Judicial Acquiescence in Large Lot Zoning: Is it Time To Rethink The Trend?

I. INTRODUCTION

A popular theme in the proverbial American dream historically has been the ownership of one's own home. Today,

> the aspiration of most Americans for a single-family house, standing free on its own plot of land, continues unabated. The suburb remains a viable icon of personal achievement and independence; the suburban home, the physical representation of a happy domestic life; the suburban town, the fullest expression of participatory democracy.[1]

Implicit in this dream of a home is the requirement of some degree of open space around that home. Williams, in his treatise on American Land Planning Law, noted that, "[a]t least to many people, the presence of some open space around a residential building, and particularly in front of such a building, is the principal mark of a good residential area."[2] It should follow, then, that if some space is a good thing, more space must be even better. In fact, the "prevalence of large lots [in a residential neighborhood] is one commonly accepted index of social tone."[3]

Protection of the American suburb is not a new concept to the judiciary. The Burger court did much to protect the integrity of the suburbs,[4] even (one might say especially) in the face of charges that many suburban ordinances providing for minimum lot sizes were exclusionary,[5] in that they limited the availability of land for residential development, increasing the cost of residential lots,[6] and making it virtually impossible for low and moderate income families to afford homes in certain suburban areas. Such

1. R. STERN, *Toward an Urban Suburbia, Once Again*, in CITIES: THE FORCES THAT SHAPE THEM 32 (1982).

2. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 9.20 (1978).

3. 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 38.01 (1978).

4. *See* R. JOHNSTON, RESIDENTIAL SEGREGATION: THE STATE AND CONSTITUTIONAL CONFLICT IN AMERICAN AREAS 73-92 (1984).

5. *See id.*

6. *See* T. CLARK, BLACKS IN SUBURBS: A NATIONAL PERSPECTIVE 8 (1979).

ordinances, particularly "large lot" zoning ordinances, will be the focus of this Note.

Courts have, until recently, analyzed the validity of these ordinances in terms of their exclusionary effects. The majority of state courts generally have found that the prescribed zoning regulations did not have impermissible exclusionary effects, though a few states notably have concluded otherwise. Two cases decided by the Supreme Court in 1987 have added a new dimension to the analysis of minimum area lot restrictions, beyond a consideration of their exclusionary effects. Although the facts of these cases did not directly involve large lot zoning, the Court applied a higher standard to evaluate land use regulations than had previously been applied by courts that have ruled on minimum area lot restrictions.

Part II of this Note will examine the general validity of zoning regulations prescribing minimum areas for residential lots. That overview will be followed in Part III by a discussion of the treatment of such regulations by state and, to a lesser degree, federal, courts. Part IV will examine the "takings" cases and speculate whether they will herald a new trend in state courts' analyses of the validity of large lot zoning regulations.

II. HISTORY AND BACKGROUND: THE LEGITIMACY OF ZONING TO PRESCRIBE LOT AREA RESTRICTIONS

The earliest zoning ordinances were prompted, in large part, by the overcrowding of urban, not suburban, land.[7] The first efforts at comprehensively controlling the development of urban land culminated in the historic 1916 New York City Zoning Ordinance. "Overcrowding and congestion had checked the movement of goods and vehicles and distorted the rational growth of the city, shut out light and air on city streets, produced unwanted changes in residential neighborhoods, and destroyed the value and best use of real estate improvements."[8] Public officials in New York City "had become aware of the health hazards of congested tenement districts, and the very real threat that things were likely to get worse with increases in population, continued migration to the cities, and consequent intensive use of land."[9]

7. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 7.06 (3d ed. 1986).
8. Boyer, *Land-Use Regulation*, in CITIES: THE FORCES THAT SHAPE THEM 30 (1982).
9. R. ANDERSON, *supra* note 7, at § 7.04.

Zoning to control population density appeared to be one solution to the considerable problem of urban overcrowding.

All zoning ordinances are enacted pursuant to the police power delegated by the state.[10] State statutes delegating zoning powers are usually referred to as "enabling acts," and are adopted from or modelled after the Standard State Zoning Enabling Act. This Act was drafted by the United States Department of Commerce in the 1920's,[11] in order to ensure the uniform application of zoning power "and thus avoid court rulings that zoning regulations represented unfair restrictions on private property and an unconstitutional use of police power."[12] Zoning ordinances are necessarily constrained by the limitations on the exercise of the police power. An ordinance must bear a "real and substantial relation to, or be reasonably necessary for, the public health, safety, morals, or general welfare"[13] in order to withstand judicial scrutiny.

Minimum lot size regulations arose within the scope of these limitations. The original purpose of these regulations was to control the density of population, a purpose which generally has been established as a lawful goal of police power regulation in furtherance of public health and safety.[14] "It is now generally accepted that municipalities have the power to prescribe lot area restrictions and that it is only the degree to which that power is exercised that is subject to challenge."[15] Additionally, ordinances prescribing minimum lot sizes more recently have been validated on the grounds that open space requirements ensure preservation of light and air, which are related to public health.[16]

The requirement that regulations be reasonably necessary for the general welfare is satisfied by regulations addressed to the "character, desirability, and even the attractiveness of a single-family neighborhood."[17] *Euclid v. Ambler,*[18] a watershed Supreme

10. *See* 82 AM. JUR. 2D *Zoning and Planning* § 38 (1976); *see also* Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (upholding the rule that zoning regulations must find their justifications in some aspect of the police power, asserted for the public welfare).

11. *See* 4 R. ANDERSON, *supra* note 7, at § 32.01.

12. *See* Boyer, *supra* note 8, at 30.

13. *See* 82 AM. JUR. 2D, *supra* note 10, at § 38.

14. *See id.* at § 96.

15. Annotation, *Validity of Zoning Regulation Prescribing Minimum Area for House Lots or Requiring an Area Proportionate to Number of Families to be Housed,* 95 A.L.R. 2D 716, 719 (1964).

16. *See* 1 R. Anderson, *supra* note 7, at § 7.05.

17. *Id.* at § 7.03.

18. 272 U.S. 365 (1926).

Court case that first approved the general validity of comprehensive zoning laws, held that an ordinance which tended to minimize evils accompanying modern development (overcrowding, traffic, noise and confusion) served the public welfare and was within the scope of the police power.[19] In yet a further step, the Supreme Court has determined that the concept of public welfare is broad enough to include purely aesthetic concerns.[20]

A controversy arises, however, when a minimum lot restriction prescribes an acreage "beyond the arguable range of health demands".[21] Zoning ordinances now include yard requirements so extravagant as to be unexplainable in terms of adequate light and air; such provisions may expose an alleged health purpose as a "makeweight in the rationale of these decisions. . . .Clearly, some of these restrictions are adopted to protect a neighborhood of a certain kind, or to enhance the appearance of a community."[22] One commentator declared that,"[t]o discuss a two-acre or even substantially smaller acreage restrictions in terms of 'health and welfare' is obvious sophistry."[23] Nevertheless, in recognition of changing views of what constitutes legitimate zoning purposes, the vast majority of state courts continue to uphold minimum lot requirements. They do so with language heralding "preservation of open space," "neighborhood character," and "aesthetic purposes," even when the minimum areas prescribed are one,[24] two,[25] or even five[26] acres in size. As a result, zoning for large lots has become a common practice in suburban municipalities, allowing municipalities to keep land permanently off the market and creating a permanent open space or "greenbelt" preserve.[27]

19. *Id.* at 397.

20. *See, e.g.,* Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

21. *See* 1 R. ANDERSON, *supra* note 7, at § 7.04.

22. *Id.* at 696.

23. *Id.* at § 7.20, at 727 n. 88, (quoting Tomson, *It's the Law*, 31 PROGRESSIVE ARCHITECTURE 138-39 (1950)).

24. *See, e.g.,* Simon v. Needham, 311 Mass. 560, 564, 42 N.E.2d 516, 518 (1942).

25. *See, e.g.,* Levitt v. Incorporated Village of Sands Point, 6 N.Y. 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959).

26. *See, e.g.,* Fischer v. Bedminster Township, 11 N.J. 194, 204, 93 A.2d 378, 383 (1952).

27. *See* D. MANDELKER, LAND USE LAW § 5.19 (2d ed. 1988).

III. Treatment by State Courts of the Minimum Lot Requirements Based on an Analysis of Exclusionary Effects

A. *The Majority Position: Upholding Minimum Lot Regulations*

One of the leading cases upholding acreage zoning is *Simon v. Town of Needham,*[28] which validated a one-acre restriction as embodying a humane recognition of the advantages of low density living and properly emphasizing the importance of a quiet and semirural atmosphere. Since this seminal Massachusetts decision, the majority of state courts generally have been sympathetic to the large lot zoning issue, but opinions have ranged from the uncritical[29] to the carefully reasoned.[30]

In opinions that might be described as uncritical, some courts have required that minimum lot area restrictions be "not clearly arbitrary and unreasonable."[31] Other courts have been even less scrutinizing and have upheld large lot ordinances without articulating any standard that must be satisfied.[32] Nearly all of these determinations involved residential suburbs of large metropolitan areas where a common concern of proponents of the ordinances was premature and uncontrolled growth.[33]

28. 311 Mass. 560, 42 N.E.2d 516 (1942).

29. *See, e.g.*, Senior v. Zoning Comm'n of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959), *appeal dismissed* 363 U.S. 143 (1960).

30. *See, e.g.*, Ybarra v. Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

31. *See* Ybarra v. Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) (holding that one-acre zoning was rationally related to preservation of a rural environment; city did not need to show compelling interest to justify large lot zoning); Steel Hill Dev. v. Sandbornton, 469 F.2d 956 (1st Cir. 1972) (holding that rezoning to six-acre lots not arbitrary or unreasonable); Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955) (finding it "not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character"); Blank v. Town of Lake Clarke Shores, 161 So. 2d 683, 686 (Fla. Dist. Ct. App. 1964) (same); Gautier v. Town of Jupiter Island, 142 So. 2d 321 (Fla. Dist. Ct. App. 1962) (upholding a zoning ordinance enacted to preserve the unique status of the town which had existed for many years as not an arbitrary or unreasonable exercise of police power).

32. *See* Oceanic California, Inc. v. City of San Jose, 497 F. Supp. 962 (N.D. Cal. 1980) (upholding five-acre zoning); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969) (upholding zoning classification which would preserve open space and protect watershed area); McDermott v. Village of Calverton Park, 454 S.W.2d 577 (Mo. 1970) (en banc) (upholding zoning classification of residential, single-family use with minimum lot size specifications); Town of Sun Prairie v. Storms, 110 Wis. 2d 58, 327 N.W.2d 642 (Wis. 1983) (upholding minimum lot restriction as quality requirement).

33. *See Sandbornton*, 469 F.2d at 960 (finding a "desire to discourage density of population, and most importantly, a fear of premature development").

Two significant cases have established the validity of zoning ordinances which seek to control growth by eliminating premature subdivision and urban sprawl.[34] In *Golden v. Planning Board of Ramapo*,[35] the New York Court of Appeals held that phasing residential development to a town's ability to provide needed facilities and services was not unconstitutional. The growth control measures approved by the town were not intended to be permanent, but instead to be re-examined and modified as the needs of the community changed.[36] Likewise, in *Construction Industry Association of Sonoma County v. City of Petaluma*,[37] the Court of Appeals for the Second Circuit upheld a similar ordinance that did not prevent growth or function as an exclusionary device, but rather allowed growth to occur in an orderly, manageable way.[38] In general, courts that have upheld large lot zoning as a means to preserve open space (the *quid pro quo* of growth control) have dutifully cautioned against ordinances that might appear to have a prohibited exclusionary purpose or would prevent spillover from nearby cities. It is difficult, however, given the tone of the opinions, to determine what type of ordinance would fail on the grounds that it was, in fact, exclusionary.

New York courts stand out among the majority of state courts that tend to uphold zoning ordinances against exclusionary challenges because of New York's formulation of a well-defined standard for determining exclusionary effects. The deliberate formulation of a clear standard is a fairly recent development. Early New York cases gave some attention to the reasonableness or exclusionary effects of the ordinance in question, but did not articulate a uniform standard against which the ordinances were to be measured and, in the end, upheld restrictive large lot ordinances in virtually every instance.[39] More recent cases have ar-

34. *See* Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

35. 30 N.Y.2d 359, 285 N.E. 2d 291, 334 N.Y.S.2d 138 (1972).

36. *See id.*

37. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

38. *See* Los Angeles Times, Feb. 24, 1976, at 1 (the plan "provided for annual 6% housing growth and did not have the undesirable effect of walling out any particular income class nor any racial minority group." (quoted in PETALUMA, THE CALIFORNIA GROWTH CONTROL PLAN; COUNCIL OF PLANNING LIBRARIANS (December 1977))).

39. *See* Levitt v. Incorporated Village of Sands Point, 6 N.Y. 269, 273, 160 N.E.2d 501, 503, 189 N.Y.S.2d 212, 214 (1959) (sustaining the validity of a two-acre minimum lot requirement in a remote rural residential community); Samuels v. Town of Harrison, 195

ticulated a clear standard by which to measure the exclusionary effects of a particular ordinance. New York courts now apply a balancing test which compares the quality of the environment, which necessarily includes regional concerns, with the exclusionary potential of the ordinance.[40]

Interestingly, once the standard was articulated and carefully applied, some challenged ordinances have been invalidated thereunder. One example of an ordinance's failure to meet the New York standard is the ordinance at issue in *Berenson v. Town of New Castle*.[41] The Court of Appeals in *Berenson* articulated a two-part test, asking whether the ordinance provided, first, "[a] properly balanced and well-ordered plan for the community" and second, for "[the] needs of the region as well as the town."[42] The town fathers of New Castle were "anxious to preserve as much of the rustic township as they could"[43] and accordingly restricted most of the town's properties to one- and two-acre minimum residential lot sizes. The court found that the zoning ordinance excluded multifamily residential housing as a permitted use in any district and, on that basis, found the ordinance to be unconstitutional.[44]

However, with *Berenson* as a notable exception, the New York courts have generally found challenged ordinances to meet the articulated standard. In *Kurzius v. Incorporated Village of Upper Brookville*,[45] the Court of Appeals applied the *Berenson* test to a community in Upper Brookville and upheld a zoning ordinance which created five-acre minimum lots.[46] The court noted that the ordinance only affected certain areas of the village and found no proof of conflicting regional needs or of a discriminatory purpose.[47] The ordinance's declared purpose of preserving open

N.Y.S.2d 882, 885 (N.Y. Sup. Ct. 1959) (upholding one-acre zoning with caveat that purpose must not be to erect exclusionary barriers); Gignoux v. Kings Point, 199 Misc. 485, 491, 99 N.Y.S.2d 280, 285 (1950) (upholding a "reasonably restricted" large lot zoning ordinance in order to preserve an open pattern of development).

40. *See* Berenson v. Town of New Castle, 38 N.Y.2d 102, 110, 341 N.E.2d 236, 242, 378 N.Y.S.2d 672, 680-81 (1975).

41. *See id.*

42. *Id.* at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 680-81.

43. *Id.* at 105, 341 N.E.2d at 239, 378 N.Y.S.2d at 676.

44. *See id.*

45. 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980).

46. *Id.* at 345, 414 N.E.2d at 683, 434 N.Y.S.2d at 183.

47. *Id.* at 346, 414 N.E.2d at 684, 434 N.Y.S.2d at 183-84.

space areas of the village was found to be a "legitimate goal of multiacre zoning".[48]

Berenson and *Kurzius* are examples of carefully reasoned opinions that appeared to take a serious look at the alleged exclusionary effects of a minimum area lot restriction. It is notable that New York is one of few states maintaining the majority position on exclusionary zoning that does not uniformly uphold large lot ordinances. This may be an indication that some of the ordinances routinely upheld in the less critical opinions of some other states' courts could not withstand scrutiny under a stricter standard. Whether a stricter standard is warranted in those states will be the subject of Part IV of this Note.

B. *The Minority Position: Striking Down Minimum Lot Regulations*

It cannot be denied that, whatever the validity of municipal land-use regulations in adopting no-growth, limited growth, or selective growth controls, such controls do "influence not only the availability of land for residential development, but also the price of land and therefore the cost of residential development."[49] The price of land will presumably tend to rise as it is restricted by zoning. By setting low ceilings on residential densities, suburban communities can make the cost of low and moderate income, higher density development prohibitively high.[50] These effects do not necessarily bespeak an exclusionary intent, but they do "limit the capacity of suburban communities to house additional residents, including blacks, and particularly the poor."[51] Nevertheless, the highest courts of Pennsylvania and New Jersey are virtually alone in recognizing the exclusionary effects of large lot zoning.

Townships and planning boards have raised several defenses to charges of exclusionary zoning. One involves financial considerations: a municipality may be unable to handle the expense of providing services for an expanding population. The Pennsylvania Supreme Court has rejected that argument and responded that zoning could not be used to avoid the economic burdens of natu-

48. *Id.*

49. *See* T. Clark, *supra* note 6, at 8.

50. *See id.*

51. *Id.* at 9.

ral growth.[52] Neither have environmental considerations persuaded the Pennsylvania courts.[53] Pennsylvania courts have consistently found large lot provisions to be unconstitutional, on the ground that such ordinances are exclusionary.[54] No Pennsylvania decision to date has declared large lot zoning to be unconstitutional *per se*, but neither has any Pennsylvania court upheld the constitutionality of such zoning restrictions.

In *Appeal of Girsh*,[55] the Pennsylvania Supreme Court held that "[p]rotecting the character—really the aesthetic nature—of the municipality is not sufficient justification for an exclusionary zoning technique."[56] The court did recognize the township's interest in protecting its attractive character, but found that it must do so by "requiring apartments to be built in accordance with (reasonable) setback, open space, height, and other light and air requirements,"[57] not by refusing to allow apartments altogether. This decision seems to be consistent with *Kurzius*[58] and *Berenson*[59] in its concern for regional needs and its decision to strike down as unconstitutionally exclusionary an ordinance that fails to address those needs.[60]

52. *See* Appeal of Kit-Mar Builders, 439 Pa. 466, 474, 268 A.2d 765, 768 (1970) (court stated that township had to make improvements rather than exclude); National Land and Inv. Co. v. Kohn, 419 Pa. 504, 528, 215 A.2d 597, 610 (1965) (disapproving four-acre zoning, even though municipality claimed such zoning was essential to protect the health of the community).

53. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 186, 336 A.2d 713, 731 (1975) (finding present environmental situation not a sufficient excuse in itself for limiting housing to single-family dwellings on large lots), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

54. *See, e.g., Kit-Mar Builders*, 439 Pa. at 466, 268 A.2d at 765; *National Land*, 419 Pa. at 504, 215 A.2d at 597.

55. 437 Pa. 237, 263 A.2d 395 (1990).

56. *Id.* at 244, 263 A.2d at 398 (citing *National Land*, 419 Pa. at 528-29, 215 A.2d at 610-11). *Cf.* Berman v. Parker, 348 U.S. 26, 33 (1954) (finding that the legislative power to determine the aesthetic as well as health standards of a community allows the condemnation of property in a blighted area over Fifth Amendment objections).

57. *See Girsh*, 437 Pa. at 245, 263 A.2d at 399.

58. Kurzius v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 345, 434 N.Y.S.2d 180, 183, 414 N.E.2d 680, 683-84 (1980) (stating that a zoning ordinance would be invalidated if it was enacted without considering both local and regional needs and has an exclusionary effect).

59. Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (stating that the validity of a zoning ordinance turns not only on the local need, but on a two-part test balancing the needs of the community with those of the region).

60. The court declared that "[a] zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise,

In *National Land and Investment Co. v. Kohn*,[61] the Pennsylvania Supreme Court went to great lengths to maintain the validity of zoning for density,[62] reasoning that it was impossible to declare any minimum acreage requirement to be unconstitutional *per se*, yet still invalidating a four-acre minimum lot restriction. The stated purposes of the ordinance were to insure proper sewage disposal, protect the township from pollution and preserve open space.[63] The court concluded that "[a] four-acre minimum acreage requirement is not a reasonable method by which the stated end[s] can be achieved."[64] *Appeal of Kit-Mar Builders, Inc.*[65] followed *National Land* in its rationale for striking down two- and three-acre minimum lot restrictions by finding an exclusionary purpose.[66]

Though Pennsylvania courts may be among the most adamant in their views, they are not alone in holding minimum lot restrictions to be invalid due to their exclusionary effects. A Virginia court[67] found a two-acre minimum lot restriction to be exclusionary where it found that "[t]he practical effect of the amendment [was] to prevent people in the low income bracket from living in the western area and forcing them into the eastern area. . . ."[68] A seminal case on the treatment of exclusionary purposes is the New Jersey case of *Southern Burlington County NAACP v. Township of Mount Laurel*.[69] In that case, the court found that a town zoning ordinance restrictive in minimum lot area, lot frontage, and building size requirements[70] was "presumptively contrary to the general welfare and outside the intended scope of the zoning power"

upon the administration of public services and facilities can not be held valid." 437 Pa. at 242, 263 A.2d at 397.

61. 419 Pa. 504, 215 A.2d 597 (1965).

62. The court stated that "[t]here is no doubt that in Pennsylvania, zoning for density is a legitimate exercise of the police power." *Id.* at 523, 215 A.2d at 607, and cases cited.

63. *Id.* at 525-27, 215 A.2d at 608-9.

64. *Id.* at 529, 215 A.2d at 611.

65. 439 Pa. 466, 268 A.2d 765 (1970).

66. The court stated that: "[W]e decided in *National Land* that a scheme of zoning that has an exclusionary purpose *or result* is not acceptable in Pennsylvania. We do not intend to say, of course, that minimum lot size requirements are inherently unreasonable." *Id.* at 470, 268 A.2d at 766-67 (emphasis added).

67. *See* Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959); *see also* Board of Supervisors of Fairfax County v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975) (striking down one-acre zoning).

68. 200 Va. at 661, 107 S.E.2d at 396.

69. 67 N.J. 151, 336 A.2d 713 (1974).

70. *Id.* at 183, 336 A.2d at 729.

and was not justified by the environmental rationale that plot size was "required for safe individual lot sewage disposal and water supply."[71] The effect of the ordinance was to preclude single family housing for moderate income families.[72]

The background against which *Mount Laurel* arose is important for an understanding of the opinion. New Jersey was faced with a desperate need for housing.[73] The township of Mount Laurel lay just outside a major city and shared the demographic character of many other older, built-up suburbs, which:

> ha[d] substantially shed [former] rural characteristics and ha[d] undergone great population increases since World War II, or [we]re now in the process of doing so, but still [we]re not completely developed and remain[ed] in the path of inevitable future residential, commercial and industrial demand and growth.[74]

The *Mount Laurel* opinion approved an earlier case, *Fischer v. Township of Bedminster*,[75] which sanctioned a minimum lot area of five acres in the major portions of the then rural municipality, but concluded that a similar practice could not be followed in the case at hand.[76] A zoning ordinance must promote the general welfare;[77] this the court interpreted to mean that an ordinance must meet the needs of all people who desire to live within its boundaries[78] and "may not adopt regulations or policies which thwart or preclude that opportunity."[79] The environmental defenses offered by the township did not persuade the court.[80] To have a valid effect, the township would have had to show that "the danger and impact. . .[were] substantial and very real. . .not simply a makeweight to support exclusionary housing measures or preclude growth."[81]

It is important to note that, though the court struck down the particular zoning ordinance, it did recognize the validity of proper planning to "prevent over-intensive and too sudden de-

71. *Id.* at 185-86, 336 A.2d at 730-31.
72. *Id.* at 183, 336 A.2d at 729.
73. *Id.* at 158, 336 A.2d at 716.
74. *Id.* at 160, 336 A.2d at 717.
75. 11 N.J. 194, 93 A.2d 378 (1952).
76. 67 N.J. at 176, 336 A.2d at 726.
77. *See* 1 R. ANDERSON, *supra* note 7, at § 7.03.
78. 67 N.J. at 179, 336 A.2d at 727.
79. *Id.* at 180, 336 A.2d at 728.
80. *Id.* at 186-87, 336 A.2d at 731.
81. *Id.* at 187, 336 A.2d at 731.

velopment, insure against future suburban sprawl and slums and assure the preservation of open space and local beauty."[82] However, such planning would have to provide for every type of housing to avoid invalidation as exclusionary.[83]

In its discussion of improper exclusionary effects, the *Mount Laurel* decision appears to be consistent with the Pennsylvania cases. Yet, the concurrence to the *Mount Laurel* decision went one step further and declared that some zoning devices are "inherently exclusionary."[84] The concurrence adopted the extreme position that, although large lot zoning is commonly rationalized as a device for preventing premature development,[85] "[s]uch zoning is not a reasonable device for regulating the pace and sequence of development. Its effects on development, if any, are merely exclusionary."[86] In adopting this position, the concurrence clearly ignored a vast body of law that upheld the many legitimate, and desirable, effects of such zoning on the regulation of development.

Many more courts have validated the use of large lot zoning as a legitimate goal of the police power. One commentator explained these courts' reasoning as follows:

> The question of whether zoning and preservation controls were a rational use of police power [often] depended on the answer to the prior question of whether there existed a plan against which these *ad hoc* land use regulations could be tested. If the answer was yes, then the controls would generally be upheld. This had [especially] been so in the case of exclusionary zoning in the suburbs. . . .[87]

Is it an anomaly that large lot zoning has become so widely accepted, in spite of clear evidence in some cases of its exclusionary effects?[88] It is undeniable that zoning promotes a desirable, and clearly desired, residential amenity, but perhaps more concern

82. *Id.* at 191, 336 A.2d at 733.
83. *Id.* at 190-91, 336 A.2d at 733.
84. *Id.* at 197, 336 A.2d at 737.
85. *Id.* at 213, 336 A.2d at 745.
86. *Id.* at 213, 336 A.2d at 746.
87. Boyer, *supra* note 8, at 30.
88. "[W]hile it would seem apparent that no zoning ordinance could constitutionally provide that persons having an income of less than a specified figure should be prohibited from living within a given area, yet it is equally clear that a number of zoning restrictions, having or tending to have such an indirect, practical effect, have over the years been recognized as valid-almost always without consideration of such 'side effects'." Annotation, *Comment Note-Exclusionary Zoning*, 48 A.L.R. 3D 1210, 1214 (1973).

should be given to the fact that "what is promoted is the residential amenity of the few at the expense of the many."[89] As the housing crisis that so many urban areas are experiencing continues to grow and homelessness becomes more prevalent, in part because lower income people are being closed out of more and more suburbs and urban areas are filled to capacity, it is important to re-evaluate the policy of presumptive validity of large lot zoning ordinances.[90]

IV. A Stricter Standard of Scrutiny, Based on a Takings Analysis, is Set Forth by the Supreme Court: The Beginning of a New Trend?

Two cases decided by the Supreme Court in 1987[91] analyzed the land use regulations at issue in terms of whether they were "takings" of private property for public purposes without just compensation. These cases did not deal with minimum area lot restrictions, but they are notable for the strict degree of scrutiny with which they approached the challenged regulations. The court in *Nollan v. California Coastal Commission*[92] announced a "new emphasis on closer judicial scrutiny of land use regulations challenged under the takings clause."[93] This emphasis on close judicial scrutiny in the realm of land-use regulation was, indeed, new. Seven years earlier, close judicial scrutiny was hardly the standard by which such regulations were measured. In 1978, the Supreme Court upheld an open space zoning ordinance against a facial takings challenge on the ground that the plaintiff was not denied all economic use of his property, and found that the ordinance on its face substantially advanced a legitimate governmental interest in preserving open space and orderly development.[94] Seven years later, the Court announced that such a lax standard of evaluating

89. *See* Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation*, 60 Minn. L. Rev. 883, 953 (1976).

90. *See* Annotation, *supra* note 88, at 1219.

91. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987).

92. 483 U.S. at 825.

93. *See* Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 338 (1988).

94. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928) and Penn Central Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978) for the proposition that the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his property).

the constitutionality of land use ordinances was no longer acceptable. Justice Brennan noted this new standard with apparent despair in his dissent in *Nollan*: "the Court demands a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a state's exercise of its police power for the welfare of its citizens."[95]

Brennan was correct, not only with respect to the standard of the Supreme Court, but with respect to many of the state courts, as well. Where the challenge to a minimum lot restriction has relied on the takings clause, the standard until *Nollan* had clearly been a very low one—if any economically viable use remained, no taking was found to have occurred. This standard was articulated in *Ramapo*,[96] which supported the idea that diminution in value was not *per se* a taking. If the ordinance was for a reasonable purpose, then it was within the power of the legislature to enact it. Similarly, recall that when a regulation was charged with having an exclusionary effect, the "reasonable purpose" test often applied did not embrace a very high standard; as long as a zoning ordinance was "not clearly arbitrary and unreasonable,"[97] it was virtually certain to be upheld by most courts. The *Nollan* court strived to make clear that such a lax standard was no longer to be tolerated. Justice Scalia, writing for a majority of five, concluded that "to pass muster under the just compensation clause, an enactment must bear a *substantial* relationship to a valid public purpose, not merely a rational relationship" (emphasis in original).[98]

The substantial relation test of *Nollan* echos the Pennsylvania cases of *National Land and Investment Co. v. Kohn*[99] and *Appeal of Kit-Mar Builders*,[100] until now the minority position, which also required a higher standard to uphold land use regulations. The court in *National Land* held that four-acre zoning was neither "a necessary nor a reasonable method" to "protect the community from pollution."[101] In *Kit-Mar*, the court invalidated two- and three-acre zoning and held that "extraordinary justification" was

95. 483 U.S. at 842-43.

96. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 381, 285 N.E.2d 291, 304, 334 N.Y.S.2d 138, 155 (1972).

97. *See* cases cited *supra* note 31.

98. 483 U.S. at 837.

99. 419 Pa. 504, 215 A.2d 597 (1965).

100. 439 Pa. 466, 268 A.2d 765 (1970).

101. *See* 419 Pa. at 504, 215 A.2d at 609.

required to validate lots of that size.[102] These standards stand a chance of becoming the majority rule following *Nollan* and *First English Evangelical Lutheran Church v. City of Los Angeles*.[103]

"Traditionally, exercises of the police power were deemed to be constitutionally legitimate if they were rationally related to proper governmental objectives."[104] Now it appears that, in the future, courts may have to more carefully scrutinize the relationships between zoning provisions and the goals they purport to achieve, whether the provisions are challenged as "takings" or as "exclusionary" or under some other charge.

"This analysis is reminiscent of the strict judicial scrutiny doctrine developed by the Warren court in its application of the equal protection clause to strike down governmental . . . laws which were racially suspect."[105] The heightened scrutiny test might be applied as well to the exclusionary effects of particular zoning ordinances. This approach first requires an answer to the question of whether ordinances that tend to exclude middle or lower income people as a group are "suspect" in a manner that warrants special examination. An argument that such income groups warrant "suspect" classification will be strengthened if it can be shown that the middle or lower income groups affected tend to be minorities. (The predominantly white nature of the suburbs could be evidence of exclusionary tactics *per se*.) Then perhaps the minimum lot restrictions imposed by town zoning boards would have to bear a substantial relationship to the legitimate goals of zoning, in addition to being "not clearly arbitrary or unreasonable."

A foreshadowing of this standard can be found in Justice Marshall's dissent in *Village of Belle Terre v. Boraas*.[106] He noted that where a suspect class was primarily affected by a particular ordinance, greater scrutiny was warranted:

> Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing

102. *See* 439 Pa. at 466, 268 A.2d at 767.

103. 482 U.S. 304 (1987).

104. Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 390 (1988).

105. *Id.* at 391. *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . [C]ourts must subject [the restrictions] to the most rigid scrutiny.").

106. 416 U.S. 1 (1974).

> that the burden imposed is necessary to protect a compelling and substantial governmental interest.[107]

Like *Nollan*, *First English*[108] also focuses on the seriousness of the takings issue. *First English* holds that even a temporary taking, accomplished through regulatory rather than physical means, must be monetarily compensated.[109] One of the butresses of the growth control cases[110] had been that, because the zoning restrictions at issue were not static and affected properties only temporarily, they could not be found to be compensable takings.[111] If the holding in *First English* could be read broadly enough to encompass growth control ordinances such as those at issue in *Petaluma* and *Ramapo*, the practical ramifications would be enormous.

Of course the rulings of *Nollan* and *First English* do not seek to invalidate all zoning ordinances as takings or exclusionary devices; the court does recognize that the legitimate goals of large lot zoning—protection of open spaces, preservation of the quality of residential neighborhoods and conservation of resources—are laudable and should be pursued.[112] The court has simply clarified that, "where [such ordinances] deprive landowners of the use of their property absent a direct nexus between projected benefits and burdens," the ordinances should not be upheld and their alleged goals must be pursued through eminent domain.[113] Of course it will be up to the courts to determine whether the required nexus is satisfied. Theoretically, the courts could apply this test, either directly or indirectly, to determine whether an ordinance has an unjustifiable exclusionary effect. It is interesting to note that, though the recent decisions of the Supreme Court appear to be the beginning of a conservative trend to erode the prerogative of local governmental agencies in the land use area and to strengthen the position of private property landowners,

107. *Id.* at 18 (class in this case was unrelated people who wanted to live together in violation of an ordinance that prohibited more than two unrelated people from living together).

108. 482 U.S. 304 (1987).

109. *Id.* at 314.

110. *See* Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897, *cert. denied*, 424 U.S. 934 (1976); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

111. *See Ramapo*, 30 N.Y.2d at 367, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

112. *See* Falik & Shimko, *supra* note 104, at 394.

113. *Id.*

they could well be a better aid to middle and lower income people than the existing trend which keeps so many of them out of the suburbs.

V. Conclusion

State courts historically have assessed the validity of large lot zoning ordinances by looking to the exclusionary effects of a particular regulation. The standard that the regulations were required to meet was relatively lax and the majority of state courts regularly validated the restrictive ordinances that came before them. Recently, some courts have begun to approach local land-use regulations from a takings perspective and have employed a much stricter standard in determining the validity of such regulations. If this analysis gains a following in the state courts and is applied to the assessment of minimum area lot restrictions, fewer such regulations may pass muster under the test of stricter scrutiny.

Although it is unlikely that *Nollan* and *First English* will initiate a dramatic or abrupt reversal in the trend of present treatment of large lot zoning ordinances, the question arises whether such a reversal is even either desirable or warranted. Large lot zoning does ensure a high-quality, low-density environment that so many Americans view as ideal. Further, preservation of open space and aesthetic considerations are well established as legitimate goals of the zoning power and are not likely to lose that status. Disappearance of the American suburb is not anyone's goal—presumably not even the middle and lower income families who are now unable to move into the suburbs. A better goal, albeit utopian, is to make the suburbs available to everyone by not unduly restricting them, yet still preserving the character that distinguishes them from the urban settings that so many are consciously choosing to leave. Would this goal best be achieved by continuing the relaxed standard of judicial review currently accorded large lot regulations, or is a stricter standard of review warranted, whether that standard is based on the takings clause or on the exclusionary effects of an ordinance?

Whatever the method or standard of review ultimately chosen, the impetus for change should focus on the suburban towns adjacent to or within reasonable commuting distance from major cities that now have either no or relatively small, minimum area

restrictions.[114] These are the areas in which large or larger lot restrictions would be most likely to have an exclusionary effect if imposed, primarily because of the proximity of such areas to large metropolitan areas and the great number of people who may wish to move into them and still commute to work or enjoy the advantages of a large city. The more remote areas that have very large acreage restrictions or are seeking to rezone to even larger lots (say from five to ten acres or seven to fifteen) are less of a concern; any change at that level is not likely to have an exclusionary effect and regional concerns are not likely to be thwarted. Such areas may continue as serene and spacious havens for the wealthy without denying those of more modest means an opportunity to share in the American dream.

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114. Two cases of minimum area zoning that may be on the borderline of having exclusionary effects, especially if rezoned are:

1. Middlesex County, New Jersey: "most restrictive residential districts normally require one acre per house; then there is a half-acre district and several smaller-lot districts," and
2. Westchester County, New York: "the ordinance usually contains two fairly large-lot districts, normally requiring one-acre and one-half acre, along with several smaller-lot districts."

2 N. WILLIAMS, *supra* note 2, at § 39.18.