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I. Introduction

Lower income New York City residents are faced with a housing emergency.[1] Concurrently, commercial and luxury residential development is expanding.[2] New York is considering adopting an approach to the housing shortage which has been taken in several other cities.[3] The plan advocates amendment of the City's[4] zoning ordinance to require developers of commercial and luxury residential projects to provide the City with lower income housing units.[5]

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1. In authorizing enactments to control housing rental rates, the State legislature found a "serious public emergency" in housing across the State. *See* N.Y. UNCONSOL. LAWS § 8622 (McKinney Supp. 1983-1984). The authorized enactments must be premised upon a finding of a local housing emergency, which can exist only if the vacancy rate is less than 5%. *Id.* § 8623(a). Once an "emergency" is declared it continues until a contrary finding is made by the local legislative body. *Id.* § 8623(b). Pursuant to this authority, New York City in 1979 reaffirmed the existence of a "serious public emergency" in City housing. *Id.* following § 8617 (NEW YORK, N.Y., RENT STABILIZATION LAW §§ YY51-1.0, 1.0.1).

New York City's vacancy rate is estimated to be below 2.5%. *See, e.g.*, Sullivan, Testimony to the Mayor's Development Commitment Study Commission, Board of Estimate Chambers 1, 6 (Sept. 22, 1983). The actual percentage, however, merely is symbolic of a situation that has become a fact of life in New York City. *See* Baker, *Moscow on the Hudson*, N.Y. Times, May 18, 1983, at A27, col. 5 (satirizing the lengths to which New York City residents must go to find any apartment, much less an affordable one).

2. In 1979, 110,000 square feet of office space were added to Manhattan. During the next three years 412,000, 558,000 and 8,486,000 square feet were added. The projection is that there will be an additional 10,430,000 square feet during 1983. Sullivan, Testimony to Mayor's Development Commitment Study Commission 6 (Sept. 22, 1983) (citing data of Real Estate Board of New York). Mr. Sullivan's comments, as well as other testimony given before the Commission, are available from the Pratt Institute Center for Community and Environmental Development, 379 DeKalb Ave., 2d Floor, Steuben Hall, Brooklyn, New York 11205.

3. See *infra* notes 23, 35 and accompanying text for a discussion of other cities' adoption of land use methods to address their needs for lower income housing.

4. In this Note "City" refers to New York City exclusively; "city" refers to cities generally. Several of the cases cited deal with towns or villages within New York State. See *infra* note 70 for a discussion of the applicability of these cases to zoning actions taken by cities.

5. Inclusionary Zoning and Housing Trust Fund: A Proposal for Equitable Development in New York City 9-11 (Draft, Dec. 12, 1983)[hereinafter cited as Draft Proposal]. The proposal is the result of a joint effort by the Pratt Institute Center for Community and Environmental Development and the Center for Metro-

New York City receives its authority to enact zoning ordinances by direct grant from the New York State legislature.[6] The grant is a delegation of the state's police power,[7] which authorizes the City to enact ordinances for the safety, health or general welfare of its citizens.[8] Although the power of the enabling act is construed broadly,[9] it is not equivalent to the State's full police power.[10] Pursuant to this grant, New York City may regulate the uses of land, the size of structures and lots and the population density.[11] Enactments which

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politan Action at Queens College of the City University of New York. It may be acquired by writing directly to the Center at Queens College, Flushing, New York 11367.

6. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 370, 334 N.Y.S.2d 138, 145, 285 N.E.2d 291, 296-97, *appeal dismissed*, 409 U.S. 1003 (1972)(exercise of zoning power to create timed population growth scheme must be founded upon legislative delegation, though it need not be specifically authorized)[hereinafter cited as *Golden v. Ramapo*].

7. *See* McMinn v. Town of Oyster Bay, 111 Misc. 2d 1046, 1057, 445 N.Y.S.2d 859, 867 (Sup. Ct. Nassau County 1981)(police power resides within state and is delegated by state to its towns for zoning purposes).

8. Maldini v. Ambro, 36 N.Y.2d 481, 484-85, 369 N.Y.S.2d 385, 389, 330 N.E.2d 403, 405-06, *appeal dismissed*, 423 U.S. 993 (1975)(town's establishment of "Retirement Community District" for aged persons promoted community's health and general welfare by meeting town's need for housing the aged).

9. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1973)(police power supported limitation of one-family residences to occupancy by no more than two unrelated persons to provide for "quiet place where yards are wide, people few, and motor vehicles restricted").

10. Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 342-43, 434 N.Y.S.2d 180, 182, 414 N.E.2d 680, 682, *cert. denied*, 450 U.S. 1042 (1980)(delegation of authority not coterminous with stated police power objectives; establishment of zones in which lots must be at least five acres permissible as within enumerated purposes of enabling act)(quoting *Golden v. Ramapo*, 30 N.Y.2d at 370, 334 N.Y.S.2d at 145, 285 N.E.2d at 296-97).

11. *See, e.g.*, N.Y. GEN. CITY LAW § 20 subds. 24, 25 (McKinney 1968 & Supp. 1983-1984). This act provides in part that:

> Subject to the constitution and general laws of this state, every city is empowered:
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> 24. To regulate and limit the height, bulk and location of buildings hereafter erected, to regulate and determine the area of yards, courts and other open spaces, and to regulate the density of population in any given area, and for said purposes to divide the city into districts. Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire, flood and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air, convenience of access, and the accommodation of solar energy systems and equipment and access to sunlight necessary therefor, and shall be made with reasonable regard to the character of buildings erected in each district, the value of land and the use to which it may be put, to the end

exceed the statutory grant are *ultra vires* and void.[12] Thus, the City may not use its zoning power to correct a general problem which is unrelated to the use of the zoned land.[13] Even enactments which are within the grant may be invalid if they bear no substantial relation to the public health, safety, morals or general welfare.[14]

Land use regulations in the United States have a relatively short history.[15] A city normally is divided into districts and regulations are established for each district.[16] This traditional approach to zoning

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that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city.

25. To regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

12. *Golden v. Ramapo*, 30 N.Y.2d at 369-70, 334 N.Y.S.2d at 144-45, 285 N.E.2d at 296-97 (ordinance is *ultra vires* unless power to condition future development upon showing of presence of sufficient support facilities can be implied from statutory scheme of enabling legislation).

13. *Id.* at 371 n.5, 334 N.Y.S.2d at 146 n.5, 285 N.E.2d at 297 n.5 (end sought must be peculiar to locality's basic land use scheme). *See also* Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 427, 297 N.Y.S.2d 129, 132, 244 N.E.2d 700, 702 (1969)(impermissible to bar new development on grounds that it would strain existing sewage disposal facilities where inadequacy existed prior to developer's application and was not caused by nature of development).

14. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926)(zoning restrictions on land use excluding business from residential areas bore substantial relationship to health, safety and general welfare). *See also* Berenson v. Town of New Castle, 38 N.Y.2d 102, 109-10, 378 N.Y.S.2d 672, 680-81, 341 N.E.2d 236, 242 (1975)(total ban on new multiple residences impermissible unless properly balanced plan exists to meet needs of town and of region for such housing, thus establishing substantial relation to health, safety and general welfare).

15. The nation's first comprehensive zoning ordinance was enacted by New York City in 1916. Elliott and Marcus, *From* Euclid *to* Ramapo: *New Directions in Land Development Controls*, 1 HOFSTRA L. REV. 56, 58 (1973)[hereinafter cited as Euclid *to* Ramapo]. The origins of zoning as a means of land use control can be traced through its relationship with the common law of nuisance. Comment, *Zoning and the Law of Nuisance*, 29 FORDHAM L. REV. 749 (1961).

16. *See* N.Y. GEN. CITY LAW, § 20 subds. 24, 25 (McKinney 1968 & Supp. 1983-1984). For an example of districting, see the description by Justice Sutherland of the relatively simple ordinance under challenge in *Euclid v. Ambler*, 272 U.S. at 379-84. The complexity of districting may be appreciated best by viewing the maps incorporated in a current city ordinance. *See, e.g.*, New York City Zoning Resolution (1961),

does not afford the flexibility which a city needs to plan adequately for future growth and development.[17] In response, cities have enacted more flexible zoning mechanisms.[18] These mechanisms change the subject of control from a single parcel to tracts of land[19] or to non-contiguous designated parcels[20] within a district. They also represent a

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zoning maps 8c, 8d (as amended July 21, 1983) (issued by N.Y.C. Dep't of City Planning). The maps depict the applicability of the Residential (R1 to R10), Manufacturing (M1-1 to M3-2) and Commercial (C1-1 to C8-4) Use District regulations to the Midtown section of Manhattan. *Id.* Superimposed upon these general districts are regulations established for Special Purpose Districts such as the Special Clinton District. *Id.* art. IX, chap. 6 (as amended April 29, 1982).

17. Traditional zoning is referred to as "Euclidean" zoning. This reference has been said to refer to *Euclid v. Ambler*, 272 U.S. 365, the Supreme Court's first pronouncement on the question of zoning. 82 AM. JUR. 2D *Zoning & Planning* § 1 (1976). However, the term also is suggestive of Euclidean geometry and thus of the rigidly patterned thought which has impeded cities in planning for future growth.

Zoning ordinances must be enacted in accordance with a comprehensive plan. *See, e.g.*, N.Y. GEN. CITY LAW § 20, subd. 25 (McKinney 1968)(regulations to be "in accord with a well considered plan"). One pair of commentators has charged that the inability of traditional, Euclidean zoning to react to the actual operation of a city has "helped turn the concentration of activities that is essential to the success of a city into congestion." Euclid *to* Ramapo, *supra* note 15, at 56. Another pair of commentators, having stated the requirements of effective urban land use planning, state that for purposes of implementing plans, the "vision of [Euclidean zoning] approximates the technological insight of the inventor of the cookie cutter." Freilich and Quinn, *Effectiveness of Flexible and Conditional Zoning Techniques—What They Can and What They Can Not Do For Our Cities*, 1979 INST. ON PLAN. ZONING & EMINENT DOMAIN 167, 168 [hereinafter cited as *Conditional Zoning*]. *See also Golden v. Ramapo*, 30 N.Y.2d at 372, 334 N.Y.S.2d at 147, 285 N.E.2d at 298 (focus on individual sites ineffective in treating problems of larger development).

18. *See* Holmes v. Planning Bd., 78 A.D.2d 1, 14, 433 N.Y.S.2d 587, 596 (2d Dep't 1980)(increasing desire of cities to plan growth has led to greater acceptance of more flexible devices proposed by professional planners). The intent is to encourage desired development and to induce the developers to provide various public amenities. *See* Heyman, *Innovative Land Regulation and Comprehensive Zoning* in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES, 23 (Marcus & Groves eds. 1970); Euclid *to* Ramapo, *supra* note 15, at 56-57.

19. Rather than setting a uniform size for all units in the district, "cluster" zoning considers the desirable total development of an area and distributes that amount of development throughout the area. Niccolai v. Planning Bd., 148 N.J. Super. 150, 152, 372 A.2d 352, 353 (A.D. 1977). "Planned Unit Development" permits a mixture of uses on a tract and varies size restrictions in consideration of the benefit to be gained from the whole tract. Rudderow v. Township Comm. of Mt. Laurel, 121 N.J. Super. 409, 413, 297 A.2d 583, 585 (1972)(discussing Municipal Planned Unit Development Act (1967)), N.J. STAT. ANN. § 40:55-54 to 55-67 (West 1967)). *See generally Symposium: Planned Unit Development*, 114 U. PA. L. REV. 3 (1965).

20. Development Rights Transfers sever the air rights from a parcel and allow them to be added to the development potential of one of several nearby designated sites. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Note, *New York City Zoning Resolution Section 12-10: A Third Phase in the Evolution of Airspace Law*, 11

shift in goals from passively restricting nuisances to actively garnering benefits from developers in furtherance of a city's plan for future growth.[21] Acquiring additional housing for lower income individuals[22] is one such benefit which cities would like to gain from private capital rather than at public expense.[23]

This Note examines the proposed requirement that commercial developers provide lower income housing units. It addresses the question of the validity of such a requirement in the context of New York

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FORDHAM URB. L.J. 1039 (1983). Such a plan was upheld over a constitutional challenge in Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), *aff'd*, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978)(city prohibited plaintiff's development above Grand Central Terminal but allowed rights to be transferred within area).

21. Incentive zoning plans encourage desirable uses or induce the addition of beneficial features to new construction by allowing the developer to increase the project to a higher level of density in exchange for inclusion of the desired use or feature. 1 R. ANDERSON, NEW YORK ZONING AND PRACTICE § 8.16, at 347 (1983). *See generally* Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint?* in THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES (Marcus & Groves eds. 1970). In New York, the arrival of incentive zoning was widely heralded. Huxtable, *Thinking Man's Zoning*, N.Y. Times, Mar. 7, 1971, § D, at 22, col. 1. More recently, it has been decried as "Frankenstein zoning." Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 363 (1982)(quoting Huxtable, *New York's Zoning Law is Out of Bounds*, N.Y. Times, Dec. 14, 1980, § 2, at 41, col. 1). Professor Costonis contends that incentive zoning "has sanctioned . . . bulky, light- and air-blocking slabs . . . . It has transformed reasonably predictable and impartial zoning procedures into a bazaar . . . ." *Id.* The City also has experienced difficulties in actually acquiring the benefits for which these bonus rights were awarded. Gottlieb, *City Is Shorted in Some Development Deals*, N.Y. Times, Oct. 16, 1983, § 4, at 6E, col. 2.

22. In its references to lower income individuals, this Note includes those of both moderate and low incomes. A "moderate income" is no greater than 80% and no less than 50% of the median income of the area. A "low income" does not exceed 50% of the median income of the area. *See* 42 U.S.C. § 1437a(b)(2) (Supp. V 1981) (defining income standards for Section 8 housing subsidy program; program uses terms "lower income" and "very low income" respectively).

Housing which is affordable by lower income individuals costs no more than 30% of the person's income. *See id.* § 1437a(b)(1) (setting rent to be charged for federally subsidized lower income housing); 12 U.S.C. § 1701s(d) (1982)(setting amounts payable as rent supplements for lower income housing). This federal standard is slightly higher than the commonly accepted figure of 25% of income. *See* South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 92 N.J. 158, 221 n.8, 456 A.2d 390, 421 n.8 (1983)[hereinafter cited as *Mt. Laurel II*].

23. *See* Fulton, *Boom Cities Force Office Developers to Build Housing*, Los Angeles Daily Journal, Aug. 5, 1982, at 1, col. 6 (reporting litigation challenging Santa Monica, California's zoning ordinance, which requires developers to include lower income housing units). *See also* Marcus, *Zoning Exactions Employed to Solve Housing Problems*, N.Y.L.J., Oct. 5, 1983, at 1, col. 3 (trend in attempts to gain housing units as benefit from developers criticized as contrary to essential nature of zoning, which is merely to regulate land use and to avoid any negative effects).

City's statutory authority to use zoning ordinances to place conditions upon proposed development projects. By analogy to the limitations on this authority, this Note recommends a shift in emphasis to bring such a program into compliance with New York law.

II. The Requirements Of Zoning Ordinances With Respect to Lower Income Housing

A. Invalid Exclusionary Ordinances

A prime goal of zoning is assuring sufficient housing to meet current needs.[24] A zoning ordinance also should anticipate future housing needs.[25] A municipality must consider these needs not only within its own borders, but also within the general region.[26]

The ordinance must contemplate appropriate housing for all segments of the population.[27] A municipality may not use zoning to

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24. South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 184-85, 336 A.2d 713, 730 (1975)(challenged ordinances precluded lower income housing; court directed that impediments be removed from ordinances)[hereinafter cited as *Mt. Laurel I*]; *Mt. Laurel II*, 92 N.J. at 260-61, 456 A.2d at 442-43 (since only minimal efforts had been made to alleviate problem of shortage of lower income housing, affirmative measures had to be undertaken to assure actual construction).

25. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 378, 334 N.Y.S.2d 138, 152, 285 N.E.2d 291, 301 (1972)("[z]oning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future").

26. A city's authority to regulate land use ends at its boundaries. *See* Siegel v. Tange, 61 A.D.2d 57, 401 N.Y.S.2d 269 (2d Dep't 1978)(where subject lots were located partially in adjoining township which was not party to action, proceeding to direct granting of variances had to be dismissed). However, in zoning its own terrritory, the municipality is required to consider the relevant needs of the surrounding region. Berenson v. Town of New Castle, 38 N.Y.2d 102, 110-11, 378 N.Y.S.2d 672, 681, 341 N.E.2d 236, 242 (1975)(although town had sufficient housing to satisfy its own present and future population, potential desire of residents of metropolitan region to live in town had to be considered). This regional outlook is required primarily of developing municipalities. *See, e.g.*, *Mt. Laurel I*, 67 N.J. at 190, 336 A.2d at 733. Several elements are considered in determining whether a municipality is "developing." *See* Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563, 567-68, 397 A.2d 384, 386 (1978). Essentially, the determination rests on whether future growth is likely. *See* Villa, Inc. v. Zoning Hearing Bd., Old Forge Borough, 57 Pa. Commw. 221, 225-26, 426 A.2d 1209, 1211-12 (1981). Such judicial determinations have drawbacks in that they are made only after the fact and do not allow for the exercise of sound planning. *Mt. Laurel II*, 92 N.J. at 224, 456 A.2d at 423. Accordingly, in reasserting its inclusionary mandate, the New Jersey Supreme Court embraced the legislature's establishment of "growth" areas in its State Development Guide Plan. *Id.* at 225-26, 456 A.2d at 423-24.

27. *See Mt. Laurel I*, 67 N.J. at 179, 336 A.2d at 727 (adequate housing for all categories of population is "an absolute essential" in promoting general welfare).

establish itself as a "haven for the well-to-do."[28] A zoning ordinance which effectively precludes lower income housing is termed "exclusionary."[29] Since exclusionary ordinances contravene the general welfare, they are an invalid exercise of the police power.[30]

Even where a municipality's zoning ordinance is not exclusionary and allows for the construction of lower income housing, the private construction industry's profit motives nevertheless may prevent units from being built.[31] In response to this economic reality, there have been various attempts to encourage such construction.[32] When a local government uses the zoning ordinance toward this end, its effort generally is termed "inclusionary" zoning.[33]

B. Valid Inclusionary Ordinances

Inclusionary zoning ordinances are an example of flexible zoning techniques.[34] These ordinances often use incentive zoning or mandatory "set-asides."[35] An incentive approach increases a residential de-

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28. *Mt. Laurel I*, 67 N.J. at 170, 336 A.2d at 723 (record established that township "through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing [and that the township has used] resources solely for the betterment of middle and upper-income persons")(quoting South Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 119 N.J. Super. 164, 178 (Super. Ct. Law Div. 1972)).

29. *See* Suffolk Hous. Servs. v. Town of Brookhaven, 91 Misc. 2d 80, 83, 397 N.Y.S.2d 302, 306, *aff'd*, 63 A.D.2d 731, 405 N.Y.S.2d 302 (2d Dep't 1978).

30. *See Berenson v. Town of New Castle*, 38 N.Y.2d at 109, 378 N.Y.S.2d at 680, 341 N.E.2d at 241-42 (primary goal of zoning ordinance must be to develop town as balanced, cohesive community); *Mt. Laurel I*, 67 N.J. at 179-80, 336 A.2d at 727-28 (since exclusion of lower income individuals is contrary to general welfare, ordinance which set requirements that increased housing costs beyond lower income affordability exceeded limits of regulatory power).

31. Blitz v. Town of New Castle, 94 A.D.2d 92, 99, 463 N.Y.S.2d 832, 836 (2d Dep't 1983)("zoning ordinances will go no further than determining what *may or may not be built* . . . ")(emphasis in original). *See also Mt. Laurel II*, 92 N.J. at 260-61, 456 A.2d at 442-43 (ordinances which merely allowed for lower income housing pursuant to *Mt. Laurel I* would not themselves provide realistic opportunity for such housing to be built).

32. Financial encouragement generally takes the form of subsidies, relaxation of building codes to provide for "least cost housing," or tax abatements. *See Mt. Laurel II*, 92 N.J. at 263, 277, 456 A.2d at 443, 451. The use of tax incentives to encourage lower income housing construction is discussed in Note, *New York City's J-51 Program: Controversy and Revision*, 12 FORDHAM URB. L.J. 103, 107-18 (1984).

33. *See Mt. Laurel II*, 92 N.J. at 266, 456 A.2d at 445. *See generally* Comment, *Inclusionary Zoning: An Alternative For Connecticut Municipalities*, 14 CONN. L. REV. 789 (1982)[hereinafter cited as *Inclusionary Zoning*].

34. Flexible zoning is discussed *supra* at notes 17-21 and accompanying text.

35. *See Mt. Laurel II*, 92 N.J. at 266, 456 A.2d at 445 (describing types of affirmative measures available to municipalities to fulfill their *Mt. Laurel* obligations). *See generally* Fox and Davis, *Density Bonus Zoning to Provide Low and*

velopment's density in exchange for the developer's voluntary inclusion within the development of housing units that lower income individuals can afford.[36] A mandatory set-aside requires the residential developer to provide units for lower income residents.[37]

In *Mt. Laurel II*, after finding that a restrictive zoning ordinance was only the most recent manifestation of the town's long history of excluding lower income individuals, the New Jersey Supreme Court ordered the use of inclusionary zoning techniques to remedy the exclusion.[38] The court, while conceding that the issue more properly is left to the legislature, contended that the constitutional rights identified in *Mt. Laurel I*[39] warrant a judicial determination of a community's fair share of regional housing needs and a court order that the necessary amount of lower income housing be constructed.[40]

The New York Court of Appeals has not been as willing to grant affirmative relief once an ordinance has been declared exclusionary, firmly maintaining in *Berenson v. Town of New Castle*[41] that the tasks of regional planning belong to the legislature.[42] Upon remand from the Court of Appeals, the *Berenson* trial court ordered the town to provide 3500 units of lower income housing.[43] The Appellate Division

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Moderate Cost Housing, 3 HASTINGS CONST. L. Q. 1015 (1976)[hereinafter cited as *Bonus Zoning*]; Freilich and Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1086-88 (1974)(proposing use of incentive zoning to encourage low and moderate income housing); Marcus, *Zoning Exactions Employed to Solve Housing Problems*, N.Y.L.J., Oct. 5, 1983, at 1, col. 3 (reporting use of incentive zoning in Miami); Gottlieb, *Tower Zoning Leads to Bitter Court Fight*, N.Y. Times, Aug. 18, 1983, at B11, col. 1 (New York City Mayor Edward Koch is considering incentive zoning program).

36. *Mt. Laurel II*, 92 N.J. at 266, 456 A.2d at 445. *See generally Bonus Zoning*, *supra* note 35, at 1026-27.

37. *Mt. Laurel II*, 92 N.J. at 267-68, 456 A.2d at 446-50. *See generally* Rose, *The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning*, 3 REAL ESTATE L.J. 176 (1974).

38. *See Mt. Laurel II*, 92 N.J. at 265, 456 A.2d at 445. Such a mandate raises questions as to the judiciary's proper role upon declaring a zoning ordinance invalid. *See generally* Note, *The Rezoning Dilemma: What May a Court Do With an Invalid Zoning Classification?*, 25 S.D. L. REV. 116 (1980).

39. 67 N.J. 151, 336 A.2d 713.

40. *Mt. Laurel II*, 92 N.J. at 212-13, 456 A.2d at 417. This decision that courts should determine a town's "fair share" and direct that it be provided has been decried as a "Communist" concept which could lead to "judicial chaos." Hanley, *Some Jersey Towns, Yielding to Courts, Let in Modest Homes*, N.Y. Times, Feb. 29, 1984, at A1, col. 1 (quoting New Jersey Governor Thomas Kean). Governor Kean instead proposed legislation to encourage towns to rezone before courts step in. *Id.* at B5, col. 5.

41. 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975).

42. *Id.* at 111, 378 N.Y.S.2d at 682, 341 N.E.2d at 243.

43. 67 A.D.2d 506, 512-13, 415 N.Y.S.2d 669, 673 (2d Dep't 1979).

vacated the order, holding that the trial court's authority was limited to finding the ordinance unconstitutional and ordering its amendment; the court could not order the construction of housing units.[44]

In *Blitz v. Town of New Castle*[45] the amended ordinance was challenged as exclusionary because it allowed for lower income units without requiring their actual construction.[46] The ordinance sought to encourage building through various incentives to those residential developers who included lower income units.[47] It included no mandatory provisions, and the court held that none were required. The court upheld the ordinance, finding that the function of a zoning ordinance is not, as the plaintiffs had contended, "to provide affirmatively for the creation of all necessary housing."[48]

Thus, incentives used to provide lower income housing are valid zoning exercises in New York.[49] The language of the *Blitz* court leaves unanswered, however, the question of the validity of an ordinance which requires that lower income housing units be provided.

Where the courts have required mandatory inclusionary zoning programs, the programs are valid.[50] Where housing unit requirements are established independently by a municipality, however, both their validity[51] and their value[52] have been challenged. Where such manda-

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44. *Id.* at 521-22, 415 N.Y.S.2d at 678-79.

45. 94 A.D.2d 92, 463 N.Y.S.2d 832 (2d Dep't 1983).

46. *Id.* at 98-99, 463 N.Y.S.2d at 836.

47. *Id.* at 94-95, 463 N.Y.S.2d at 833-34.

48. *Id.* at 99, 463 N.Y.S.2d at 836.

49. *Id.* (zoning ordinance may encourage construction of lower income housing by including incentive density bonus provisions); Trinity Place Co. v. Finance Admin'r of the City of New York, 38 N.Y.2d 144, 379 N.Y.S.2d 16, 341 N.E.2d 536 (1975). In *Trinity Place* the plaintiff had agreed to an arrangement which allowed him to exceed the height limitations on one parcel in exchange for dedication of the adjoining parcel as a park. Plaintiff initiated the suit to contest a tax assessment which valued the dedicated parcel at an amount equal to its value prior to the dedication. Plaintiff contended that, because development on the parcel was precluded, it was essentially valueless. 38 N.Y.2d at 147, 379 N.Y.S.2d at 18, 341 N.E.2d at 538. The court characterized the arrangement as an example of incentive zoning. *Id.* at 149-50, 379 N.Y.S.2d at 20-21, 341 N.E.2d at 539-40. It noted the benefits which the city may gain by such arrangements and, emphasizing the negotiated nature of the arrangement, refused to find the land valueless for assessment purposes. *Id.*

50. *Mt. Laurel II*, 92 N.J. at 271, 456 A.2d at 448 (mandatory inclusionary devices are constitutional where necessary to satisfy *Mt. Laurel* obligation). Referring to the New Jersey state constitution, the court stated that "it would take a clear contrary constitutional provision to lead us to conclude that that which is necessary to achieve the constitutional mandate is prohibited by the same Constitution." *Id.* at 273, 456 A.2d at 449. For a discussion of inclusionary zoning as a duty rather than a choice, see *Bonus Zoning*, *supra* note 35, at 1022-24.

51. Board of Supervisors of Fairfax County v. DeGroff Enters., Inc., 214 Va. 235, 198 S.E.2d 600 (1973). The Board enacted an ordinance which required a 15%

tory programs have been proposed, their validity has been urged by analogy to the common suburban practice of conditioning development approval on the developer's providing some benefit to the community in mitigation of the anticipated effects of the development.[53] Determining whether this analogy supports mandatory housing inclusions requires an analysis of the differences between requiring a suburban developer to supply parkland or road improvement and requiring a city commercial developer to provide lower income housing units.

III. The Requirements of Conditions Placed Upon Development

The practice of inclusionary zoning has been applied only to suburban settings where growth is occurring or likely.[54] Flexible zoning

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set-aside as a condition to plan approval. *Id.* at 235-36, 198 S.E.2d at 601. The court acknowledged that providing low and moderate income housing serves a legitimate goal. *Id.* at 237, 198 S.E.2d at 601. Nevertheless, the court found the ordinance invalid, because (1) it exceeded the statutory grant of power; (2) its use of socio-economic zoning was an improper exercise of the police power; and (3) it authorized an uncompensated taking of property. *Id.* at 238, 198 S.E.2d at 602. *See also* Annot., 62 A.L.R.3d 880 (1975)(analyzing *DeGroff Enterprises*).

Proponents of mandatory set-asides argue that they will be upheld in other jurisdictions. *See* Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330, 350 (1975). The New Jersey Supreme Court expressly reserved the issue of the validity of mandatory set-asides in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 518-19, 371 A.2d 1192, 1210 (1977). However, the court later held mandatory set-asides permissible where necessary to correct a history of exclusionary policy. *Mt. Laurel II*, 92 N.J. at 271, 456 A.2d 448. A Pennsylvania appellate court also has reserved judgment on the question. *See* Raum v. Board of Supervisors of Tredyffrin Township, 20 Pa. Commw. 426, 443-44, 342 A.2d 450, 458-59 (1975). New York also has not ruled on the issue. *See supra* notes 41-48 and accompanying text.

52. *See* Ellickson, *Inclusionary Housing Programs: Yet Another Misguided Urban Policy?*, prepared for Inclusionary Zoning Moves Downtown: A Legal Symposium, at C.U.N.Y. Graduate Center, New York, New York (Nov. 14, 1983)[hereinafter cited as Symposium]. (The papers and proceedings of the symposium will be published in 1984 by the Planners Press of the American Planning Association. To order copies contact the Center for Metropolitan Action, Queens College, Flushing, New York 11367). Professor Ellickson criticizes inclusionary zoning as a tax on new development. *Id.* at 3. In addition, Ellickson feels that the "in-kind" housing subsidies provided by these programs are less helpful than cash payments. *Id.* at 5. Finally, according to Ellickson, these programs link taxing and spending policies so that funds cannot be diverted if necessary, and spending is insulated from normal political review. *Id.* at 7.

53. Draft Proposal, *supra* note 25, at 21 (proposed zoning amendment based on traditional mitigation rationale). *See also* Kleven, *Inclusionary Ordinances and the Nexus Issue*, Symposium, *supra* note 52, at 10-12 (inclusionary requirements are justified as exactions based on need created by the development). *Cf.* Lesk, *Theatre Fund and Housing Trust Fund Issues*, Symposium, *supra* note 52, at 7-9 (mitigation theory may not fulfill requirements of New York enabling act).

54. *See Inclusionary Zoning*, *supra* note 33, at 789. *See generally Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971).

provisions seek to derive public benefit from private development initiative.[55] Where there is no such initiative, neither coercion nor coaxing yields results.[56] Rather than wait for private initiative in residential areas that need new construction and rehabilitation, several cities have sought to tap development initiative where it already exists.[57]

This Note will examine the element of these programs that requires commercial developers either to construct or to pay for lower income housing units.[58] As stated, proponents argue that support for this approach can be found through analogy to conditions placed upon development approval.[59]

Assuming that the analogy supports imposing conditions on residential development,[60] there are two critical differences when these conditions are imposed on commercial development. First, the housing is planned for some location off-site from the regulated development. Second, the housing is conditioned upon commercial development.[61] The question of validity, as with any zoning enactment, turns on the ordinance's relationship to the police power and on whether the enabling act grants the city authority to engage in such a practice.

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55. *Euclid* to *Ramapo*, *supra* note 15, at 56-57.

56. *Id.* at 56 n.1 ("[z]oning admittedly has minimal impact in areas where private investment is unprofitable").

57. *See supra* notes 5, 23, 31-33 and accompanying text for a discussion of attempts to encourage private development initiative.

58. *See* Brooks, *Lessons to Learn From Inclusionary Zoning*, in Symposium, *supra* note 52, at 1 (Boston and Seattle programs); Fulton, *The City Takes Its Cut*, 47 PLANNING, No. 9, 23 (Sept. 1981)(San Francisco program); Marcus, *Zoning Exactions Employed to Solve Housing Problems*, N.Y.L.J., Oct. 5, 1983, at 1, col. 3 (Miami program); Sedway, *The San Francisco Office Housing Production Program*, in Symposium, *supra* note 52, at 1-2.

59. *See* Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330, 350 (1975). Mandatory set-asides are discussed *supra* at note 51 and accompanying text.

60. The question of whether a city's residential development validly can be zoned to require an inclusion of lower income units is discussed in Note, *Municipalities and the Increasing Need for Low and Moderate Income Housing*, 28 WASH. & LEE L. REV. 408 (1971).

61. Lesk, *Theatre Fund and Housing Trust Fund Issues* in Symposium, *supra* note 52, at 7. Lesk includes a third distinction which is an amalgam of the first two. Since the benefit is housing away from the site, the area around the development is left with the detrimental effects which justified taking the exaction initially. *Id.* The premise of flexible zoning is that development has a negative impact on an area which can be offset by requiring the developer to provide certain benefits. *See supra* notes 17-21 and accompanying text. When the development is permitted in exchange for a benefit to a different area of the city, the development area is left with the burden and no ameliorative amenity.

A. Housing Construction As A Condition

Conditional approvals reflect New York City's planning function.[62] The terms of a particular exaction, however, must be contemplated by the enabling act,[63] which is strictly construed.[64]

New York City may condition approval of a subdivision plat.[65] Conditions may be premised on the need for adequate housing.[66] The developer may be required to construct sewers and watermains, to provide transportation within the development area or to dedicate a portion of the subdivision as streets or parkland.[67] The statute does

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62. Holmes v. Planning Bd., 78 A.D.2d 1, 14, 433 N.Y.S.2d 587, 596 (2d Dep't 1980)(problems such as traffic congestion generally are not addressed by zoning schemes because they require broader and more flexible outlook).

63. *Id.* at 11-12, 433 N.Y.S.2d at 594-95.

64. *See, e.g.*, Kamhi v. Planning Bd., 59 N.Y.2d 385, 390-91, 465 N.Y.S.2d 865, 867-68, 452 N.E.2d 1193, 1195-96 (1983). In *Kamhi*, the court held that where the statute permits "conditions on the ownership, use, and maintenance" of land, it does not authorize a requirement of dedication or conveyance of land. *Id.* at 388 n.1, 392, 465 N.Y.S.2d at 866 n.1, 868, 452 N.E.2d at 1194 n.1, 1196. Similarly, where it authorizes dedication, the statute does not permit the conditioning of permit approval upon an outright conveyance. *Id.* These are fine distinctions which underscore the importance of the enabling act. In contrast, the appellate division, examining legislative history, had concluded that a dedication was comprehended as a condition on ownership. Kamhi v. Planning Bd., 89 A.D.2d 111, 118-19, 454 N.Y.S.2d 875, 885 (2d Dep't 1982).

65. A subdivision plat proposes a plan to subdivide a tract of land into parcels for separate sale; a site plan is a development proposal for a single lot owned by a single individual. *See Holmes v. Planning Bd.*, 78 A.D.2d at 16, 433 N.Y.S.2d at 597.

66. N.Y. GEN. CITY LAW § 32 (McKinney 1968)("[f]or the purpose of providing for the future growth and development of the city and affording adequate facilities for the housing . . . of its population" city may empower its planning board to approve or reject plats).

67. Friends of the Pine Bush v. Planning Bd., 86 A.D.2d 246, 248, 450 N.Y.S.2d 966, 968 (3d Dep't 1982), *aff'd*, 59 N.Y.2d 849, 465 N.Y.S.2d 924, 452 N.E.2d 1252 (1983)(a city is given power to condition subdivision plat approval upon such conditions listed in N.Y. GEN. CITY LAW § 33 (McKinney Supp. 1983-1984)). *See also* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 85, 271 N.Y.S.2d 955, 958, 218 N.E.2d 673, 676 (1966) (influx of people was sufficiently attributable to subdivision to permit requirement that parkland be dedicated or that fee be paid in lieu of dedication); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965)(same).

To meet the imposed condition, the developer actually must construct the required improvements or post a performance bond. The only option open to a city is to waive the requirements, but if the city has established requirements, it cannot waive the developer's obligation to either construct or pay for those requirements in favor of some other arrangement. *Friends of the Pine Bush*, 86 A.D.2d at 249, 450 N.Y.S.2d at 968-69 (developers were to petition city council to have city install improvements and assess costs to property owners). Furthermore, where the statute has not been complied with strictly, plat approval must be nullified. Save the Pine Bush, Inc. v.

not, however, specifically authorize a requirement that a developer provide housing.[68]

The city may condition approval of a site plan[69] upon the developer's assuming a reasonable share of the burden that the development will place upon the community.[70] The city may determine in advance what improvements will be required of site plans within a given district and incorporate them into its zoning ordinance as conditions of approval.[71] The burdens which may be eased by conditional site plan approval and the elements which may be required in a site plan are listed in the General City Law.[72] The list does not expressly allow inclusion of a housing unit requirement as an element of any

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Planning Bd., 96 A.D.2d 986, 988, 466 N.Y.S.2d 828, 832 (3d Dep't 1983)(statute required construction or payment prior to approval; where neither took place, approval was void).

68. N.Y. GEN. CITY LAW § 33 (McKinney 1968)(prior to approval, planning board must impose conditions regarding streets, highways and parks, and require that needed improvements actually be undertaken by developer). *See also Friends of the Pine Bush*, 86 A.D.2d at 249, 450 N.Y.S.2d at 968-69 (planning board could waive condition that improvements be made).

69. *See supra* note 65.

70. *Holmes v. Planning Bd.*, 78 A.D.2d at 21, 433 N.Y.S.2d at 600 (requirement that developer give reciprocal parking easement to neighboring property with intention of alleviating traffic congestion was reasonable condition for site plan approval).

71. N.Y. GEN. CITY LAW § 30-a(1)(a) (McKinney Supp. 1983-1984)(ordinance "shall specify the uses . . . required and the elements to be included" as determined by planning board). There is no similar provision for including conditions of subdivision plat approval within the zoning ordinance. *See* N.Y. GEN. CITY LAW § 33 (McKinney Supp. 1983-1984).

72. *See* N.Y. GEN. CITY LAW § 30-a(1)(a) (McKinney Supp. 1983-1984). A city may:

> as part of a zoning ordinance . . . authorize the planning board to review . . . site plans, prepared to specifications set forth in the said zoning ordinance . . . . Such ordinance . . . shall specify the uses for which such approval shall be required and the elements to be included in such plans submitted for approval; such elements may include, where appropriate, those relating to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, impact of the proposed use on adjacent land uses and such other elements as may reasonably be related to the health, safety and general welfare of the community.

Id.

The same power is granted to towns, N.Y. TOWN LAW § 274-a (McKinney Supp. 1983-1984), and villages. N.Y. VILLAGE LAW § 7-725 (McKinney Supp. 1983-1984). *See* 1977 Op. N.Y. Att'y Gen. 200 (1977); Riegert Apartments Corp. v. Planning Bd. of the Town of Clarkstown, 57 N.Y.2d 206, 213, 455 N.Y.S.2d 558, 562, 441 N.E.2d 1076, 1080 (1982)(legislative intent was to give uniform grant of power to all municipalities in state).

conditional approval.[73] The list concludes, however, with an authorization for the city to include "such other elements as may reasonably be related to the health, safety and general welfare of the community."[74] Any authority to include specific housing unit requirements must be implied from this broad authorization.

This grant of authority regarding the general welfare is not as broad as the state's police power,[75] nor does it vest the city with authority to address general community problems through zoning ordinances.[76] However, the city's authority cannot be narrowly confined and has been held to support a zoning ordinance enacted to provide sufficient housing for the aged.[77] In the face of an acute housing shortage for lower income people, a zoning ordinance to provide for those housing needs also should come within the city's delegated police power.[78]

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73. N.Y. GEN. CITY LAW § 30-a(1)(a) (McKinney Supp. 1983-1984). Housing is not included in the list of allowable elements.

74. *Id.* There is no similarly broad grant with respect to the types of conditions which may be placed on subdivision plat approval. *See* N.Y. GEN. CITY LAW § 33 (McKinney Supp. 1983-1984).

75. *See supra* notes 7-10 and accompanying text.

76. Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 371 n.5, 334 N.Y.S.2d 138, 146 n.5, 285 N.E.2d 291, 297 n.5 (1972)(requirement that future development take place only after adequate support facilities had been provided in location of development was valid in that it was not directed at any general problem but at problems which would be created by development in areas which did not have adequate facilities).

77. Maldini v. Ambro, 36 N.Y.2d 481, 484-85, 369 N.Y.S.2d 385, 389, 330 N.E.2d 403, 405 (1975)(breadth of police power grant to regulate land use for community's general welfare embraced town's purpose of meeting need for adequate housing for aged). *See also* Marcus Assocs., Inc. v. Town of Huntington, 45 N.Y.2d 501, 410 N.Y.S.2d 546, 382 N.E.2d 1323 (1978)(upholding as within grant of police power a zoning ordinance which regulated population density in industrial use zone).

78. *Accord* Note, *Municipalities and the Increasing Need for Low and Moderate Income Housing*, 28 WASH. & LEE L. REV. 408 (1971). The author argues that the shortage alone is so detrimental to the general welfare that the action taken to alleviate it is within the police power. *Id.* at 412. The Virginia Supreme Court, however, has held that an attempt to require construction of lower income housing is socio-economic zoning and thus is impermissible under the same rationale that prohibits exclusionary zoning. *See* Board of Supervisors v. DeGroff Enters., 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973); *accord* Mindel v. Township Council, 167 N.J. Super. 461, 467, 400 A.2d 1244, 1247 (1979)(zoning ordinance which permitted lower income housing could not be used to compel owner of rural land to construct housing). *But see* Borough of Kinnelon v. South Gate Assocs., 172 N.J. Super. 216, 219, 411 A.2d 724, 725 (App. Div. 1980)(disapproving *Mindel* to extent it suggests that ordinance may not restrict or condition use of land for commercial farming in light of housing needs); *Mt. Laurel II*, 92 N.J. at 267-68, 456 A.2d at 446 (where towns had pursued course of exclusionary zoning, proper to mandate that they require developers to provide lower income housing units).

B. Requiring Housing Construction Off-Site

Even if lower income housing may be required within a development as a condition for its approval, a different problem is presented when the housing units exacted from a developer are not part of the development itself.[79] If conditions or exactions are to be valid, the burden they place on the developer must be related to the burden that the development itself causes the city.[80] As long as the conditions exacted from the developer are attributable in this way to the development, exactions are valid even where they might be said to overcompensate the public by providing a benefit that outweighs the burden imposed by the development.[81]

The requirement that the exaction be attributable to the development necessitates some proximity between the improvement and the property.[82] Approval may be granted or denied based on a consideration of the impact the development will have upon property throughout the jurisdiction.[83] Approval of a project cannot, however, be conditioned upon the developer's making improvements outside the area of the development itself.[84] A city can preclude any negative

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79. *See Golden v. Ramapo*, 30 N.Y.2d at 378, 334 N.Y.S.2d at 152, 285 N.E.2d at 302 (difficulties attending exactions of off-site improvements, particularly questions of constitutionality, indicate preferability of suspending development until necessary improvements are achieved by other means).

80. Holmes v. Planning Bd., 78 A.D.2d 1, 17-18, 433 N.Y.S.2d 587, 598-99 (2d Dep't 1980). The standard first was enunciated in Pioneer Trust and Sav. Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961), which required that the burden be "specifically and uniquely attributable" to the development. *Id.* at 380, 176 N.E.2d at 802. This standard has not been "so restrictively applied as to cast an unreasonable burden of proof upon the municipality . . . ." Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965).

81. *Holmes v. Planning Bd.*, 78 A.D.2d at 20-21, 433 N.Y.S.2d at 599 (condition is reasonable since premised on exacerbation of traffic congestion expected from proposed development; irrelevant that condition will alleviate existing traffic congestion and benefit public generally).

82. *Id.* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 112 (1973).

83. Pearson Kent Corp. v. Bear, 28 N.Y.2d 396, 398, 322 N.Y.S.2d 235, 237, 271 N.E.2d 218, 219 (1971)(denial of subdivision plat premised on determination that existing access roads would not support increased traffic).

84. Valmont Homes, Inc. v. Town of Huntington, 89 Misc. 2d 702, 704, 392 N.Y.S.2d 806, 808 (Sup. Ct. Suffolk County 1977)(city had no authority to require developer to improve existing access road outside of proposed site); Peckham Indus., Inc. v. Ross, 61 Misc. 2d 616, 617, 306 N.Y.S.2d 1006, 1009 (Sup. Ct. Orange County), *aff'd*, 34 A.D.2d 826, 312 N.Y.S.2d 627 (2d Dep't 1970)(same). This distinction between on-site and off-site exactions first was drawn in Medine v. Burns, 29 Misc. 2d 890, 208 N.Y.S.2d 12 (Sup. Ct. Suffolk County 1960). In *Medine*, Justice Bernard Meyer, currently of the New York Court of Appeals, found no statutory

effect outside the development area by denying approval of the project.[85] Alternatively, a city may alleviate negative effects by suspending development until necessary improvements have been made.[86]

In *Golden v. Planning Board of the Town of Ramapo*,[87] the town established a comprehensive capital improvement plan to supply needed support facilities while suspending development until the improvements were complete.[88] The town provided, however, that if private concerns made the improvements prior to their scheduled completion by the town, the development ban would be lifted when the facilities were in place.[89] The town included among the necessary facilities not merely sewage and street improvements, but also sufficient lower income housing to meet its share of the regional need.[90]

The town did not require developers to build lower income housing. Instead, it allowed them to do so to hasten construction approval for their more profitable housing units. Thus, the town was able to acquire privately constructed lower income housing indirectly.[91] New York City's use of the same approach should be valid considering the uniform grant of zoning power to the several municipal entities.[92]

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authorization for access road improvement as a conditon of plat approval. *Id.* at 891-92, 208 N.Y.S.2d at 14-15. The statutes instead allowed for such a requirement only as a condition for a building permit. *Id.* at 892, 208 N.Y.S.2d at 14-15. *See also* Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 350-51, 245 A.2d 336, 337-38 (1968)(off-site exaction impermissible since not expressly authorized by statute and thus no procedure existed to apportion cost on basis of benefits to development site).

85. *Pearson Kent Corp.*, 28 N.Y.2d at 399, 322 N.Y.S.2d at 237-38, 271 N.E.2d at 219-20.

86. *Golden v. Ramapo*, 30 N.Y.2d at 366, 334 N.Y.S.2d at 142, 285 N.E.2d at 294 ("pressures of an increase in population and the ancillary problem of providing facilities and services" justified suspending residential development until adequate facilities existed at proposed site since town had planned to provide facilities). *See also* Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 604-07, 135 Cal. Rptr. 41, 53-55, 557 P.2d 473, 485-87 (1976)(upholding similar suspension of residential development until educational standards and support facility requirements were met).

87. 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972).

88. *Id.* at 366-68, 334 N.Y.S.2d at 142-43, 285 N.E.2d at 294-96.

89. *Id.* at 368-69, 334 N.Y.S.2d at 144, 285 N.E.2d at 296.

90. *Id.* at 366-68, 380, 334 N.Y.S.2d at 143-44, 153, 285 N.E.2d at 295, 303.

91. See *supra* notes 41-48 and accompanying text regarding the implication that, in New York, direct requirements that housing be built are not viewed with favor. *See also DeGroff Enterprises*, discussed *supra* at note 51, where such direct requirements were invalidated.

92. *See* Riegert Apartments Corp. v. Planning Bd., 57 N.Y.2d 206, 213, 455 N.Y.S.2d 558, 562, 441 N.E.2d 1076, 1080 (1982)(legislative intent was to give uniform grant of power to all state municipalities).

C. Requiring Housing Construction By Commercial Developers

The restrictions that are imposed upon development to minimize its detrimental effects must bear a reasonable relationship to those effects.[93] The central concept is the relationship between the use and the condition placed upon it.[94] Where municipalities seek to exact lower income housing from commercial developers, commercial development must be shown to have a reasonable relationship to the shortage of lower income housing; that is, the shortage must be attributable to commercial development.

In New York City there has been a steady increase in the number of service industry jobs[95] and a simultaneous decrease in the number of housing units available for lower income individuals.[96] This trend has

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93. Holmes v. Planning Bd., 78 A.D.2d 1, 19, 433 N.Y.S.2d 587, 598-99 (2d Dep't 1980)(interpreting *Jenad, supra* note 67, as requiring reasonable relationship between foreseeable problems caused by proposed development and conditions placed on development). *See* Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 602, 439 N.Y.S.2d 326, 330, 421 N.E.2d 818, 822 (1981)(had conditions been challenged, standard would have been whether conditions limiting building size and types of professional use and requiring shrubbery reasonably were related to "minimizing the potentially deleterious effect of a zoning change on neighboring properties"); Pleasant Valley Home Constr., Ltd. v. VanWagner, 41 N.Y.2d 1028, 395 N.Y.S.2d 631, 363 N.E.2d 1376 (1977)(although approval of mobile home development could not be denied based on community pressure, city could place conditions on development which would alleviate feared impact); Oakwood Island Yacht Club v. Board of Appeals, 32 Misc. 2d 677, 223 N.Y.S.2d 907 (Sup. Ct. Westchester County 1961)(city could not condition approval of plan to construct yacht club on private island on owner's improvement of housing that adjoined proposed development site). *See also* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 388-89, 153 P.2d 950, 952 (1944)(district's drainage of water over plaintiff's land was not justified under police power because it "extend[ed] beyond the necessities of the case"); Liberty v. California Coastal Comm'n, 113 Cal. App. 3d 491, 503-04, 170 Cal. Rptr. 247, 254-55 (4th Dist. 1980)(same; county could not shift to private party its own burden of assuring presence of sufficient beach-side parking by requiring that private lot be free to public during day); Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872, 879-80 (3d Dist. 1969)(*sine qua non* of exaction's reasonableness is fulfillment of public needs emanating from proposed land use; needs may be to protect community from deleterious effects of, or to meet public service demands created by, proposal).

94. *See Conditional Zoning, supra* note 17, at 200 (condition "unrelated to the use to which the property will be put or . . . unreasonably onerous given the use" is invalid).

95. Stetson, *Jobs in New York City Rose To A 10-Year High in 1983*, N.Y. Times, Feb. 23, 1984, at B6, col. 1 (gain concentrated in service, trade and finance-insurance-real estate sectors); Sulzberger, *25% More Workers To Crowd Midtown in 80's*, N.Y. Times, Nov. 8, 1981, § 1, at 1, col. 3 (reporting study of likely environmental consequences of expected addition of 150,000 office workers during decade).

96. *See Housing's Best Hope*, N.Y. Times, Oct. 24, 1983, A18, col. 1 ("need for decent moderate-income housing far exceeds any effort to promote it . . . "); *Perma-*

been asserted as a justification for requiring commercial developers to contribute to easing the housing shortage.[97] The rationale is that it is reasonable to require a commercial developer to provide lower income housing, since the development will increase the number of people in need of such housing.[98] This rationale, however, may be overly broad. An equally compelling and consistent analogy could be formulated to support a requirement that the developer improve the transit, educational or recreational facilities which these new residents will use.[99]

Commercial development by its nature has an undesirable effect when it takes place within or adjacent to a residential zone.[100] Residential additions also hamper enterprises in a commercial zone.[101] This is the basic justification for separating the uses.[102] Because of this natural deleterious effect, commercial developers can be required to include improvements to minimize the physical or aesthetic impact of the project on adjacent residential property.[103]

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nent Lodging For Homeless, N.Y. Times, Oct. 14, 1983, A30, col. 1 (loss of 81,000 units in last decade and waiting list of 150,000 families for public housing mean only greater commitment to lower income housing can resolve problem of increasing number of homeless in New York City).

97. Sullivan, Testimony to the Mayor's Development Commitment Study Commission, Board of Estimate Chambers 2-3 (Sept. 22, 1983).

98. *Id.*

99. *See* Marcus, *Zoning Exactions Employed to Solve Housing Problems*, N.Y.L.J., Oct. 5, 1983, 1, col. 3 (criticizing attempts to exact housing from commercial developers as contrary to fundamental assumptions of zoning and comprising instead attempts to redistribute wealth). *See also* Fulton, *The City Takes Its Cut*, 47 PLANNING No. 9 at 23, 24 (Sept. 1981)(reporting proposal by San Francisco's mayor to require owners of downtown skyscrapers to subsidize transit fares).

100. Town of Huntington v. Park Shore Country Day Camp of Dix Hills, Inc., 47 N.Y.2d 61, 66-67, 416 N.Y.S.2d 774, 776-77, 390 N.E.2d 282, 284-85 (1979)(ordinance validly prohibited commercial tennis courts from residential district even though it allowed courts in nonprofit clubs; pursuit of pecuniary profits of commercial enterprise render it more burdensome than same enterprise conducted on nonprofit basis).

101. *See* 1 R. ANDERSON, NEW YORK ZONING AND PRACTICE § 8.22, at 361 (1973)("[i]t seems clearly established that residential uses injure commercial districts" by diluting the effect of a "shopping area where all may prosper").

102. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)(whether particular uses may be restricted requires consideration of proposed use as well as circumstances; even if it is "merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard"—use may be prohibited from an area).

103. Church v. Town of Islip, 8 N.Y.2d 254, 259, 203 N.Y.S.2d 866, 869, 168 N.E.2d 680, 683 (1960)(portion of residential area rezoned for business use may require, as conditions, improvements to minimize annoyance created by businesses). Conditions included as part of a rezoning are analogous to conditions attached to site plan approval. *See* Miracle Mile Assocs. v. Department of Envtl. Conserv., 73

The conditions imposed in such instances are supported by a reasonable relationship between the commercial development and the effect to be diminished, since the effect and the conditions are physical and immediately discernible.[104] Where it is alleged that commercial development affects the city-wide need for lower income housing, the relationship is statistical rather than physical.[105]

The legal difficulty, however, is whether such a statistical correlation is sufficient to satisfy the standard that conditions placed on a development must be reasonably related to its proposed use.[106] The standard is not inherently violated by the fact that the relationship is shown through statistical projections.[107] Statistical projections of the future effects of development are merely a reflection of planning attempts.[108] However, conditions premised upon such anticipated effects must be consistent with a city's comprehensive plan for managing future growth.[109]

A.D.2d 807, 807-08, 423 N.Y.S.2d 732, 733 (4th Dep't 1979)(having given final approval to site plan, town could not place further conditions upon development by zoning change). Ameliorative conditions also may be placed upon development which is the subject of a variance application. North Shore Steak House v. Board of Appeals, 30 N.Y.2d 238, 244, 331 N.Y.S.2d 645, 649, 282 N.E.2d 606, 609 (1972)(section of plot on which restaurant operated was in residential zone; variance to allow its use for additional restaurant parking was properly subject to conditions "to minimize its impact on the surrounding area").

104. In Church v. Islip, 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680 (1960), the zoning conditions required that no building cover more than 25% of the tract and that the property be surrounded by both live shrubbery and a fence. *Id.* at 257, 203 N.Y.S.2d at 867, 168 N.E.2d at 681. In *Collard*, 52 N.Y.2d 594, 439 N.Y.S.2d 326, 421 N.E.2d 818 (1981), the conditions similarly were directed toward limiting the construction of eyesores and also sought to keep the level of intensity of use at a minimum. *Id.* at 602, 439 N.Y.S.2d at 330, 421 N.E.2d at 822. *See also* Dexter v. Town Bd., 36 N.Y.2d 102, 105, 365 N.Y.S.2d 506, 508, 324 N.E.2d 870, 871 (1975)(condition which limited rezoning to benefit only current owner of parcel was invalid since "zoning deals basically with land use . . . . [C]onditions and safeguards must be reasonable and relate only to the real estate involved . . .").

105. See *supra* note 104 for a discussion of particular conditions.

106. *See supra* notes 97-99 and accompanying text.

107. *See, e.g., Holmes*, 78 A.D.2d at 21, 433 N.Y.S.2d at 600 (statistical correlations evidencing likelihood of increased traffic congestion from development had supported other regulations and could have been used to support conditional zoning ordinance but were not necessary).

108. N.Y. GEN. CITY LAW § 31 (McKinney 1968)(planning board has power to "make such investigations . . . relating to the planning and development of the city as to it seems desirable . . ."). See *supra* notes 17-21 and accompanying text for a discussion of the importance of a city's planning for the future.

109. *See Conditional Zoning*, *supra* note 17, at 204-09 (discussing requirement that rezoning conditions be in accordance with a plan).

IV. The Requirements Of A Comprehensive Plan

Conditions upon and exactions from development must be in accordance with a comprehensive plan.[110] Restrictions on a landowner's free use of property must be justified by the community's needs and goals.[111] These needs and goals must be articulated in a comprehensive plan that represents a rational statement of land use control policies.[112]

The comprehensive plan need not be a written document.[113] It may be discernible from the community's patterns of zoning.[114] However, the basis upon which zoning proceeds should be as clear and specific as possible to establish compliance with the enabling act.[115] The plan is not required to be static. As needs become apparent, alterations of land use policies and development plans may be necessary.[116] While comprehensive planning is required, a particular plan can be modified.[117]

Essentially, comprehensive planning requires a community to consider its foreseeable land use goals and needs.[118] Local officials must anticipate both the potential problems and alternative courses of action which can minimize adverse effects upon landowners.[119] Where such foresight is shown, courts are reluctant to displace the legislature's chosen means of achieving proper ends and planning for

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110. A zoning ordinance that is not adopted in accordance with a comprehensive plan exceeds the grant of the enabling act and is therefore *ultra vires*. Udell v. Haas, 21 N.Y.2d 463, 476, 288 N.Y.S.2d 888, 899, 235 N.E.2d 897, 904-05 (1968)(after adoption of ordinance, town sought suggestions from professionals of plans which would justify ordinance). In the case of a city in New York State, the plan must be "well considered" with respect to promoting the public health, safety and general welfare. N.Y. GEN. CITY LAW § 20, subd. 25 (McKinney 1968).

111. *Udell v. Haas*, 21 N.Y.2d at 476, 288 N.Y.S.2d at 899, 235 N.E.2d at 904-05.

112. *Id.*

113. *Id.* at 471, 288 N.Y.S.2d at 895, 235 N.E.2d at 902. *But see* Larsen and Siemon, *"In Accordance with a Comprehensive Plan"—The Myth Revisited*, 1979 INST. ON PLAN. ZONING & EMINENT DOMAIN 105, 130-32 (criticizing *Udell* for not requiring actual enunciation of plan).

114. *Udell v. Haas*, 21 N.Y.2d at 471, 288 N.Y.S.2d at 895, 235 N.E.2d at 902.

115. *Id.* at 470, 288 N.Y.S.2d at 894, 235 N.E.2d at 901.

116. Kravetz v. Plenge, 84 A.D.2d 422, 429, 446 N.Y.S.2d 807, 811 (4th Dep't 1982)(amendment to allow hotel development in residential historic district not contrary to comprehensive plan since it was enacted for betterment of community and reflected considerable forethought).

117. Town of Bedford v. Village of Mt. Kisco, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136, 306 N.E.2d 155, 159 (1973)("[t]he obligation is support of comprehensive planning, not slavish servitude to any particular comprehensive plan").

118. *Udell v. Haas*, 21 N.Y.2d at 470, 288 N.Y.S.2d at 894, 235 N.E.2d at 901.

119. *Id.*

future needs.[120] A challenger of the legislative solution must prove that the ordinance, adopted pursuant to the confines of the enabling act, is nonetheless an improper exercise of the delegated police power.[121]

The existence of a comprehensive plan has supported zoning actions which set aside areas to house the aged,[122] conditioned commercial development upon the developer's mitigation of anticipated ill effects[123] and postponed development until the foreseeable needs of the community were met.[124] However, where the plan is offered as a mere rationalization for the ordinance rather than as a true attempt to anticipate and solve the community's land use problems, the requirement of the enabling act has not been met.[125]

Thus, a zoning amendment which exacted housing units from a commercial development would have to be based on a city's determination that lower income housing is a need which can be met least obtrusively by such an exaction.[126] This determination then would have to be evidenced by a change in the city's land use policies.[127] The city could not adopt such a proposal merely as an inexpensive way of addressing the housing problem generally.[128] Nor could the enactment be based only on the community's desire to provide lower income housing.[129] An amendment which included such an exaction could be adopted only if it were indicated as an appropriate response to anticipated land use problems, as addressed in a comprehensive plan.[130]

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120. *Golden v. Ramapo*, 30 N.Y.2d at 376-77, 334 N.Y.S.2d at 151, 285 N.E.2d at 301.

121. *Id.* at 377, 334 N.Y.S.2d at 151, 285 N.E.2d at 301; Kravetz v. Plenge, 84 A.D.2d at 430, 446 N.Y.S.2d at 810-11.

122. Maldini v. Ambro, 36 N.Y.2d 481, 485, 369 N.Y.S.2d 385, 389, 330 N.E.2d 403, 405-06, *appeal dismissed*, 423 U.S. 993 (1975).

123. Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 602, 439 N.Y.S.2d 326, 330, 421 N.E.2d 818, 822 (1981).

124. *Golden v. Ramapo*, 30 N.Y.2d at 380, 334 N.Y.S.2d at 153, 285 N.E.2d at 303.

125. *Udell v. Haas*, 21 N.Y.2d at 471, 475, 288 N.Y.S.2d at 895, 899, 235 N.E.2d at 902, 904.

126. *See supra* notes 118-19 and accompanying text.

127. *See supra* notes 114-16 and accompanying text.

128. *See supra* notes 75-76 and accompanying text.

129. *Golden v. Ramapo*, 30 N.Y.2d at 377, 334 N.Y.S.2d at 151-52, 285 N.E.2d at 301 (planning was required regardless of benefits which ordinance might be expected to yield); *Udell v. Haas*, 21 N.Y.2d at 476, 288 N.Y.S.2d at 899, 235 N.E.2d at 904-05 (council's finding that it was the *"feeling of the Village"* that further business development was not desirable did not fulfill requirement of comprehensive planning in support of ordinance rezoning area to preclude such development)(emphasis in original).

130. *See supra* notes 118-19 and accompanying text.

V. Recommendations

Zoning ordinances which require commercial developers to provide lower income housing units must be contemplated by the state's enabling act. Additionally, they must not exceed the limits of the police power delegated by the act. Both requirements anticipate an ordinance which furthers the general welfare by satisfying such a fundamental zoning concern as the provision of sufficient housing.

Neither the enabling act nor the grant of police power will support a direct requirement that a commercial developer provide needed housing units. However, in furtherance of a comprehensive plan for future growth and development problems, New York City could slow the pace of commercial development until the need for lower income housing units is under control. Pursuant to the City's police power, a comprehensive plan could establish the reasonable relationship required to place such a condition upon growth.

The City should not restrict individual developments, but commercial development generally. Continued commercial development should be allowed only upon satisfaction of the need for sufficient lower income housing which the City expects to be generated by commercial development. The City itself must undertake a plan to satisfy its need for lower income housing. Satisfaction of this need must be a primary goal if New York City validly is to attempt to exact from commercial developers the share of the lower income housing need which their developments generate.

VI. Conclusion

New York City is faced with the problem of providing for its urgent housing needs. The general need for lower income housing must be made a primary goal of the City in addressing its land use problems. Programs which offer an expedient solution through a mandatory exaction of lower income housing units from commercial developers do not comply with the requirements of the enabling act. Rather, the City must adopt an approach which addresses the problem through a comprehensive plan for long range land use which incorporates the City's expected future housing needs. To the extent housing needs are created or exacerbated by commercial development, such development should be curtailed until those needs are met by the combined efforts of the City and of private developers seeking to engage in more profitable commercial ventures.

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