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A RESPONSE TO WILLIAM A. FISCHEL

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Dr. Fischel critiques four points about the American Planning Association's (APA) *amicus curiae* brief: (1) The APA is not concerned about the overall impact of growth management systems that restrict the pace of development and therefore boost the cost of housing on a metropolitan basis; (2) a monetary damages remedy for an interim taking from excessive land use controls is a better solution than the "builder's remedy," which is court permission to allow the plaintiff/developer to construct a housing project in which housing units are set aside for low- and moderate-income persons; (3) mandatory inclusionary zoning allows communities, once they have fulfilled their fair-share objective, to act in an exclusionary manner toward market rate development; and (4) exclusionary zoning is somehow justifiable because everyone does it.

First, Dr. Fischel and the APA could certainly agree that land use controls, by restricting supply of appropriately zoned land in the face of increasing demand, raise housing prices. No citation to authoritative studies is necessary to persuade us. Unfortunately, Dr. Fischel seems to equate the Town of Chester's badly-drafted zoning code with "growth management." But *Wayne Britton v. Town of Chester*, as the trial court opinion indicates, is not about a town that was trying to implement a growth management system under New Hampshire law, that is, an integrated system of planning, land use controls and infra-

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structure expenditures in which development was to be phased over a foreseeable future in accordance with a capital improvement program. Chester was doing no such thing. Chester had no water or sewer lines of its own, and the major road systems were state routes maintained by the State of New Hampshire. Chester's master plan did not call for or anticipate any major new infrastructure. Municipal service levels were modest.

Instead of sophisticated growth management, *Wayne Britton v. Town of Chester* is about none-too-subtle exclusionary zoning, as the trial court found. The APA's brief points out that the town was using all the classic land use devices to specifically keep out low- and moderate-income housing. Despite a regional housing plan for southern New Hampshire and a local master plan that both identified a need for affordable housing and set short-term fair-share goals, and a zoning code that offered illusory inclusionary "incentives," Chester really was not interested in providing housing for low- and moderate-income persons, whether indigenous to the town or expected to reside there.

Moreover, it appears Chester was pretty successful at excluding. Dr. Fischel suggests that the "growth pressures" on Chester, whose 1988 population was estimated at 2550, may have been the result of monopolistic spillover effects from other, more conveniently located towns in southern New Hampshire and northeastern Massachusetts which employed even more restrictive zoning. Our data, detailed in Appendix B of the brief, suggest quite the opposite growth pattern was occurring. United States Census Bureau counts for 1980 and estimates for 1988 showed that five of the six towns contiguous to Chester—Auburn, Candia, Derry, Fremont, and Raymond — increased by 40 to 47% during the 1980-88 period, while Sandown, the sixth, grew by 77.4%. In contrast, Chester increased by only 27.1% between 1980 and 1988, sharply declining from its 45.2% rate during the 1970s. Chester was the proverbial "hole in the doughnut" due to a growth rate markedly lower than surrounding towns.

Second, Dr. Fischel questions why the APA did not endorse Professor Ellickson's theory of monetary damages for an interim taking from excessive regulation.¹ Dr. Fischel's economic theories about the poten-

1. See Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 467-75 (1977) (discussion of proposed compensation scheme for reimbursing landowners and consumers damaged by growth control); see also *id.* at 493-500 (application of approach to exclusionary zoning).

Professor Ellickson's approach would be to use the takings clauses in state constitutions to require suburbs which enact growth control measures to reimburse a landowner

tial beneficial impact of Professor Ellickson's remedy notwithstanding, the plaintiffs do not pursue damages for an interim taking for good practical reasons: seeking a damages remedy considerably ups the ante for plaintiffs because it brings into the case defense attorneys whose fees and related costs are paid for by insurance companies indemnifying the municipality. Plaintiffs in zoning cases like this one do not have the same luxury of protracted or expensive litigation. They are interested in getting affordable housing built quickly (and presumably, being reimbursed for attorneys fees and costs). As a matter of strategy and tactics, the plaintiffs simply ask for the builder's remedy. Getting it is a better result than seeking a damages remedy, which often only serves to enrich insurance defense attorneys with the opportunity to pursue endless procedural impediments and appeals.

Third, Dr. Fischel contends that mandatory inclusionary zoning allows communities, once they have fulfilled their fair-share objective, to engage in exclusionary zoning rather than deregulate and increase the overall supply of housing. To some degree, state planning legislation will influence the behavior of towns. As we point out in our brief,² there is no current requirement in the New Hampshire planning statutes for towns to address any housing needs for low- and moderate-income or market rate housing. The town master plan authorizes an optional housing element, but the statutes do not require any commitment to its implementation, and there is no state monitoring of local regulatory efforts. In any case, absent a state statutory or *Mount Laurel* style constitutional obligation, communities need not address low-

for damages based upon how much a land use restriction reduces the market value of his land and to reimburse housing consumers (generally, as a class) for any damages they have suffered as a result of housing price increases attributable to a suburb's land use policies. As a defense, a suburb would have to affirmatively prove that its land use restrictions were fair to the respective parties and efficient. *Id.* at 469.

Because the plaintiff would bear the initial burden of proof, this complex, Rube Goldberg compensation scheme would demand that the builder or low-income plaintiff produce elaborate, costly economic evidence at trial, resulting in sort of a full employment act for economists and appraisers, which, no doubt, explains Dr. Fischel's enthusiasm for it (Ellickson, for example, expressly endorses the use of econometricians). A lot of money would go toward attorneys and assorted expert witnesses, but no housing would get built.

Ellickson does add that "[i]njunctive relief is appropriate, however, against a municipal program motivated by discrimination against ethnic or ideological minorities." *Id.* at 468.

2 See *supra* note 34 of APA Brief at 17 describing the planning requirements in New Hampshire.

and moderate-income housing needs at all. Consequently, Dr. Fischel's critique on this point seems a little lame.

We agree that the salvation favored by economists — deregulation — is a partial answer and one advocated in *Mount Laurel I*: get rid of the devices that add unnecessarily to housing cost (like required minimum floor areas and excessive subdivision improvement requirements), speed up the approval process for developments, increase the supply of residentially zoned land at higher densities, and you will lower the cost of all housing. If it were only that simple. A single decision-making body, presumably at the state level, would hand down the ultimatum, delivered in stentorian tones: “YOU SHALL DEREGULATE AND THE RISING TIDE OF DEREGULATION WILL LIFT ALL BOATS.”

Justice Pashman's concurring opinion in *Mount Laurel I* noted the defect in relying solely upon the type of deregulation championed by Dr. Fischel:

In theory, low and moderate income families should benefit even from construction of new housing which they themselves cannot afford because such housing creates vacancies which “filter down.” In reality, however, most of these vacancies are absorbed by the enormous lag between population growth and new housing construction. The housing which does “filter down” to persons with low- or moderate-incomes is often badly dilapidated and in deteriorating neighborhoods.³

We think the primary mechanism to address these housing needs is through the type of state legislative action contemplated in the *Mount Laurel* decisions. No one forces towns to enact land use controls; rather, state law “enables” them to do it. And where state law confers a right, it also imposes a substantive constitutional obligation to look out for a broader welfare than just that of the community enacting the regulations.

Despite Dr. Fischel's assertions, the legislation resulting from *Mount Laurel*, the New Jersey Fair Housing Act, seems to be working,⁴ although perhaps too slowly, in producing housing units in suburban areas that will directly benefit low- and moderate-income persons. Over time, it may even lead to broad-scale regulatory reevaluation by local governments as they try to determine how to lower housing costs

3. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 205, 336 A.2d 713, 741 (1975) (*Mount Laurel I*) (citations omitted).

4. See *supra* Appendix D of APA Brief at 47-48.

to meet affordable housing goals or consideration of other non-zoning alternatives such as rehabilitation to preserve or enhance the housing stock.⁵

Dr. Fischel's final critique, drawn from his experience in serving as a New Hampshire town zoning board alternate, is that exclusionary zoning is okay because everybody does it. That reminds us of the classic Woody Allen line "I'm guilty, your honor, but with an excuse." Dr. Fischel has lots of excuses. We can expend our time in developing elegant graphs of supply and demand curves and general propositions, as he does in his 1985 book, *The Economics of Zoning Laws*, explaining why things won't work in theory, or rationalizing why, when they do happen to work in practice, that's bad too. Or we can take action in the real world and try to get affordable housing built now in areas where people need it.

The APA prefers the latter.

5. See *supra* Point IV of APA Brief at 32.

NOTES

