles or large public interests are involved, citizens or corporations may sue on behalf of themselves, and their fellow-citizens to arrest some projected violation of constitutional law or abuse of corporate authority."³⁵² This same principle was stated more forcefully in the later case of *City of Baltimore v. Concord Baptist Church*.³⁵³ *Concord Baptist Church* involved a challenge to a statute concerning the condemnation of churches, and the Court of Appeals of Maryland held that "where the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight."³⁵⁴

The need to provide housing opportunities for people of all incomes in developing areas of the state should be a matter of great public concern in Maryland. As noted above, article 66B, section 10.01 of the Annotated Code of Maryland expressly "encourages" local governments to "provide affordable housing" by way of "planned unit developments" and other mechanisms.³⁵⁵ Article 49B, section 19,

350. See, e.g., *Horace Mann League, Inc. v. Bd. of Pub. Works*, 242 Md. 645, 652, 220 A.2d 51, 54 (1966) (holding that the Horace Mann League lacked standing to sue on behalf of its individual members or the public as a whole); *Citizens Comm. of Anne Arundel County v. County Comm'rs of Anne Arundel County*, 233 Md. 398, 405, 197 A.2d 108, 112 (1964) (holding that the citizens committee was without standing to sue on behalf of its members).

351. 233 Md. 398, 197 A.2d 108 (1964).

352. *Id.* at 402, 197 A.2d at 110 (citing *Kelly Piet & Co. v. Baltimore*, 53 Md. 134, 139 (1880)) (correction omitted).

353. 257 Md. 132, 262 A.2d 755 (1970).

354. *Id.* at 138, 262 A.2d at 759. See also *Horace Mann League, Inc.*, 242 Md. at 653, 220 A.2d at 54 (involving the funding of private colleges and holding that where the issues presented are of great public interest and concern, "the necessary interest to sustain standing to institute a taxpayer's suit is 'broadly comprehensive' and may be 'slight'").

355. See *supra* note 305. Incredibly, however, Article 66B, Section 1.01, entitled "Visions," makes no reference to housing, much less to the need to provide "affordable" housing for the workforce. See *supra* note 161. Section 1.03,

albeit dealing with access to public accommodations, clearly reflects Maryland's emphasis on affordable housing. It states:

It is the policy of the State of Maryland to provide for fair housing throughout the State of Maryland, to all its citizens . . . and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons, in order that the peace, health, safety, prosperity and general welfare of all the inhabitants of the State may be protected and insured.³⁵⁶

A similar finding of great public concern was made in *Mount Laurel I*,³⁵⁷ where the Supreme Court of New Jersey noted "an extreme, long-time need in this state for decent low and moderate income housing, set forth in the numerous statutes providing for various agencies and methods at both state and local levels designed to aid in alleviation of the need."³⁵⁸ The court concluded that "[i]t is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of general welfare required in all local land use regulation."³⁵⁹

3. Requirements for a Declaratory Judgment Action

"The Maryland Declaratory Judgments Act . . . is remedial in nature and 'its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.'³⁶⁰ To this end, Maryland courts have repeatedly held that "[t]he Act shall be liberally construed and administered."³⁶¹ The courts have further noted that "[a] primary objective of the Act is to 'relieve litigants of the rule of the common law that no declaration of rights may be judicially adjudged unless a right has been violated.'³⁶²

dealing with Comprehensive Plans in Charter Counties, does not include housing among the "Required Elements" of the comprehensive plan. MD. ANN. CODE art. 66B, § 1.03 (2003). Similarly, Section 3.05, entitled "The Plan," does not include housing among the mandated elements of a plan, but merely authorizes inclusion of a housing element among discretionary elements that may be listed therein. *See supra* note 162.

356. MD. ANN. CODE art. 49B, § 19(a) (2003).

357. 336 A.2d 713 (N.J. 1975).

358. *Id.* at 727.

359. *Id.*

360. *County Comm'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 122 Md. App. 505, 516, 713 A.2d 351, 356 (1998) (citing MD. CODE ANN., CTS. & JUD. PROC. § 3-402 (2002)).

361. *Id.*

362. *Id.* at 517, 713 A.2d at 357 (quoting *Boyd's Civic Ass'n. v. Montgomery County Council*, 309 Md. 683, 691, 526 A.2d 598, 602 (1987)).

i. The Exhaustion of Administrative Remedies Issue

Regardless of the liberal application the Declaratory Judgments Act may afford, declaratory judgment actions may not lie where a party has not exhausted its administrative remedies or where the issue is not ripe for review. Pursuant to the Maryland Code, when a statute provides a special form of remedy for a specific type of case, that statutory remedy must be followed in lieu of a declaratory judgment action.³⁶³ Exhaustion is often required in land use cases. For example, Article 66B of the Maryland Code expressly grants to county boards of appeal the power to “[h]ear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of this article or of any ordinance adopted under this article.”³⁶⁴ Further, “[i]t is well established that [where] an appeal from the action of an administrative body is provided by statute, a remedy by way of mandamus, injunction or declaratory judgment will be denied.”³⁶⁵

However, the prohibition against awarding declaratory relief to parties who have alternative statutory administrative remedies “is applicable only where the alternative means of redress was intended to be exclusive.”³⁶⁶ The Maryland Court of Appeals explained the rationale behind the exhaustion doctrine in *Prince George’s County v. Blumberg*, where it stated:

The principal reasons for this exhaustion requirement with respect to administrative bodies are manifest—(i) the issues are largely within the expertise of the involved agency to hear the evidence and determine the propriety of the request; (ii) the courts would be undertaking functions the legislature thought could best be performed by an agency; and (iii) courts might be called upon to decide matters that would never arise if the prescribed administrative remedy was followed.³⁶⁷

Maryland courts have recognized that exhaustion is not an “absolute” bar to access to the courts. Limited exceptions exist that allow a party to pursue declaratory relief even without exhausting administrative remedies. These exceptions “include: (1) when the party attacks the statutory scheme as facially unconstitutional; (2) when there is no

363. See MD. CODE ANN., CTS. & JUD. PROC. § 3-409 (2002).

364. MD. ANN. CODE art. 66B, § 4.07(d)(1) (2002). See also *Wharf at Handy’s Point, Inc. v. Dep’t of Natural Res.*, 92 Md. App. 659, 669, 610 A.2d 314, 318-19 (1992).

365. *Bd. of County Comm’rs. v. Buch*, 190 Md. 394, 402, 58 A.2d 672, 676 (1948).

366. *Md.-Nat’l Capital Park & Planning Comm. v. Wash. Nat. Arena*, 282 Md. 588, 595, 386 A.2d 1216, 1223 (1978).

367. 288 Md. 275, 284, 418 A.2d 1155, 1160-61 (1980).

administrative remedy; or (3) when the administrative remedy provided by the statutory scheme is inadequate."³⁶⁸

Therefore, there are a number of approaches that may be taken in addressing the issue of exhaustion of remedies in this type of case. The first is, of course, that there is no statutory requirement, much less an exclusive one, requiring a person to file an application and have it denied before pursuing a declaratory judgment action, although such an exclusive statutory remedy may arguably exist in the County's code for appeals from denials of specific applications. Second, even if such a requirement arguably exists, it would have to be shown that it was intended to be an exclusive remedy. Finally, if it were found that such an exclusive remedy existed, the exceptions from the exhaustion doctrine could be argued, as the Developer's action here would be a facial challenge and the administrative remedy would be inadequate (in that the challenge itself is to the County's discriminatory practices and, therefore, challenges to such practices could not possibly be reviewed objectively by the County).

ii. *Ripeness*

With regard to the related issue of ripeness, Maryland courts have been liberal in their interpretation of what issues are ripe for review in declaratory judgment actions. In *Boyd's Civic Association v. Montgomery County Council*,³⁶⁹ the Court of Appeals of Maryland stated that "if a court is satisfied that the 'ripening seeds' of an actual controversy exist, the facts are not too contingent or speculative for declaratory relief."³⁷⁰ For example, in *Key Federal Savings & Loan Association v. Anne Arundel County*,³⁷¹ the Court of Special Appeals of Maryland held that declaratory relief was proper when a property owner brought an action against the county with respect to the county's *threatened* withholding of occupancy permits.³⁷² Likewise, in *Liss v. Goodman*,³⁷³ the Court of Appeals of Maryland considered ripe the question of whether the City Council had authority to reject proposed budgets submitted to it by the Board of Estimates even when the Board of Estimates had not yet submitted the annual budget and there was no certainty the City Council would want to reject it.³⁷⁴

368. See *Abington Ctr. Assocs. v. Baltimore County*, 115 Md. App. 580, 593, 694 A.2d 165, 171 (1997) (citations omitted).

369. 309 Md. 683, 526 A.2d 598 (1987).

370. *Id.* at 691, 526 A.2d at 602.

371. 54 Md. App. 633, 460 A.2d 86 (1983).

372. *Id.* at 642, 460 A.2d at 91-92 (emphasis added).

373. 224 Md. 173, 167 A.2d 123 (1960).

374. *Id.* at 180, 167 A.2d at 126-27.

4. Are Maryland Courts Up To the Task?

i. Applicable Factors for Successful Court Intervention

If a *Mount Laurel* strategy were to be attempted in Maryland, the issues encountered in implementing the Supreme Court of New Jersey's *Mount Laurel I* and subsequent *Mount Laurel* decisions must be taken into account, along with the capacity of a Maryland court to address them. Admittedly, there will be questions about the capacity of a Maryland court, or indeed any court, to effectively manage litigation of the magnitude of *Mount Laurel*. Several years before *Mount Laurel*, one scholar observed that the success of such a fundamental decision dealing with equal protection depends upon the presence of two of three factors ("Kurland Factors"):

- "that the constitutional standard is a simple one;
- that the courts have adequate control over the means of effectuating enforcement; and
- that the public acquiesces in the principle and its application."³⁷⁵

It must be acknowledged that problems were encountered in implementing *Mount Laurel I*. For nearly a decade thereafter, municipalities, home-builders, lawyers, courts, and many citizens became bogged down over such questions as:

- (i) What is a developing county?
- (ii) What is the relevant region, perhaps the county itself or the county plus neighboring counties?
- (iii) What is meant by "realistic opportunity?"
- (iv) What is "affordable" or "workforce" housing?
- (v) What is a community's reasonable fair share?

Resolution of these issues was not easy and there was a great deal of frustration which ultimately led to *Mount Laurel II*.³⁷⁶ Even to this day, for example, respected commentators have questioned the wisdom of imposing standards for determining what is a municipality's "regional fair share" of affordable housing opportunities.³⁷⁷

There is strong reason, however, to believe that the requisite two of the three Kurland Factors—i.e., the first two factors—could be satisfied if a Maryland court were to undertake and decide a *Mount Laurel* suit. To begin with, the basic entity of local governance in Maryland, unlike New Jersey, is the *county*. In Maryland, the planning and zon-

375. HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 137 (citing Philip B. Kurland, *Equal Education Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 592 (1968)) (bullets added).

376. *See supra* note 283 and accompanying text.

377. *See, e.g.*, Daniel R. Mandelker, *The Affordable Housing Element In Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555 (2003) (arguing that the assignment of numerical fair shares is not an acceptable basis for affordable housing policies in comprehensive plans, and that alternate strategies should be considered).

ing power is vested in only twenty-three counties, the City of Baltimore and a relatively small number of municipalities. In contrast, New Jersey spreads the planning and zoning among many small towns, townships and other municipalities, each of whose landmass is substantially less than the hundreds of square miles comprising the typical Maryland county. Thus, "regions" in Maryland should be more readily ascertainable, and consequently, determining a county's fair share of the region's affordable housing needs should not be as difficult.

One consideration abetting this calculus could be enactment of state legislation mandating the maintenance of buildable land inventories by local governments, as strongly recommended in APA's recently published *Growing Smart Legislative Guidebook*.³⁷⁸ Inventories of this nature would greatly assist the State of Maryland, its local governments and, if necessary, its courts in determining whether, for example, the supply of workforce housing in a given county or region is keeping pace with the growth of employment therein. Fair share housing goals could be based on standards or guidelines arising from these inventories and related analyses, and could be set forth either as empirical standards required to be achieved, or as recommended optimal ranges, which if not achieved over a period of time would warrant remedial actions by the local government on a voluntary basis, with mandates being deferred.

Moreover, while Maryland, unlike New Jersey, does not have a State Development Guide Plan (which was adopted in New Jersey after *Mount Laurel I*), it does have in place a "smart growth" program, reflected in a series of laws intended, among other things, to channel growth into designated "Priority Funding Areas" (PFAs).³⁷⁹ Thus, a regional approach to planning is already in place and being enhanced in Maryland.

ii. Applying the Kurland Factors to a Maryland Mount Laurel Case

The aforementioned circumstances argue well for a Maryland "*Mount Laurel*" court being able to achieve the first two of the three Kurland Factors, were it to rule in favor of the plaintiffs. As noted above, the first factor is that "the constitutional standard be a simple one."³⁸⁰ After a thorough analysis, the ABA Advisory Commission

378. AM. PLANNING ASS'N, 1 GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 7-94 to 95 (Stuart Meck ed., 2002). To date, the Maryland Association of Counties has not embraced legislative proposals that would require mandatory lot inventories in Maryland.

379. State funding of public infrastructure, including roads, is to be prioritized based upon whether a project is located in a designated PFA. See HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 137.

380. See *id.*

contemplated the definition of “region” and methodologies for determining “fair share,” both of which were considerably more difficult to discern in New Jersey than they would be in Maryland. The Commission, however, had no difficulty in concluding that *Mount Laurel I* satisfied “the first two” of the Kurland Factors.³⁸¹ As to the first factor, the Commission stated that: “The basic standard is that presumptively a municipality cannot foreclose the opportunity for low- and moderate-income housing, and in its regulations it must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need for such housing.”³⁸²

Although, as noted, the Commission found some definitions and criteria to be open to debate, it concluded that “the standard is amenable to quantification and thus is in some respects analogous to the simple one-man-one-vote standard of the reapportionment cases.”³⁸³ Nor, said the Commission, is a judicial standard that contemplates “a relatively even distribution of low - and moderate-income housing throughout a region . . . irrational.”³⁸⁴

With regard to the second of the Kurland Factors, that the court have adequate control over the means of effectuating enforcement,³⁸⁵ the Commission acknowledged that while considerable doubt had been expressed about the availability of effective remedies “to enforce the outcome of a *Mount Laurel*-type of suit,”³⁸⁶ it noted that the court in *Mount Laurel I* called upon the state legislature to enact some form of regional zoning.³⁸⁷ The Commission concluded that effective remedies could be fashioned by the courts and thus help facilitate “fundamental changes in metropolitan housing patterns.”³⁸⁸ Some of these remedies, including greater reliance upon builders’ remedies and variances, were incorporated in *Mount Laurel II*.³⁸⁹

As in New Jersey, a Maryland court could call upon state agencies and associations, such as the Maryland Department of Planning and the Maryland Association of Counties, to assist it in promulgating guidelines to answer questions such as those posed in *Mount Laurel*.³⁹⁰ Nor is there reason to believe that effective enforcement remedies

381. See HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 137-38.

382. *Id.* at 137.

383. *Id.* at 138.

384. *Id.*

385. *Id.* at 137.

386. *Id.*

387. *Id.* at 138. See N.J. STAT. ANN. § 52:27D-301 (2001) (acknowledging the regional planning mandate of the Supreme Court of New Jersey as expressed in *Mt. Laurel I* and *II*). The New Jersey legislature subsequently authorized the creation of the Council on Affordable Housing. See *Toll Bros. v. West Windsor Township*, 803 A.2d 53 (N.J. 2002).

388. HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 138-39.

389. See *Mt. Laurel II*, 456 A.2d at 452-60 (discussing remedies available in *Mount Laurel* litigation).

390. See *supra* Part VIII.C.2.i.a.

could not be fashioned by a Maryland court, since some of these "remedies" (i.e., regional local governance) are either in place or readily achievable in Maryland.

While the Commission was ambivalent about the "broader question" of outright judicial intervention in combating the exclusion of low- and moderate-income housing from the suburbs, it acknowledged that courts "have an important role to play" in this regard.³⁹¹ Nonetheless, the Commission felt that broader intervention by the courts would be "premature."³⁹²

Suffice to say that twenty-five years have passed since the Commission made these observations, and the exclusion of the workforce from housing opportunities near places of employment has become more pronounced in Maryland than ever before. It has reached a point where the economic well being of the state, or at least a significant number of its regions, may be imperiled.³⁹³ The complexities of effectively enforcing a favorable *Mount Laurel* ruling in Maryland, while formidable, are demonstrably less than those that confronted the Supreme Court of New Jersey in 1975. That court, unlike a Maryland court considering such a case today, had no meaningful judicial precedent to draw upon.³⁹⁴ A Maryland court would not only have the *Mount Laurel* litigation (and implementation) experiences to guide it, but as noted, it would have an additional quarter-century of local government intransigence and federal court indifference to reflect upon. Finally, as noted, Maryland's primary system of local governance through its counties would likely narrow some of the issues before a state court and facilitate enforcement of its remedial orders.

Thus, the *Mount Laurel* option, though by no means a simple one, has significant potential as a vehicle for addressing broad-based exclusion of citizens from housing opportunities in Maryland because of their income. It warrants further research and consideration.

X. CONCLUSION

Two decades ago, in a widely discussed essay, entitled *The Egregious Invalidity of the Exclusive Single Family Zone*, the late Richard F. Babcock, the dean of America land use attorneys, concluded his clarion call by saying:

Today, there can be no justification under the police power for compelling the construction of single-family houses. The daring trial lawyer who chooses to litigate this issue will undoubtedly lose in the trial and intermediate

391. HOUSING FOR ALL UNDER THE LAW, *supra* note 159, at 139.

392. *Id.*

393. *See, e.g.*, GMU Analysis, *infra* Appendix.

394. *See Mt. Laurel II*, 456 A.2d at 409-10 (noting that *Mt. Laurel I* was a case of first impression).

courts. But he should prepare his record with the Supreme Court view. Using as witnesses builders, demographers, engineers, planners, environmentalists, and land economists, he should build a record that once and for all demolishes the notion that the single-family detached house is forever isolated and protected.³⁹⁵

To this we would add only one qualification, namely that when challenging land use regulations that exclude people based on their income, the challengers should also focus upon their State constitution and State high court. For, as the late Justice William Brennan observed over a quarter-century ago:

[T]he point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. *State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.* The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.³⁹⁶

. . . .
[S]tate courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions. *This was precisely the circumstance of Mr. Justice Hall's now famous Mt. Laurel decision, which was grounded on the New Jersey Constitution and on state law. The review sought in that case in the United States Supreme Court was, therefore, completely precluded.*³⁹⁷

For those who are concerned that local land use regulations may be denying reasonable housing opportunities to citizens, based upon their income, the time may well have come (after more than a quarter century) to reexamine the initiatives of New Jersey Justice Frederick Hall in Mount Laurel I and the advice of Supreme Court Justice William Brennan, as noted above.

395. Richard F. Babcock, *The Egregious Invalidity of The Exclusive Single-Family Zone*, 35 LAND USE L. AND ZONING DIG. 4, 8 (1983).

396. Brennan, *supra* note 266, at 491 (emphasis added).

397. *Id.* at 502 (emphasis added).

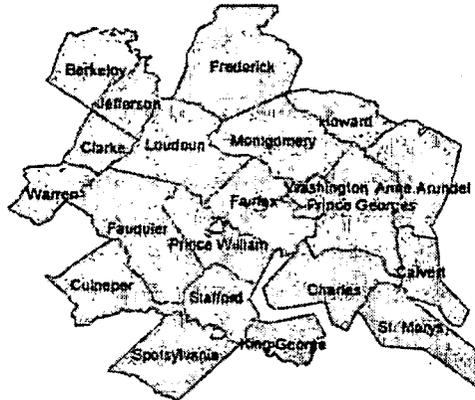
APPENDIX

FUTURE HOUSING SUPPLY AND DEMAND
ANALYSIS FOR THE GREATER
WASHINGTON AREA

Executive Summary*

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**FUTURE HOUSING SUPPLY AND DEMAND
ANALYSIS FOR THE GREATER
WASHINGTON AREA**



Prepared for:
District of Columbia Building Industry Association
Maryland-National Capital Building Industry Association
Northern Virginia Building Industry Association

By
John McClain, AICP, Senior Fellow
Stephen S. Fuller, PhD, Director

The Center for Regional Analysis
School of Public Policy
George Mason University

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APPENDIX

PROLOGUE

This research effort by The Center for Regional Analysis at George Mason University was undertaken in response to concerns that a constrained supply and diminished affordability of housing could further threaten the economic growth and vitality of the Greater Washington region. The research examines past and current trends and projected future demand and supply of the region's housing.

The purpose of the research was to analyze regional trends in housing demand and supply in order to develop a statistically sound basis for examination of local government forecasts of economic growth and residential development. The analysis seeks to discern how adequately the region's projected housing supply, based on current land use and development policies, will accommodate the job creation necessary to support anticipated economic growth.

The current market for housing is very strong, stimulated by a healthy regional economy in the last half of the 1990s and into 2001; housing prices have risen sharply in the last few years, as has growth in population and jobs. Such rapid growth, however, has prompted calls in some communities for new or revised planning, zoning, and environmental policy actions to further restrict residential development. A related question arises. To what extent will such policy actions impede job creation and, therefore, the future economic growth and prosperity of the region?

EXECUTIVE SUMMARY

- Over the last thirty years the Washington region has transformed from one driven by federal employment to one driven by both federal employment and procurement, resulting in one of the most dynamic economies in the country. The presence of the federal government and the expanded purchasing of services and goods by the government from private firms have been at the foundation of the growth of the region's economy. Residents of the Greater Washington area enjoy the highest incomes in the country, the greatest increase in new jobs of any other region in the past six years, the lowest rate of poverty, and an abundance of educational, cultural, and recreational opportunities. All of these characteristics combine to encourage more companies and organizations to locate in the area. The healthy economy also encourages more people move to the region to take advantage of the job opportunities.

APPENDIX

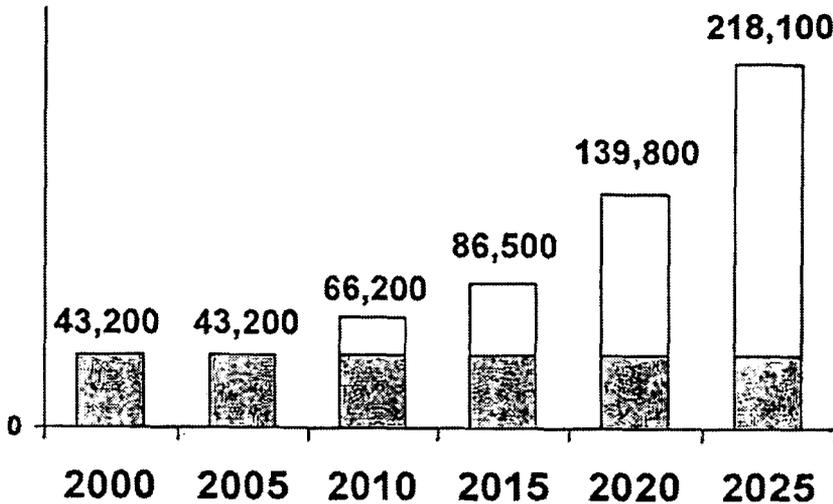
- In the last several years, the Washington region has enjoyed a healthy economy and housing market. The region had the largest growth in new jobs from 1996 to 2001 than any other metropolitan area in the country. The region's healthy economy and job growth are major contributing factors to the high incomes in the region. In fact, the Greater Washington region has the highest median household income of all major metropolitan areas. The growth has occurred throughout the region and, in the past few years, jobs and housing have not only located in the suburbs, but interest and development are also focusing in the core jurisdictions. While there is a current slump in the economy, the central area of the region is doing very well. The office market in the District of Columbia is the healthiest in the country and there are several new housing projects completed and many more proposed or planned.
- Since 1970, the region has grown from a population of 3.62 million to 5.75 million as of the 2000 Census. In growing by over 2.1 million persons in that time, the region has added 1.03 million households and 1.72 million jobs. In addition, the region has also seen significant demographic changes. In 1970, the typical household had two or more children and the majority had only the male spouse in the workforce. Today there are fewer children in the household and the large majority of married-couple family households have both spouses going to work.
- Both the numerical and demographic changes in the past form a basis for the examination of the long-term outlook for the demand and supply of housing for the next 25 years. For each new job added in the 1970-2000 period, the region added 0.60 new households to supply the housing for the workforce; conversely, each new household supplied the workforce for 1.67 new jobs. That relationship has varied, particularly in recent times, as population per household and workers per household has shrunk. In the 1990s, for example, each new household supplied the workforce for only 1.4 new jobs.
- In forecasting the next 25 years, this study used a ratio of 1.60 new jobs per household. This is only slightly less than the long-term historical trend and approximately the same trend being assumed collectively by local governments in their Co-operative Forecasting process. This ratio is surely a conserva-

tive assumption. If future workforce were to be supplied at the relationship of the 1990s experience between housing and jobs, the supply deficit projected by this research would be much larger. The assumption of 1.6 as the factor results in a projection of housing deficit that represents the least dire picture.

- By 2005, the Greater Washington region is forecast to grow by 1,510,000 jobs and is expected to grow by 768,900 households, based on the Cooperative Forecasts developed by the local governments. This job growth is an increase of forty-four percent over the year 2000, which is less than half the growth the region experienced in the last thirty years, when it more than doubled (+105%). On an annual basis for the study area, this forecast is 60,400 new jobs per year average growth, which is slightly less than the experience of 61,300 from 1980 to 2000.
- As of 2000, the region already had a deficit of housing. Household growth-and housing units-did not keep pace with job growth in the 1990s, and in 2000 was short by 7,900 units. More significantly, the normal housing stock vacancy was drawn down significantly during the 1990s, which was a contributing factor to the steep rise in housing values the last few years. Using the 1990 vacancy rate as a norm, the region had a vacancy deficit in 2000 of 35,300 units. Added to the demand gap due to job growth for the period, the region started out in 2000 with a total housing unit deficit of 43,200 units.
- Applying the historical ratio of 1.6 jobs per household, the demand for new households by 2025 to supply the work force for the job forecast is 944,000, or 174,900 more than local government expectations—meaning that there will be a shortfall in 2025 of approximately that many housing units. In other words, the local governments of the region are collectively expecting and allowing for 174,900 too few housing units. Adding this to the deficit starting out in 2000 means that in 2025 the total housing deficit will be 218,200 units.
- Looking at the results of this analysis by 5-year period from 2000 to 2025 shows the deficits at each 5-year point:

APPENDIX

Deficit Supply of New Housing vs. Calculated Demand for New Housing



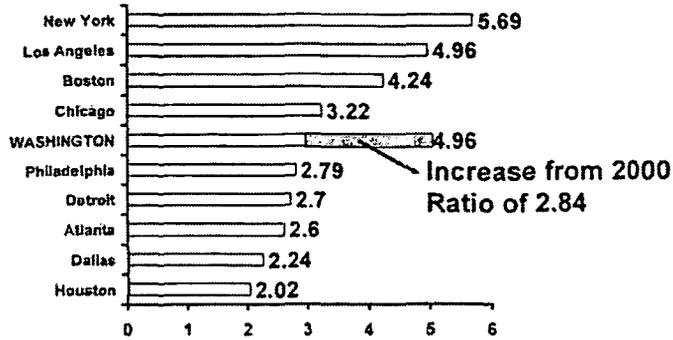
- The deficit in housing will mean that the adopted plans for several jurisdictions will achieve buildout long before what is currently anticipated, expressed as the local government forecasts of households. Howard County, for one, says it will reach buildout in 2015. However, in 2025, Fairfax, Loudoun, and Prince William Counties, and probably Montgomery County, will all be approaching estimates of plan buildout capacity based on their own forecasts. Therefore, if the housing deficit in 2025 is 174,900 units, these counties will likely be reaching plan buildout long before 2025.
- The converse of the housing supply view of this analysis is that, in 2025, if the local government expectations and policy constraints succeed and new household growth as developed by the local governments comes to pass, the region's potential economic growth will have been reduced by 288,400 jobs. Alternatively, those jobs would be filled by workers commuting in from outside the study area—i.e., from beyond Frederick, Howard, Anne Arundel Counties in Maryland and from beyond King George, Culpepper, Fauquier, Warren and Clarke Counties in Virginia—further exacerbating a very serious commuting and transportation problem already being exper-

perienced today. Commuting from the outer areas into the central employment areas of the region has already increased significantly. In 1970, there were 64,200 workers commuting into the central employment area of D.C., Arlington, Alexandria, Fairfax, Montgomery, and Prince George's Counties. By 1990, that had increased to 300,000 and, by extrapolation, would be 450,000 today.

- The ultimate effects of restricting housing supply could be many, and none of them positive. A deficit of supply, given economic demand, could mean:
 - Higher housing prices and increasingly inadequate supply of housing affordable for low and moderate-income households
 - More developments occurring further out in order to attain some affordability, putting increased suburban growth and cost pressures on now-rural counties.
 - Longer, more congested, and odd-hour commutes.
 - All of these would eventually mean a stagnant or declining economy and quality of life.
- Local economic factors explain approximately fifty percent of the change in the price of housing in the Washington region. Holding non-local factors constant—mortgage rates, consumer confidence, etc.—income and job growth generate housing price increases that exceed the national average. These increasing prices could be thought of as the premium paid for living in an area having a growing economy. Projecting to 2025, using the statistical correlation between economic and job growth with housing prices, the median housing value in the region will rise to \$415,000 by 2025 compared to \$177,000 in 2000 (both in 1996 dollars). Relating this to projections of income over the forecast period shows that affordability (measured by median housing value divided by median income) will decline significantly by 2025. The chart below shows the region in 2000 compared to the other top ten metro areas with the projected ratio for 2025 for Washington.

APPENDIX

Ratio of Median Housing Value to Median Household Income Washington Projected to 2025



- This projected increase in housing prices does not include the effects of an inadequate supply of housing, which is projected to be 218,100 units short.