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NOTE

TRADING AFFORDABLE HOUSING OBLIGATIONS: SELLING A CIVIC DUTY OR BUYING EFFICIENT DEVELOPMENT?

Exclusionary zoning, the practice of using seemingly-innocuous zoning regulations to exclude affordable housing from affluent areas, endangers metropolitan economic growth by increasing racial and economic segregation. Recognizing these problems, many states now require affordable housing construction in all municipalities. Unfortunately, these efforts often face overwhelming opposition, leading New Jersey and other states to add flexibility to their approach. This Note evaluates New Jersey's program, called Regional Contribution Agreements (RCAs), which allows municipalities to sell up to half their affordable housing obligations to another municipality. Although RCAs generate valuable revenue for affordable housing construction, this Note concludes that they fail to achieve their ultimate goal of reducing racial and economic segregation.

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TRADING AFFORDABLE HOUSING OBLIGATIONS: SELLING A CIVIC DUTY OR BUYING EFFICIENT DEVELOPMENT?

I. INTRODUCTION

Despite widespread economic growth, millions of Americans lack affordable housing. As of 2001, 85% of persons below the poverty line, or 11.7 million people, spent more than 30% of their income on housing, while two-thirds spent over 50% of their income on housing.[1] Although many factors contribute to this affordability crisis, exclusionary zoning is the primary culprit because it reduces the supply of affordable housing and leads to the concentration of high-poverty areas.[2] While exclusionary zoning superficially appears to be a legitimate policy to manage growth and preserve open space, its primary function is to keep undesired persons out of affluent suburbs.[3] By excluding unwanted individuals from affluent suburbs, exclusionary zoning exacerbates racial and economic segregation.[4]

Housing segregation is harmful because it separates poor and minority residents from "opportunity structures" that foster social advancement, including adequate employment, schools, and health care.[5] In the employment area, this phenomenon is called the "spatial mismatch hypothesis," which describes the difficulties of large distances between affordable housing and jobs.[6] This separation harms metropolitan economies by hindering economic transactions within the metropolitan area.[7] This separation is particularly difficult to address in metropolitan areas with many independent municipalities seeking to preserve their own

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[1] *See* Anthony Downs, *Growth Management, Smart Growth, and Affordable Housing*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 264, 266 (Anthony Downs ed., 2004) (citing U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2001, tbl.2-13, http://www.census.gov/hhes/www/housing/ahs/ahs01/tab213.html).

[2] Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 25–26 (1996).

[3] *See* Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 361–63 (1995).

[4] *See, e.g.*, Dietderich, *supra* note 2, at 32–33 (discussing the economic effects of exclusionary zoning on the concentration of poverty).

[5] John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 188, 190–92 (2003).

[6] *See, e.g.*, Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform*, 9 HOUSING POL'Y DEBATE 849 (1998), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_0904_ihlanfeldt.pdf.

[7] *See, e.g.*, MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 153 (2002).

tax bases.[8] Therefore, we must affirmatively counteract exclusionary zoning to foster metropolitan growth.

Nationwide efforts to remedy housing segregation have been underway for decades. These efforts, however, have focused on housing discrimination rather than addressing exclusionary zoning.[9] Unfortunately, the federal Fair Housing Act[10] requires a high burden of proof, which prevents plaintiffs from recovering absent explicit evidence of discrimination.[11] Thus, if poor or minority residents cannot afford to live in a town because facially neutral exclusionary zoning limits the supply of affordable housing, they cannot recover under the Act.[12] Moreover, even without exclusionary zoning, countless individuals' decisions to live near others with similar racial and economic characteristics perpetuates housing segregation.[13] For the reasons discussed above, more proactive housing integration strategies are essential.

Some jurisdictions have attempted more proactive strategies to attack exclusionary zoning, such as requiring developers or towns to provide affordable housing in new developments or giving affordable developers an edge in the zoning process.[14] Faced with these policies' repeated failures to counter strong attitudes against affordable housing, a few states have experimented with allowing towns or developers to trade affordable housing obligations.[15] New Jersey, however, is the only state with a comprehensive affordable housing trading policy.[16] This program, enacted to deflect opposition to more traditional anti-exclusionary zoning policies, allows towns to sell up to half of their state-imposed affordable housing obligations to another town.[17] This Note argues that while this program channels substantial housing funds from wealthy suburbs to impoverished cities, it perpetuates racial and economic segregation by funding affordable housing in high-poverty areas. Thus, this Note contends that allowing towns to trade affordable housing obligations undermines the central purpose of mandating affordable housing in suburbs—to counteract segregation.

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[8] Powell, *supra* note 5, at 193–94.

[9] *See* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 5–7 (1996); John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1574–76 (1993).

[10] 42 U.S.C. §§ 3601–31 (2000).

[11] *See* Boger, *supra* note 9, at 1583–85.

[12] *See id.*

[13] *See id.* at 1579–80. Contrary to this individual-based explanation of housing segregation, Haar asserts that "racial discrimination in the operation of housing markets appears to be the most powerful factor," exemplified by the majority's choice to "insulate themselves from the worrisome quandaries posed" by the problems of concentrated urban poverty. HAAR, *supra* note 9, at 6.

[14] *See infra* Part II.B.

[15] *See infra* Part II.B.

[16] *See infra* Part IV.G.

[17] *See infra* Part IV.

Although several scholars analyzed New Jersey's program shortly after its enactment in 1985 and during its first years of operation,[18] no study has evaluated its long-term progress or current effectiveness. This Note fills that gap by summarizing and assessing the program's results over the past twenty years and predicting its future. In addition, this Note uses observations from New Jersey to analyze the broader implications of affordable housing trading policies. Part II introduces the history of exclusionary zoning and its effects on affordable housing and segregation in metropolitan areas, and concludes by analyzing opposition to exclusionary zoning. Part III summarizes the scholarly theory behind regulatory trading policies in general and affordable housing trading policies in particular. Part IV describes the history and current progress of New Jersey's affordable housing trading program. After evaluating scholarly reactions to the program, Part IV concludes by evaluating the effectiveness and desirability of the program as well as comparing the program to more limited affordable housing trading systems in other states. Finally, Part V offers brief conclusions and policy suggestions.

II. EXCLUSIONARY ZONING AND HOW TO FIGHT IT

Innocuous on the surface, exclusionary zoning dominates municipal land regulation in most municipalities. In fact, despite laudable justifications to separate incompatible land uses and to preserve open space from development, zoning itself originated as a tool to exclude undesired individuals and land uses from wealthy areas.[19] After surveying the history of zoning, this Part summarizes the basic characteristics of exclusionary zoning ordinances and their effect on housing segregation. Next, it assesses various types of opposition to exclusionary zoning, including constitutional challenges, housing discrimination statutes, and laws requiring towns to accept affordable housing. Finally, this Part analyzes inclusionary zoning, a broad category of policies encouraging towns or developers to provide affordable housing within new development. Although inclusionary zoning and other policies opposing exclusionary zoning modestly expand affordable housing opportunities in some areas, they are insufficient to alleviate the housing affordability crisis.

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[18] *See, e.g.*, Patrick Field et al., *Trading The Poor: Intermunicipal Housing Negotiation in New Jersey*, 2 HARV. NEGOT. L. REV. 1 (1997); Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 FORDHAM URB. L.J. 535, 559 n.98 (1988); Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 691–92 (1987).

[19] *See infra* Part II.A.1.

A. *History, Characteristics and Politics of Exclusionary Zoning*

1. *Exclusionary Origins of Zoning*

From its inception, zoning has accomplished two major goals: separating incompatible land uses and excluding undesired people.[20] Early ordinances predating formal zoning, such as the anti-laundry ordinances enacted in California in the 1890s, set the precedent of regulating land use to discriminate against the poor and minorities.[21] Exclusion also dominated the first formal zoning ordinance, passed in New York City at the urging of wealthy Fifth Avenue merchants seeking to distance garment factories (and low-income workers) from their exclusive shops.[22] Ever since, zoning has legitimately promoted safe development by separating incompatible uses while simultaneously excluding poor and minorities from wealthy areas.[23] However, explicitly racial zoning persisted decades after the Supreme Court found such ordinances unconstitutional.[24]

Facially neutral exclusionary zoning continues, in part because the Court gives substantial deference to local land use decisions, even if they indirectly perpetuate racial or economic segregation.[25] The Court broadly upheld zoning as a legitimate exercise of the state's police power, sweeping aside the trial court's concerns that zoning would "classify the population and segregate them according to their station in life."[26] Unfortunately, zoning has fulfilled that prediction, exacerbating both racial and economic residential segregation and threatening housing affordability.

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[20] *See* Morgan, *supra* note 3, at 360–61 (summarizing the origins of zoning in private and public common law nuisance actions and private deed covenants); *see also* SAMUEL BASS WARNER, JR., THE URBAN WILDERNESS: A HISTORY OF THE AMERICAN CITY 28–30 (1972).

[21] *See* WARNER, *supra* note 20 at 28–29 (discussing the California ordinances which discriminated against Chinese immigrants).

[22] *See id.* at 29–30.

[23] *See* Morgan, *supra* note 3, at 361; *see also* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 242 (1985) (arguing that despite rhetoric to the contrary, zoning has always been a "device to keep poor people and obnoxious industries out of affluent areas"); WARNER, *supra* note 20, at 31 (describing zoning as a "defense against 'undesirable' activities and people").

[24] Florence Wagman Roisman, *Symposium: Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 92 (2001) (citing, inter alia, Buchanan v. Warley, 245 U.S. 60, 82 (1917); City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950)); *see also* WARNER, *supra* note 20, at 32 (noting that in 1948, the Supreme Court held that racially restrictive private covenants were unenforceable).

[25] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88, 397 (1926); *see also* Roisman, *supra* note 24, at 93 n.148 (discussing judicial deference to zoning despite its exclusionary tendencies).

[26] *Vill. of Euclid*, 272 U.S. at 387–88, 397; Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 316 (N.D. Ohio 1924). This judicial deference followed an increase in zoning's popularity as demonstrated by the model zoning statute promulgated by the Federal Commerce Department in 1924. *See* WARNER, *supra* note 20, at 31.

2. *Features and Effects of Exclusionary Zoning*

Exclusionary zoning ordinances minimize development density to protect property values and "community character."[27] Such ordinances accomplish these goals—and also increase housing costs—using several standard components, including large minimum lot sizes and setbacks, maximum building densities, and restrictions on or prohibition of multi-family homes.[28] The resulting low-density development increases housing costs by requiring more infrastructure, including streets, utilities, and sewers per unit, reducing housing supply, and restricting multi-family housing, which is generally cheaper than single-family homes.[29] In addition to the effects of low-density development, some ordinances increase costs directly by requiring unnecessary infrastructure, such as excessive street size and parking.[30] Finally, some ordinances use "fiscal zoning" to exclude affordable housing, usually justified by its impact on the tax base.[31]

Critics of exclusionary zoning focus on several prominent negative effects, each of which interacts to reduce housing affordability for low-income individuals and increase racial and economic residential segregation. In brief, as framed by Andrew G. Dietderich, exclusionary zoning has five major effects.[32] First, it increases housing prices in suburban areas by adding extra requirements and preventing efficiencies that result from denser development.[33] Second, it makes single-family housing artificially cheaper than multi-family housing by expanding the supply of single-family housing but making multi-family housing "artificially scarce."[34] Third, it forces people to consume more land than they need.[35] Fourth and fifth, it segregates wealthy suburban and poor urban tax bases and fosters "the concentration of poverty."[36]

Although exclusionary zoning arguably benefits wealthy suburbs by avoiding costs imposed by poor residents, this exclusion hurts the aggregate region by concentrating poverty in small areas.[37] Indeed, the

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[27] Morgan, *supra* note 3, at 361.

[28] *Id.*

[29] *See id.* at 362.

[30] Dietderich, *supra* note 2, at 51–52.

[31] Morgan, *supra* note 3, at 363; *see also* Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2055 (1994).

[32] Dietderich, *supra* note 2, at 31.

[33] *Id.* 31–32

[34] *Id.* at 32.

[35] *Id.*

[36] *Id.* at 32–33. Critics emphasize these five negative effects discussed above to challenge municipal choice theory, which was first articulated by Charles Tiebout. *Id.* at 32–33. This theory posits that municipalities should offer different packages of services and taxes to compete for residents in order to promote choice and efficiency. *Id.* at 31–35.

[37] *Id.* at 34.

number of low-income residents in the region remains the same regardless of each municipality's zoning rules, but exclusionary zoning enables some municipalities to force others to bear the costs of concentrated poverty.[38] By preventing dense suburban development, exclusionary zoning also exacerbates urban crowding and the job-housing mismatch—both of which disproportionately harm low-income individuals.[39]

Exclusionary zoning thus imposes social costs on individuals and communities at several levels. First, by drastically increasing housing prices, it reduces the opportunity structures and worsens the living environment of many low-income individuals excluded from affluent suburbs.[40] Second, it harms less affluent municipalities, both urban and suburban, by reducing their ability to broaden their tax base with an economically diverse population to support the costs of low-income residents.[41] Third, it imposes social and economic costs on metropolitan areas by promoting racial and economic segregation, which often leads to greater conflict between racial and economic groups.[42] Finally, it imposes broad environmental costs by expanding automobile use (through greater distance between housing and employment) and consuming excessive open space with low-density development.[43]

3. *Opposition to Exclusionary Zoning*

Although the costs of exclusionary zoning are now widely understood, its supporters' clout, combined with judicial deference to local land use decisions, long prevented substantial zoning reform.[44] Politically, its supporters, typically current residents of affluent suburbs, are better positioned than opponents.[45] Most importantly, current residents have a strong interest in keeping zoning that increases their land values.[46] They also have more influence over zoning decisions because they vote for local government officials with direct or indirect control over land use decisions

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[38] *See id.* at 34–35 (explaining that any change in the community's tax base will be offset by an equal change in another community's tax base, which would shift the costs to the other community).

[39] *See* ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 130–31 (2000) (discussing how exclusionary zoning and suburban sprawl reduce the employment and living choices available to low-income individuals); Dietderich, *supra* note 2, at 35.

[40] *See* Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 229, 232–34 (2003); *see also* Powell, *supra* note 5, at 193–95.

[41] *See* Dietderich, *supra* note 2, at 34 (positing that a rational community will either have low-income residents carry the costs of the increased tax rate necessary to provide services to less-wealthy individuals, or will exclude them altogether).

[42] *See* Roisman, *supra* note 24.

[43] *See* DUANY ET AL., *supra* note 39, at 91–92, 151.

[44] *See* Choppin, *supra* note 31, at 2055–60.

[45] *Id.* at 2056.

[46] *See id.* at 2056–57.

and are more likely to have standing to challenge ordinances in court.[47] They have little reason to oppose exclusionary zoning, which does not exclude them because they already live in the town, while allowing them to exclude groups they fear or dislike.[48] In contrast, potential residents of a town have much less influence because they cannot vote in the town, have limited legal standing, and have difficulty organizing politically.[49] Low-income and minority potential residents have even less leverage because they often have fewer resources to create coalitions or litigate against exclusionary ordinances.

Finally, while developers in the aggregate should benefit from inclusionary zoning because it permits denser and thus more efficient development, "their numbers are small and they may have divided loyalties."[50] Denser development is cheaper to build and therefore more profitable because it requires less infrastructure costs per unit and allows more units to be built for the same initial architectural, regulatory, and organizational investments in a parcel of land.[51] Yet, developers of luxury units on scarce land have every incentive to favor rules that exclude competitors.[52] Moreover, towns rather than developers often bear some of the increased infrastructure costs of low-density development, such as high sewer, utility, and road installation and maintenance costs per unit, which in turn creates an unaffordable tax burden for low-income individuals.[53] Thus, only the few developers who specialize in producing affordable housing, often with partial state or federal funding, advocate the denser development that makes their projects feasible. These political disparities also prevent zoning reform on the state and federal levels. Although exclusionary zoning opponents can form coalitions more easily on broader levels, affluent existing residents have powerful resources to maintain the status quo.

Court challenges to exclusionary zoning also frequently fail because unless ordinances target protected classes of persons, most courts uphold them as a lawful exercise of the police power to promote aesthetics, public health, and efficient government services, and to maintain property values.[54] The Supreme Court's deference to local land use decisions, including exclusionary zoning ordinances, prevents federal constitutional challenges. On due process grounds, the Court has upheld major features of exclusionary zoning such as low density and high setback

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[47] *Id.* at 2055–57.
[48] *See id.*
[49] *Id.* at 2056.
[50] *Id.*
[51] Dietderich, *supra* note 2, at 52; Morgan, *supra* note 3, at 361.
[52] *See* Choppin, *supra* note 31, at 2056.
[53] *See* Fox, *supra* note 18, at 540–41.
[54] *See* Morgan, *supra* note 3, at 362–63, 365.

requirements.[55] More generally, in *Warth v. Seldin*, the Supreme Court prevented federal court challenges to exclusionary zoning by denying standing to plaintiffs who could not prove affordable housing would be certain to exist without the ordinance.[56] Equal protection challenges also fail. Since poverty is not a suspect class and housing is not a fundamental right, courts uphold ordinances as long as they are rationally related to a legitimate state purpose.[57]

In contrast to the U.S. Supreme Court, some state courts have been more receptive to exclusionary zoning challenges, partially because some states have laxer standing rules than the federal courts. State high courts in New Hampshire, New Jersey, New York, Pennsylvania, Virginia, and others have struck down exclusionary ordinances holding that the police power must protect the entire region's housing needs.[58] Thus, rather than deferring to local government's use of the police power, those courts also analyzed the effect and underlying purpose of exclusionary ordinances.[59] The New Jersey Supreme Court expanded this approach by not only invalidating exclusionary zoning, but also affirmatively requiring all municipalities to provide their "fair share" of regional affordable housing.[60] Yet ultimately, the most successful challenge to exclusionary zoning involves amending local ordinances to require a broad mix of housing, including enough low-income housing to serve area poor residents.[61] To this end, several states have enacted statutes to encourage regional development of affordable housing by sidestepping or outlawing local exclusionary zoning ordinances.[62]

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[55] *See id.* at 364 (citing Agins v. City of Tiburon, 447 U.S. 255, 261 (1980); Village of Belle Terre v. Boras, 416 U.S. 1, 6 (1974); Berman v. Parker, 348 U.S. 26, 32–33 (1954); Goreib v. Fox, 274 U.S. 603, 608 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

[56] Warth v. Seldin, 422 U.S. 490, 504 (1975); Morgan, *supra* note 3, at 364.

[57] Morgan, *supra* note 3, at 365.

[58] *Id.* at 366–68 (citing S. Burlington County NAACP v. Twp. of Mt. Laurel (*Mt. Laurel II*), 456 A.2d 390 (N.J. 1983) (expanding prior decision to all municipalities); S. Burlington County NAACP v. Twp. of Mt. Laurel (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) (broadly invalidating exclusionary zoning ordinances for municipalities in the path of development); Town of Pompey v. Parker, 385 N.Y.S.2d 959 (N.Y. App. Div. 1976), *aff'd*, 377 N.E.2d 741 (N.Y. 1978) (limiting court's scrutiny to developing communities); Berenson v. New Castle, 341 N.E.2d 236 (N.Y. 1975); Appeal of Girsh, 263 A.2d 395 (Pa. 1970) (invalidating restriction on multiple family dwellings); Appeal of Kit-Mar Builders, 268 A.2d 765 (Pa. 1970) (invalidating excessive minimum lot size); Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965) (same); Bd. of County Supervisors v. Carper, 107 S.E.2d 390, 396–97 (Va. 1959) (invalidating facially neutral excessive minimum lot size that was applicable only in one part of the county, which effectively imposed economic segregation); *see also* Britton v. Town of Chester, 595 A.2d 492, 494–96 (N.H. 1991) (invalidating a restriction on multi-family housing).

[59] *See* Morgan, *supra* note 3, at 366–68.

[60] *Mount Laurel II*, 456 A.2d at 419.

[61] *See infra* Part II.B.

[62] *See infra* Part II.B.

B. *Inclusionary Zoning: Encouraging Suburban Affordable Housing Development*

Efforts to neutralize exclusionary zoning and increase affordable housing opportunities have expanded in recent years.[63] There are three broad types of such programs. First, inclusionary zoning programs require towns or developers to include a set percentage of affordable units in new developments.[64] Second, inclusionary housing programs include agreements and policies to promote affordability.[65] Third, fair-share housing policies require towns to provide a certain percentage of the metropolitan region's affordable housing.[66] Using each of these methods, different states have chosen strategies with a broad range of enforcement, ranging from firm mandates to general encouragement of affordable housing.

1. *Fair Share Requirements and Builder's Remedies*

New Jersey's *Mount Laurel* decisions represent the most direct attack on exclusionary zoning, mandating municipalities to provide for regional affordable housing needs, although the New Jersey statute adds flexibility to this framework.[67] This approach, however, is an explicit limit on the judicially-created builder's remedy, which helps developers win appeals against towns that reject their affordable housing projects, unless the town demonstrates that it denied the project for a statutorily permissible purpose.[68] Statutes in Connecticut, Massachusetts and Rhode Island also provide a builder's remedy.[69] Statutes in California, Florida, Oregon, and Washington require a state agency to review local affordable housing plans regularly to ensure they provide sufficient affordable housing opportunities to satisfy regional housing needs.[70]

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[63] *See* Douglas R. Porter, *The Promise and Practice of Inclusionary Zoning*, *in* GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT? 212, 213 (Anthony Downs ed., 2004).

[64] *Id.* at 212–13 n.1.

[65] *Id.*

[66] *Id.*

[67] *See infra* Part IV.A.

[68] *See* Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 327–28 (2001); *see also* Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 125, 139 (2001) (describing damage to the statute's effectiveness resulting from broad judicial interpretation of the statute's provision that any legitimate planning justification neutralizes the builder's remedy).

[69] Morgan, *supra* note 3, at 370–72; Stonefield, *supra* note 68, at 327–28.

[70] Morgan, *supra* note 3, at 373–77.

2. *Inclusionary Zoning Ordinances*

Inclusionary zoning ordinances, often prompted by state statutes, require developers to include a set percentage of affordable housing in any new project above a certain size. In theory, inclusionary ordinances are ideal because they produce affordable housing without public funding.[71] Unfortunately, inclusionary zoning may instead cause more exclusionary pricing by forcing developers to compensate for revenue from affordable units by increasing market prices.[72] To counteract this problem, some ordinances compensate developers with streamlined regulatory approval and/or density bonuses.[73] In addition, some ordinances are voluntary and allow affordable builders to choose to obtain regulatory relief.[74] Generally, only in "extraordinarily strong housing markets" do the ordinances impose mandatory quotas without density bonuses.[75] Density bonuses, which typically range from 10% to 25%, often on a sliding scale with increased affordability, more directly reduce development costs.[76] First, increased density reduces per-unit infrastructure and construction costs. Second, higher density development is valuable because it is rare in suburbs that practice exclusionary zoning.[77] Thus, density bonuses help overcome many barriers to developing affordable housing.[78]

Other variations in inclusionary zoning substantially influence their impact. First, the size of development that triggers the ordinance exempts many small projects from affordable requirements, especially in jurisdictions with little available land.[79] Second, the percentage of affordable units required usually ranges from 10% to 15% of the project's units, but variations alter the requirement's stringency.[80] Third, the incomes targeted by the affordable units controls the population of persons who will benefit from the new housing.[81] Most ordinances require the

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[71] Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 974 (2002).

[72] *See id.*; Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

[73] *See* Kautz, *supra* note 71, at 981.

[74] At least superficially, mandatory inclusionary zoning produces more affordable housing, as exemplified by Montgomery County, Maryland, which produced approximately 11,000 affordable units in the first twenty-five years after passing its ordinance. Karen Destorel Brown, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area* 2 (Brookings Inst. Ctr. on Urb. & Metro. Pol'y, Discussion Paper, Oct. 2001), http://www.brook.edu/es/urban/publications/inclusionary.pdf.

[75] Porter, *supra* note 63, at 221, 226.

[76] *See id.* at 227.

[77] *See* Dietderich, *supra* note 2, at 51–54 (also noting that density bonuses reduce suburban sprawl, another argument in their favor). Density bonuses, however, do not erase other exclusionary practices, such as excessive street, parking, or other infrastructure requirements. *Id.* at 52.

[78] *See id.* at 69.

[79] *See* Brown, *supra* note 74, at 18; Porter, *supra* note 63, at 226.

[80] *See* Porter, *supra* note 63, at 227.

[81] *Id.*

affordable units to be accessible to households earning 50% to 80% of the Area Median Income (AMI), although some require higher affordability.[82] Finally, the ordinances provide a range of time for which units must remain affordable, typically ranging from ten to thirty years.[83] Montgomery County, for example, controls affordable prices for ten years for sales and twenty years for rentals, which means that a majority of its affordable units are now market-rate, although the county collects portions of sales to build permanently affordable units.[84]

3. *Challenging the Racially Discriminatory Effects of Exclusionary Zoning*

Except for Montgomery County, most inclusionary zoning programs reduce economic segregation but fail to alleviate racial housing segregation.[85] Arguing that "economics cannot be used as a proxy for race," some scholars worry that zoning appeals statutes exacerbate racial segregation by primarily providing affordable housing for whites.[86] Similarly, a study of New Jersey's *Mount Laurel* initiatives demonstrates a failure to improve racial integration.[87] While 15% of occupants moved from cities to suburbs, only 5% of blacks and 2% of Latinos did so.[88]

Other scholars, unsatisfied with zoning-based affordable housing programs, advocate challenging exclusionary zoning as racial discrimination under the federal Fair Housing Act.[89] This strategy has become more realistic after 1988, when the Second Circuit invalidated "an overwhelmingly white suburb's zoning regulation, which restrict[ed] private multi-family housing to a largely minority 'urban renewal area.'"[90] Granted, the court emphasized that greater deference is due to developers seeking relief from a discriminatory ordinance than affirmatively requiring a municipality to provide more affordable housing, but this decision establishes that ordinances' discriminatory impact may violate Title VIII.[91]

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[82] *See id.* at 224–25, 228, 235–36.

[83] *See id.* at 230.

[84] *See* Brown, *supra* note 74, at 6–7, 17.

[85] Roisman, *supra* note 24, at 71–72. Roisman explains that Montgomery County fosters racial integration by selecting some of the inclusionary zoning housing occupants from public housing waiting lists, which contain many minority applicants. *Id.* at 78–79.

[86] *See id.* at 72, 84.

[87] *See* Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1294–98 (1997).

[88] *Id.* at 1295–96.

[89] *See* Fair Housing Act, 42 U.S.C. §§ 3601–31 (2000); James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 90 (1993).

[90] Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 928, 940 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (per curiam); *see also* Hartnett, *supra* note 89, at 112–13.

[91] *Huntington*, 844 F.2d at 940–41; *see also* Hartnett, *supra* note 89, at 114.

New Jersey's *Mount Laurel* cases reflect a similar strategy using state constitutional law, while the New Jersey courts continue to review the administration of affordable housing programs for discriminatory effects.[92]

C. *Flexibility in Inclusionary Zoning Policies*

Some affordable housing strategies include more flexibility in satisfying mandates, such as imposing linkage fees on all developers to contribute to affordable housing funds or allowing developers to pay fees in lieu of producing on-site affordable housing.[93] Additional intra-regional cooperation in providing more affordable housing could also result form establishing robust regional housing governments.[94] A few jurisdictions, including California and New York City, have also introduced affordable housing trading schemes to add additional flexibility. New Jersey's Regional Contribution Agreement program, however is the only scheme that lets municipalities buy and sell affordable housing obligations.[95] As discussed below, this program encourages the redistribution of some housing funds but fails to alleviate racial or economic housing segregation.

III. REGULATORY TRADING SCHEMES

A. *Trading Schemes Generally*

Implemented prominently in the marketable allowances of the acid rain reduction program of the Clean Air Act[96] and in transferable development rights,[97] market-based regulation has become more popular as regulated entities seek more flexibility to reduce compliance costs.[98] Instead of requiring all regulated entities to follow specific guidelines, trading schemes allocate initial obligations and allow entities to buy and sell credits towards meeting their obligations.[99] In order to preserve the

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[92] *See* Hartnett, *supra* note 89, at 117–20, 124–27 (discussing, inter alia, *In re* Twp. of Warren, 622 A.2d 1257, 1271 (N.J. 1993) (invalidating occupancy preferences for current residents of the municipality in newly constructed affordable housing as unlawful discrimination against minorities)).

[93] *See, e.g.*, Powell, *supra* note 5, at 206–07.

[94] *See, e.g.*, Thomas A. Brown, Note, *Democratizing the American Dream: The Role of a Regional Housing Legislature in the Production of Affordable* Housing, 37 U. MICH. J. L. REFORM 599, 648–660 (2004).

[95] *See infra* Part IV.G.

[96] Clean Air Act, 42 U.S.C. §§ 7651–7651o (2000).

[97] *See* David G. Andersen, Comment, *Urban Blight Meets Municipal Manifest Destiny: Zoning at the Ballot Box, the Regional Welfare, and Transferable Development Rights*, 85 NW. U. L. REV. 519, 553–56 (1991).

[98] *See* John R. Swinton, *The Potential for Cost Savings in the Sulfur Dioxide Allowance Market: Empirical Evidence from Florida*, 78 LAND ECON. 390, 391 (2002).

[99] *See* James E. Krier, *Marketable Pollution Allowances*, 25 U. TOL. L. REV. 449, 454 (1994) (discussing the positive and negative impacts of marketable allowance theory as applied to the Clean Air Act).