ZONED OUT: ASSISTED-LIVING FACILITIES AND ZONING

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As the population of elderly persons in this country is ever increasing, so too is the need for housing to accommodate this portion of the population. In this note, Mr. Kling explores the viability of assisted living facilities in providing housing for the nation's elderly. Mr. Kling observes that heretofore assisted living facilities have had an uncertain status for zoning purposes because there is no national definition for such facilities. An examination of case law in a number of jurisdictions reveals that, as has been the case with both hospitals and nursing homes, communities have been able to tailor their zoning laws to satisfy their desires relating to the placement, or exclusion, of the elderly in these communities. Mr. Kling argues that it is the responsibility of municipalities to combat the "not in my backyard" (NIMBY) way of thinking. To this end, Mr. Kling recommends that comprehensive zoning ordinances include policy statements regarding community growth and development that are inclusive of all members of the community.

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The author would like to extend both his gratitude and thanks to Beth Kling for her skillful editing, resilience as a sounding board, and infinite patience during the writing of this note.

I. Introduction

Shuffleboard, cards, cruises, long afternoons of reading, and brief but important phone calls to family members on Sundays—these are the images that the word "elderly" projects on the mind's theater. The critical and fundamental problem of living arrangements never seems to enter into this script. Nonetheless, the booming elderly population has begun to bring these intrinsic issues to the forefront. In 2001, the Administration on Aging estimated that there were forty-three million—or one in six—Americans who were over sixty years old,[1] and three million Americans were eighty-five or older.[2] By 2030, the population of those over sixty "will double to 85 million, while those 85+ will triple to 8 million."[3]

Most of these individuals will need a place to call home. Yet meager incomes create an immense barrier for most elderly persons in their search for living arrangements.[4] Currently, over nine million Americans are over age sixty-five and live alone, and over two million state that "they have no one to turn to if they need help."[5] Moreover, approximately seven million elderly need assistance with daily living activities.[6] Thus, the overwhelming push to meet the assistance needs of low-income seniors gave rise to the assisted living facility.

Unfortunately, there is no standard definition of an assisted living facility because "[t]here are no minimum federal standards, and state standards vary widely."[7] It is only recently that states have recognized the need for supervision and regulation, but they tend to focus only on admission criteria, staffing, and living accommodations.[8]

1. *The Administration on Aging and the Older Americans Act*, *at* http://www.aoa.dhhs.gov/aoa/pages/aoafact.html (last modified July 10, 2001) [hereinafter *Administration on Aging*].

2. *Id.*

3. *Id.* Minorities will increase at a much greater rate than the white population—the African-American population will increase 265%, and the Hispanic population will increase 530%, while the white population will increase only 97%. *Id.*

4. *See Facts About Assisted Living*, *at* http://www.alfa.org/public/articles/details.cfm?id=97 (last visited Sept. 9, 2000) [hereinafter *ALFA Facts*].

5. *See Administration on Aging*, *supra* note 1. Also, "[e]ighty percent of those living alone are women and nearly half of the persons aged 85 or older live alone." *Id.*

6. *See ALFA Facts*, *supra* note 4.

7. Stephanie Edelstein, *Assisted Living: Recent Developments and Issues for Older Consumers*, 9 STAN. L. & POL'Y REV. 373, 377 (1998).

8. *Id.* at 376. This source also contains a sample list of state statutes. *Id.* at 376 n.35.

Thus, various local governments tend to ignore this type of retirement community, or place it in varying community locations, based solely upon the local governments' definition of an assisted living facility and with little consideration as to the impact upon both the elderly and the physical landscape. This marginalization of the elderly is reflected in the local zoning laws.

Part I will explore the definition and nature of an assisted living facility by presenting existing and current definitions, different options, and facts about the facilities themselves. Part II will examine reactions to the placement of an assisted living facility by focusing on the prevailing "Not in my backyard!" sentiment as well as exclusionary zoning. Part III presents a general overview of the current status of zoning regulations as derived from the case law of various states. This part will primarily discuss local zoning laws applying to assisted living facilities as compared to those of hospitals and nursing homes. Finally, Part IV investigates different inclusionary models to facilitate the integration of the elderly into the community. Integration places the elderly closer to recreational, medical, shopping, and mass transit facilities, thereby minimizing the potential impact of the pending elderly population explosion upon both the environment and the community.

II. What Is Assisted Living?: Definitions, Comparisons, and Facts

A. Definitions

One of the main impediments to assisted living facilities is that this particular form of senior housing is "new enough that the businesses offering it and the states that license it do not agree on a precise definition."[9] Yet, various experts have offered their definitions of an assisted living facility.[10] For example, the federal government offers mortgage insurance to nursing homes, intermediate care facilities, board and care homes, and assisted living facilities in the Federal Housing and Community Development Act of 1992.[11] In this Act, an

9. Catherine Hawes et al., *A National Study of Assisted Living for the Frail Elderly*, http://aspe.os.dhhs.gov/daltcp/reports/facreses.htm (Apr. 26, 1999) (page numbers unavailable) (quotation marks omitted).

10. *See infra* notes 11, 15.

11. 12 U.S.C. § 1715w (1994).

assisted living facility is defined as one that is publicly owned or held by a private nonprofit corporation that is licensed and regulated by the State, provides supportive services,[12] separate dwelling units (which may contain a full kitchen and bathroom), common rooms, and other appropriate facilities.[13]

The General Accounting Office (GAO) conducted two investigations into assisted living facilities—one in 1997 and another in 1999.[14] In the 1997 report, the GAO stated that "assisted living may be defined as a special combination of housing, personalized supportive services, and health care. . . . However, there is no uniform assisted living model, and considerable variation exists in what is labeled an [assisted living facility]."[15] The support services are designed for residents who need help with "activities of daily living . . . but who may not need the level of skilled nursing care provided in a nursing home."[16]

In the 1999 report, the GAO studied closely assisted living facilities in California, Oregon, Ohio, and Florida.[17] The GAO commented that, because no standard definition existed, they mailed a survey to any facility that was a member of a trade organization[18] or was li-

12. Supportive services can include "bathing, dressing, eating, getting in and out of bed or chairs, walking, going outdoors, using the toilet, laundry, home management, preparing meals, shopping for personal items, obtaining and taking medication, managing money, using the telephone, or performing light or heavy housework." *Id.* § 1715w(b)(6)(B).

13. *Id.* § 1715w(b)(6). For readers interested in further housing developments for elderly persons, Congress has recently introduced a bill which provides for grants to convert public housing and elderly housing such as nursing homes into assisted living facilities. *See* S. 2733, 106th Cong. (2000).

14. The GAO is an investigative agency that investigates almost any issue on which a congressional member wishes to become better informed. The reports generated by the GAO are sent to the questioning congressional member, and thirty days later are released to the public.

15. GAO, LONG-TERM CARE: CONSUMER PROTECTION AND QUALITY-OF-CARE ISSUES IN ASSISTED LIVING, http://www.gao.gov/archive/1997/he97093.pdf [hereinafter GAO, LONG-TERM CARE].

16. *Id.* Activities of daily living included "eating, bathing, dressing, getting to and using the bathroom, getting in or out of a bed or chair, and mobility." *Id.* at 3 n.2.

17. *See* GAO, ASSISTED LIVING: QUALITY-OF-CARE AND CONSUMER PROTECTION ISSUES IN FOUR STATES, http://www.gao.gov/archive/1999/he99027.pdf [hereinafter GAO, ASSISTED LIVING].

18. Those listed were: American Association of Homes and Services for the Aging, American Health Care Association, and Assisted Living Federation of America. *Id*. at app. I n.31.

censed by its state by 1997 in order to determine which facilities to study.[19]

In the State of Massachusetts, assisted living facilities are designated "assisted living residences" and are licensed by the state.[20] An assisted living residence must meet the following criteria: "provide[] room and board . . . assistance with activities of daily living for three or more adult residents . . . and collect[] payments."[21] Moreover, a residence must provide or arrange for: social opportunities within the residence or in the community at large, up to three daily meals, housekeeping, twenty-four hour on-site emergency services, and laundry services for which a fee may be charged if necessary.[22] Massachusetts law also requires that residences offer single or double units with lockable doors only, a private half bathroom, and a kitchenette.[23] Finally, at the discretion of the owner of the facility, the residence may provide or arrange for "barber/beauty services, sundries for personal consumption . . . local transportation for medical or recreational purposes," and assistance with activities of daily living beyond bathing, dressing, and walking.[24]

Similar to Massachusetts, Illinois regulates its assisted living facilities pursuant to the Assisted Living and Shared Housing Act.[25] Illinois's definition of assisted living requires that the facility has sleeping accommodations for at least three unrelated adults, eighty percent of the residents are fifty-five or older, and the following services are

19. *Id*. at app. I.

20. MASS. GEN. LAWS ch. 19D, §§ 1, 3 (1999 & Supp. 2001). For an in-depth look at the Massachusetts assisted living laws, see Alan S. Goldberg, *Assisted Living in Massachusetts: Another Way of Caring*, 41 BOSTON B.J. 10 (1997).

21. MASS. GEN. LAWS ch. 190, § 1. Assistance with activities of daily living include "physical support, aid or assistance with bathing, dressing/grooming, ambulation, eating, toileting or other similar tasks." *Id.* § 1.

22. *Id.* § 10. In addition, if a resident's plan or contract so specifies, the residence must assist with activities of daily living (at a minimum includes walking, dressing, and bathing) and self-administered medication management. *See id.*

23. MASS. GEN. LAWS ch. 190, § 16. New assisted living residences must supply a private full bathroom for each unit that consists of a sink, bathing facility, and a toilet. *Id.*

24. *Id*. § 10.

25. *See* 210 ILL. COMP. STAT. § 9/1 (2000). This statute has a very broad purpose section that is brimming with "buzz words": "aging in place," "dignity," and "autonomy." *Id.* § 9/5. Although the purpose section contains many clichés, the intent is very commendable and is implemented by slightly vague, policy-like phrases that are further refined and made concrete in the definition section. *Id.* § 9/10. In the author's opinion, this Act has the potential to be a model for other states to follow because of its focus on the policy first and then a gradual narrowing and specification of what the legislators actually intend.

provided: those "consistent with a social model that is based on the premise that the resident's unit . . . is his or her own home; community-based residential care for persons who need assistance with activities of daily living[26] . . . mandatory services . . . a physical environment that is a homelike setting."[27] Mandatory services include: three meals daily, housekeeping services, available laundry service, twenty-four hour security, twenty-four hour emergency response system, and assistance with activities of daily living.[28] A homelike setting is described as individual living units with a private full bathroom or private half bathroom and common areas for various activities.[29] Double occupancy is allowed only at the request of the residents.[30]

Some commentators have defined assisted living facilities in relatively similar terms. Abromowitz and Plaut define this type of housing by listing some of its various characteristics and services: standard monthly payment, laundry, light housekeeping, one meal a day, maintenance of apartment, and additional services (e.g., help with dressing, medication, errands, and physical therapy).[31] Edlestein described assisted living facilities as "group or apartment-style living that provides residents with personal care tasks such as bathing, dressing, and taking medications, social and recreational opportunities, and protective oversight and monitoring."[32] de Lisle claims that assisted living facilities are small furnished or unfurnished apartments with kitchenettes and common areas.[33] Additionally, these facilities offer assistance with "daily living activities," such as dressing, bathing, and eating, while providing minimum health care as needed.[34]

A telephone survey conducted by the Myer Research Institute attempted to determine the exact impact assisted living facilities had in providing long-term care for the elderly in a residential setting.[35] In

26. Activities of daily living include "eating, dressing, bathing, toileting, transferring, or personal hygiene." *Id.* § 9/10.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. David Abromowitz & Rebecca Plaut, *Assisted Living for Low-Income Seniors*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 63, 63 (1995).
32. Edelstein, *supra* note 7, at 373.
33. Victoria M. de Lisle, *Senior Housing: Zoning for the Future*, 12 PROB. & PROP. 33, 33 (1998).
34. *Id.*
35. *See* Hawes et al., *supra* note 9.

order for their study to proceed, the experimenters needed to create a definition of an assisted living facility. The "Eligibility Criteria" were: "having more than 10 beds, serving a primarily elderly population, and represent[ing] itself as an assisted living facility or offer[ing] at least a basic level of services, which were 24-hour staff oversight, housekeeping, at least 3 meals a day, and personal assistance."[36]

B. Other Options

A comparison to assisted living facilities is best conducted by examining the range of other options for an elderly person. These other options provide varying levels of care and supervision. Very similar to assisted living, a board and care home is a "publicly or privately operated residence that provides personal assistance, lodging, and meals" but with much closer supervision.[37]

A life care retirement community obligates itself to life-long care for the elderly person in exchange for a large entrance fee and monthly payments.[38] Because the life care retirement community provides a full spectrum of health care, the resident may move from apartment to apartment within the residence as her needs change.[39]

Finally, a nursing home provides continuous supervision and health and medical services for an elderly person for a monthly fee.[40] These services range from very basic skilled nursing care to all-encompassing custodial care.[41]

C. Facts About Assisted Living Facilities

The telephone survey by the Myer Research Institute was national in scope and created various estimates about the assisted living industry.[42] There were 2,945 candidate facilities and a total of 1,251 contacted.[43] The study concluded that at the beginning of 1998 there were 11,459 facilities with 611,300 beds and 521,500 residents.[44] The

36. *Id.* Personal assistance was defined as "help with at least two of the following: medications, bathing, or dressing." *Id.*
37. Edelstein, *supra* note 7, at 374 n.6.
38. *Id.* at 374 n.5.
39. *Id.*
40. *Id.* at 374 n. 3.
41. *Id.*
42. *See* Hawes et al., *supra* note 9.
43. *Id.*
44. *Id.*

average number of beds in a facility was fifty-three.[45] Seventy-three percent of the residential units were private while only twenty-five percent were shared by more than two unrelated persons.[46] Forty percent of the facilities had a full-time registered nurse on staff, and twenty-four percent of residents received help with three or more activities of daily living.[47] Eleven percent of facilities were designated as high privacy and high service while thirty-two percent of facilities were designated as minimal privacy or service.[48] Twenty-seven percent of the facilities surveyed were low privacy and low service.[49] One of the most startling statistics offered by this report was that forty-one percent of the facilities that met the eligibility criteria had "at least one room shared by three people."[50]

The average monthly payment was between $1000 and $1999, which is an annual rate of $12,000 to $24,000.[51] However, this basic rate often did not include any services beyond a bare minimum.[52] It is important to note that this cost, although lower than nursing homes,[53] is generally much greater than most low-income seniors can afford.[54] For example, forty percent of people seventy-five and older had in-

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* High privacy "meant that at least eighty percent of the resident units were private," while minimal privacy was defined as the facility having one or more rooms with three or more residents. *Id.* High services was delineated as having "full time Registered Nurse on staff, [provide] nursing care, as needed . . . help with at least two [activities of daily living], 24-hour staff, housekeeping, and at least 2 meals a day." *Id.* Minimal services was defined as not helping with two activities of daily living. *Id.*
49. *Id*. Low privacy and low service falls in-between the high and minimal designations. *See id.*
50. *Id.* The report did not state whether these room assignments were through choice or forced upon the residents.
51. *Id.* The American Association of Retired Persons conducted a survey where the median rates were between $995 per month and $1639 per month. Edelstein, *supra* note 7, at 375. However, in Florida the rates ranged from $610 per month to $3000 per month for luxury accommodations. *Id*. In Washington, D.C., the luxury facilities reached $5000 per month but included activities such as private golf courses, sailing, and fine dining. *Id.*
52. Hawes et al., *supra* note 9. "Residents often pay extra for such services as medication administration, transportation, and any assistance with [activities of daily living] or nursing care above the minimum covered by the basic rate in the facility." *Id.*
53. *See* Edelstein, *supra* note 7, at 374 n.3. Nursing homes may cost over $6000 per month. *Id.*
54. Hawes et al., *supra* note 9.

comes less than $10,000 per year, and eighty-four percent of that same group had incomes less than $25,000 per year.[55]

Similar to the Myer Research Institute report, the GAO conducted an in-depth study of assisted living facilities within four states.[56] With responses from 622 facilities, the GAO concluded that in the four states—California, Oregon, Ohio, and Florida—the average number of beds was sixty-three.[57] Also, fifty-seven percent of the assisted living facilities were part of a "multilevel facility" that incorporated other care such as a nursing home.[58] Over ninety percent of the facilities had available housekeeping, meals, laundry, self-medication management, and special diets.[59] More than fifty percent of the facilities assisted residents with medications and bathing; dressing, toilet assistance, and walking were the next most frequently listed assisted activities.[60] Less than ten percent of the facilities would accept a resident who was bedridden or needed tube feeding.[61]

The average monthly rate ranged from less than $1000 to more than $4000, which equals $12,000 to $48,000 annually.[62] To offset this high cost, about forty percent of the facilities reported receiving public assistance for one or more residents.[63]

55. *Id.* Figures are for 1997. *Id.* According to the National Investment Conference for Senior Living and Long-Term Care Industries, the "next boom will be in building affordable units—those in the $400 to $1200 a month range." Edelstein, *supra* note 7, at 376 (citation omitted).

56. *See* GAO, ASSISTED LIVING, *supra* note 17, at 2.

57. *Id.* at 3. The quantity of beds ranged from 2 beds to 600 beds. *Id.* Also, the facilities that accepted dementia patients had an average bed size of twenty-three. *Id.* at 7.

58. *Id.*

59. *Id.* at 8 tbl.1.

60. *Id.* at 9.

61. *Id.* at 11.

62. *See id.* at 3.

63. *Id.* at 7. In Florida and Oregon, where the states allow Medicaid waivers, forty-three percent of the facilities in Florida and eighty-six percent of the facilities in Oregon receive public assistance. *See id.* However, in Ohio and California, which do not accept Medicaid waivers, only twenty-seven percent of the facilities in Ohio and twenty-eight percent of the facilities in California received public funds. *Id.*

III. Community Reaction

A. The NIMBY Phenomenon[64]

The term *NIMBY* is used to encompass the entirety of a community's reaction to the influx of a new and unwanted segment of the general population.[65] The receiving community may recognize the need for the service being provided (e.g., a homeless shelter, home for recovering substance abusers, or elderly housing), but not feel it is fair that they must shoulder "the burden" created by the presence of the particular element in question.[66]

Some commentators believe that this backlash stems from society's dismay at the pervasiveness of these issues in our culture as a whole.[67] The common reactions generally fall into four categories: safety, economics, density, and neighborhood appearance.[68] With respect to safety, a common feeling is that criminal behavior will increase, and the residents will provide poor examples of proper behavior to the children.[69] Moreover, the management of the community-opposed facility may be poor, and the staff thereby will not be able to maintain control.[70] For example, a church wished to maintain its soup kitchen after moving a few blocks away from its original site.[71] Some residents in the new area were worried that this soup kitchen would create an unsafe situation in their neighborhood, while another community member simply stated that "[w]e as residents of this area can't do anymore to help. The city as our government must help us and protect us."[72]

64. STEERING COMM. ON THE UNMET LEGAL NEEDS OF CHILDREN & COMM'N ON HOMELESSNESS & POVERTY, AM. BAR ASS'N, NIMBY: A PRIMER FOR LAWYERS AND ADVOCATES 1 (1999) [hereinafter NIMBY]. NIMBY is an acronym for "Not in my backyard!" *Id.*

65. *Id.* at 5; *see also* Kristine Nelson Fuge, *Exclusionary Zoning: Keeping People in Their Wrongful Places or a Valid Exercise of Local Control?*, 18 HAMLINE J. PUB. L. & POL'Y 148, 158–59 (1996). For example, when a state signed a contract with a home to admit 120 AIDS patients, a protester stated: "I don't have anything against them, but why should they be next to my house? Who's going to visit a drug addict? Who's going to visit a homosexual? Another homosexual! They go after your children." NIMBY, *supra* note 64, at 5 (quoting Michael Winerip, *Our Towns: NIMBY Views with People with AIDS*, N.Y. TIMES, Apr. 5, 1988, at B1).

66. *See* NIMBY, *supra* note 64, at 7.

67. *Id.* at 6–7.

68. *Id.* at 8.

69. *See id.* at 10.

70. *See id.* at 11.

71. *Id.* at 7.

72. *Id.* at 7–8.

Most economic concerns center around property values and neighborhood businesses suffering from illegal sales on the street.[73] Density issues arise with regard to higher traffic flows with inadequate streets to meet this increased need, parking shortages, and intensity of the development.[74] Finally, regarding neighborhood appearance, incumbent residents claim that the proposed facility may have a decrepit appearance, or a façade that does not match the existing architecture of the neighborhood, with poorly maintained landscaping.[75] Also, the people who inhabit the new facility may not preserve the community's characteristics because the new residents are perceived as "lazy, unemployed, and . . . outsiders."[76]

In addition, this NIMBY attitude may originate from "a belief that providing aid and/or services furthers dependency on charity and governmental assistance."[77] For instance, a resident objected to the construction of a homeless shelter because the resident believed that the intermediary nature of the shelter cultivated homelessness and it was not "fair that one section of the community ha[d] to house a good portion of the county's homeless."[78]

Admittedly, these are not direct arguments against senior housing facilities, but the issues above are also at the heart of similar debates concerning assisted living facilities. Especially relevant are the density and economic arguments; in addition to these common issues, the presence of housing for the elderly creates unique issues. For example, the residents within a facility may have Alzheimer's, use a wheelchair or walker, have limited mobility, and be extremely frail.[79] Thus, the residents of the neighborhood surrounding a senior care facility, when out exercising, walking, or driving, would have to be extraordinarily careful of the facility residents. Although these further distinctions may seem comparatively trivial, elderly housing facilities

73. *Id.* at 9.

74. *Id.* at 10. However, de Lisle states that the elderly population has "fewer cars and generate fewer traffic and parking problems." de Lisle, *supra* note 33, at 34.

75. NIMBY, *supra* note 64, at 11–12.

76. *Id.* (citations omitted).

77. *Id.* at 7.

78. *Id*. (quoting Joseph P. Griffith, *For the Homeless: NIMBY on the Doorstep*, N.Y. TIMES, Mar. 22, 1992, § 10, at 8).

79. *See generally* Michael J. Cacace & Kevin E. Montano, *Developing the Modern Congregate Care/Assisted Living Facility* 1999 (PLI Tax Law & Estate Planning Course Handbook Series No. H-274, 1999).

still receive treatment similar to that of homeless shelters and halfway houses.

B. Exclusionary Zoning

Exclusionary zoning is a common tool employed by local municipalities to exclude whatever segment of the population they deem undesirable. Historically, the term solely referred to "land use controls that promoted economic segregation" and consequently racial segregation.[80] The most common techniques included minimum lot size requirements, building size requirements, and exclusion of multifamily dwelling units and manufactured housing.[81] These density requirements had the basic effect of raising lot prices, the cost of building a home, and property taxes.[82]

The leading cases on this subject are the New Jersey Supreme Court's *Mount Laurel* cases. In the 1975 decision, *Mount Laurel I*,[83] the New Jersey Supreme Court established a plan to eradicate exclusionary zoning.[84] The zoning ordinance in question provided that one-third of the township be set aside for industry, two percent for retail, and the remainder for single-family residences.[85] The court invalidated the zoning ordinance because it did not provide a fair share of the township's land to low- or moderate-income families.[86] The court placed an affirmative duty on the township to "remove barriers to affordable housing, assume responsibility to provide its fair share, and zone with a regional perspective."[87]

In *Mount Laurel II*,[88] the New Jersey Supreme Court revisited the *Mount Laurel I* decision because not a single lower-income unit had been built since the passage of *Mount Laurel I*.[89] Unanimously, the court strengthened its previous stance on exclusionary zoning and—in a detailed opinion—outlined procedures and polices that munici-

80. 1 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 3.01[1], at 3-6 (Eric Damlan Kelly et al. eds., 2001).
81. *Id.* § 3.01[2], at 3-13.
82. *Id.* § 3.01[2], at 3-19.
83. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975).
84. *See id.*
85. Fuge, *supra* note 65, at 154–55.
86. *Mount Laurel I*, 336 A.2d at 731–32.
87. Fuge, *supra* note 65, at 155.
88. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983).
89. *Id.* at 461.

palities would now have to follow.[90] Such procedures and policies included: "provid[ing] lower cost housing opportunities for [the municipality's] resident poor," demonstrating the provision of a specific number of lower-cost housing, and designating a special panel of judges to hear Mount Laurel cases.[91]

In response to the *Mount Laurel II* decision, the New Jersey legislature passed the Fair Housing Act, which essentially codified the *Mount Laurel II* decision.[92] The Act established a policy of mediation and exchanged litigation for administrative process by creating the Council on Affordable Housing to promulgate criteria and guidelines to help various municipalities determine their fair share.[93] If petitioned by a municipality, the Council also could certify a fair share housing plan, which would allow the municipality to avoid litigation and the remedies of *Mount Laurel II*.[94]

In 1986, the New Jersey Supreme Court upheld the constitutionality of the Fair Housing Act and ordered the transfer of all pending *Mount Laurel* litigation to the Council on Affordable Housing (*Mount Laurel III*).[95] Most recently, in *Mount Laurel IV*,[96] the court approved the municipalities' use of reasonable development fees on commercial and residential property to finance low-income housing, but only after the Council on Affordable Housing promulgated rules concerning the imposition of such fees.[97] The court felt that the fees were conducive to generating a realistic opportunity for developing low-income housing.[98]

90. *See id.* at 421–59; *see also* Fuge, *supra* note 65, at 156–57.

91. Fuge, *supra* note 65, at 156. The requirements further included: "The concept of 'developing municipality' was replaced by 'growth areas' designated by the State Development Guide . . . [and] [a]ffirmative action may be required such as subsidies, tax incentives, density bonuses, and mandatory set-asides of lower cost units in new developments." *Id.*

92. *See* 1 ROHAN, *supra* note 80, § 303[2], at 3-122.

93. *Id.*

94. *Id.* § 3.03[2], at 3-122 to -124.

95. *See* Hills Dev. Co. v. Bernards Township, Somerset City, 510 A.2d 621, 654 (N.J. 1986).

96. Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

97. *See id.* at 295.

98. *See id.* at 283–88.

IV. Current Status of Zoning Regulations

During the recent surge of urban sprawl, land use has become an important local issue. It has become of special concern for the elderly because local zoning laws typically relegate them to the outskirts of town, far from essential services (recreational facilities, shopping centers, hair salons, etc.) with no adequate means of transportation. The following will present exemplary zoning law cases concerning hospitals and nursing homes to provide a useful standard against which to compare case law on assisted living facilities. Finally, case law on assisted living facilities will be explored.

A. Hospitals and Nursing Homes

Lazarus v. Village of Northbrook[99] represents the typical situation faced by many developers attempting to obtain zoning approval.[100] The developers in this case obtained a 2.5-acre tract in the Village of Northbrook near a convalescent home and a nursing home.[101] A movie theater, toll road overpass, bowling alley, liquor store, motel, and restaurants were also in the vicinity.[102] In this metropolitan area, the developer wished to construct a three-story, 134-bed hospital with a parking facility,[103] but the village board denied the permit.[104]

The Northbrook zoning ordinance placed various uses such as public buildings, hospitals, nursing homes, airports, and cemeteries in the "special use" category.[105] These uses were permitted in any zone upon approval by the village board after a public hearing by the village planning commission; the denial of a permit had to bear a "'real and substantial relation to the public health, safety, morals, or general welfare.'"[106] This technique of defining a use as "special" was created to give the zoning authorities the flexibility to allow uses "which cannot be categorized in any given use zone without the danger of excluding beneficial uses or including dangerous ones."[107]

99. 199 N.E.2d 797 (Ill. 1964).
100. *See id.*
101. *Id.* at 799.
102. *Id.*
103. *Id.* at 800.
104. *Id.*
105. *Id.*
106. *Id.* at 801 (citation omitted).
107. *Id.* at 800 (citation omitted).

The court found that the hospital would not be an incompatible use in its proposed location and that the record was devoid of any proof that the hospital would cause any depreciation in the surrounding properties.[108] In fact, the court was incredulous at the suggestion that the hospital could be incompatible when two nursing homes were not.[109]

Urban Farms, Inc. v. Borough of Franklin Lakes[110] presents a case similar to *Lazarus*, except that the borough amended its zoning ordinance midstream.[111] Urban Farms had acquired a twenty-six-acre tract of land located at an intersection in a residential zone near a golf club, public elementary school, fire house, shopping center, and sewage treatment plant in order to construct a nursing home.[112] After several delays and many lengthy hearings, the Board of Adjustment recommended approval of a special exception use permit.[113] The mayor and council denied the permit.[114]

The zoning ordinance in question had five categories for special exception uses or conditional uses in a residential zone: (1) churches; (2) hospitals and nursing homes; (3) elementary schools; (4) golf courses; and (5) nonprofit recreational facilities.[115] Approval was conditioned on findings that the "proposed use [would] not be detrimental to the health, safety, and general welfare of the community and [w]as reasonably necessary for the convenience of the community and [would] not be injurious to the remainder of the district as a place of residence."[116] In addition, each category within the ordinance had to meet minimum bulk requirements.[117]

The court held that the evidence met the criteria set forth in the ordinance.[118] The court specifically highlighted the minimal intensity of the use, the location at the intersection, the nature of the surrounding uses, the capacity of the roads, and the proposed architecture of the nursing home.[119] Moreover, the requirement within the ordinance

108. *Id.* at 801.
109. *Id.*
110. 431 A.2d 163 (N.J. Super. Ct. App. 1981).
111. *Id.* at 169.
112. *Id.* at 165.
113. *Id.* at 166.
114. *Id.*
115. *Id.* at 165.
116. *Id.* (citation omitted).
117. *Id.*
118. *Id.* at 166.
119. *Id.*

for the use to be reasonably necessary to the community created a hybrid special exception-variance, which the court held effectively operated as a variance.[120] The proposed nursing home met this criteria as a public or quasi-public institution.[121]

Finally, the court invalidated the new ordinance—passed midstream—that allowed hospitals as a conditioned use in residential districts but not nursing homes.[122] These two types of uses were thought so similar that "disparate classification for zoning purposes could be justified only on compelling public policy grounds."[123] While hospitals could arguably be seen as serving a greater portion of the population, the disturbance within the community created by the emergency services and patient visiting offsets this broad base.[124] Likewise, the smaller base of persons benefited by a nursing home is offset by the greater compatibility with the residential district.[125]

In *People's Counsel for Baltimore County v. Mangione*,[126] a court in Maryland upheld the denial of a permit for a nursing home in a residential district.[127] In this case, the developer wished to build a nursing home on a four-acre tract in a single-family residential district.[128] The location was not near any arterial streets, and the Board concluded that the home would overshadow the surrounding landscape, worsen a storm water runoff problem, and over-tax the feeder streets to the home.[129] Consequently, the Board denied the special exception permit.[130]

The standard used by the court to determine whether a special exception would have an adverse impact upon the zoning district was "'whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the

120. *Id.* at 167.
121. *See id.*
122. *Id.* at 169.
123. *Id.*
124. *Id.* at 170.
125. *Id.*
126. 584 A.2d 1318 (Md. Ct. Spec. App. 1991).
127. *Id.* at 1320.
128. *Id.*
129. *Id.*
130. *Id.*

zone.'"[131] Based on this standard, the court held that the special exception was denied properly.[132] The court emphasized the blockage of light caused by the erection of the building, possible odors from the kitchen and dumpster, erosion produced by the construction, storm water runoff, and intrusion in the residential neighborhood.[133] Dwelling on the small feeder roads, the court worried about the safety of children playing in the streets due to increased traffic.[134]

Thus, as extrapolated from the above cases, hospitals and nursing homes seem to fall into the special exception or conditioned use category. Also, these types of facilities tend to arouse much local opposition[135] and typically end with a permit denial by the local zoning board. Unfortunately, assisted living facilities generally follow this established pattern, and the courts must step in to counteract the local government.[136]

B. Assisted Living Facilities

1. DEFINITIONAL PROBLEMS WITH ZONING ORDINANCES

Due to the lack of a national standard definition of an assisted living facility,[137] local governments have placed this type of elderly housing in various categories within their local zoning laws or have not recognized it at all. For example, in *Pollard v. Palm Beach County*,[138] a developer had to request a special exception to build an "adult congregate living facility for the elderly" in a residential district.[139] The permit was denied after neighbors complained of traffic problems, light and noise pollution, and a general adverse impact on the community.[140] The court quashed the order due to lack of factual evidence.[141]

131. *Id.* at 1323 (quoting Board of County Comm'rs v. Holbrook, 550 A.2d 664, 668 (Md. Ct. Spec. App. 1991)).
132. *Id.* at 1325.
133. *Id.* at 1324.
134. *Id.*
135. For further explanation of NIMBY responses, see *supra* notes 64–79 and accompanying text.
136. *See infra* notes 138–73 and accompanying text.
137. *See supra* notes 9–35 and accompanying text.
138. 560 So. 2d 1358 (Fla. Dist. Ct. App. 1990).
139. *Id.* at 1359.
140. *Id.* These are textbook NIMBY complaints. *See supra* text accompanying note 68.
141. *Pollard*, 560 So. 2d at 1359–60. "'The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a per-

In *Jayber, Inc. v. Municipal Council of West Orange*,[142] an owner of a nursing home (previously permitted by a variance) wished to expand the facility to include a 120-unit "senior citizen congregate care housing facility" on a five-acre tract.[143] In addition to a common dining room, the facility was to include lounges, exercise facilities, physical and occupational therapy facilities, laundry facilities, and nursing services.[144] The use variance was denied by the Zoning Board.[145] The court noted that there is a "very serious problem in New Jersey with housing for the elderly" and that congregate housing is not a defined or regulated concept in New Jersey.[146] Subsequently, the court stated that the proposed use was inherently beneficial to the general welfare and advanced the elderly housing purpose in state law.[147] Also, the evidence supported the finding that the impact on the community would be minimal and immensely preferred to any other use.[148] Consequently, the court overruled the Zoning Board and granted a variance to the owner of the facility.[149]

Similar in outcome to *Jayber*, the court in *Welsh v. Town of Amherst Zoning Board of Appeals*[150] upheld the granting of a use variance to a 100-unit "senior citizen housing complex."[151] The variance was granted properly because the owner would not be able to obtain reasonable return from the land without the variance, the hardship was due to two separate wetlands on the property, and the proposed location was at a major intersection.[152] In addition, the proposed use would not adversely impact the nature of the community.[153]

Besides those existing through special exceptions and variances, assisted living facilities have been approved under different existing

mit.'" *Id.* at 1360 (quoting City of Apopka v. Orange County, 299 So. 2d 657, 659 (Fla. Dist. Ct. App. 1974)).

142. 569 A.2d 304 (N.J. Super. Ct. App. Div. 1990).
143. *Id.* at 305.
144. *Id.* at 306.
145. *Id.* at 305.
146. *Id.* at 306–07.
147. *Id.* at 310.
148. *Id.* at 311.
149. *Id.* at 309. Use variances should be granted when "the applicant . . . first show[s] special reasons, namely, . . . serve the general welfare or promote one or more of the purposes of zoning [in state law]. The applicant must also meet the negative criteria, namely, . . . 'relief granted without substantial detriment to the public good . . . .'" *Id.* at 309–10.
150. 706 N.Y.S.2d 281 (App. Div. 2000).
151. *Id.* at 282.
152. *Id.*
153. *Id.*

definitions within local zoning laws.[154] For example, in *Hoffman v. Board of Appeals of Rochester*,[155] a New York court held that a variance was not necessary, nor permissible, for the construction of a "home for the aged."[156] The home for the aged was held to be an apartment house under the permitted uses in a residential zone.[157]

Contrary to the New York decision, a Massachusetts court held that an assisted living facility did not fit within the definition of an apartment building, nor a multifamily dwelling.[158] In this case, APT (a developer) planned to convert an apartment building into an assisted living facility as defined under the Massachusetts law.[159] In addition to common areas and two dining rooms, APT was offering personal-care services such as assistance with bathing, dressing, and eating.[160] The assisted living facility was originally classified as a "dormitory" by the city's building commissioner and later changed to a multifamily dwelling (both permitted as of right within the particular zoning district).[161] However, the board disagreed with both definitions, stating that assisted living facilities fall between nursing homes and apartment buildings, and denied the permit.[162] Significantly, the board noted that the local zoning had a gap where its language was incongruent with the available elderly housing options.[163] The court agreed with the conclusions of the board based primarily upon the fact that assisted living facilities entail personal services that apartment buildings or dormitories do not offer.[164] Also, because most residents would not retain live-in nurses (the addition of which could constitute a family under the local ordinance), the proposed use would not fit into the definition of a multifamily dwelling.[165]

In *Antonik v. Greenwich Planning and Zoning Commission*,[166] a Connecticut court held that an assisted living facility, as defined un-

154. 125 N.Y.S.2d 222 (App. Div. 1953).
155. *Id.* at 223.
156. *Id.*
157. *Id.*
158. APT Asset Mgmt., Inc. v. Bd. of Appeals of Melrose, No. 97-P-2213, 2000 WL 1403642, at *5 (Mass. App. Ct. Sept. 27, 2000).
159. *Id*. at *2.
160. *Id*.
161. *Id*. at *2–3.
162. *Id*. at *3.
163. *Id*.
164. *Id*. at *5–6.
165. *Id*. at *5.
166. No. CV 98-0163185 S, 1999 WL 391049 (Conn. Super. Ct. June 4, 1999).

der Connecticut law, was a "home for the aged" under a local zoning ordinance.[167] While state law and regulations may define an assisted living facility, the state law does not preempt the application of the local zoning ordinance, nor does the state law preclude the facility from being an assisted living facility and a home for the aged simultaneously.[168] In fact, the court supported the Commission in its decision to refrain from amending the zoning ordinance to include assisted living facilities because the nature and characteristics of an assisted living facility were evolving so rapidly that a broad term would be more conducive to a wide array of situations.[169]

The Sylvania Township Board of Appeals in Ohio chose the exact opposite tack from the Connecticut municipality.[170] This board amended the township's ordinance to include assisted living facilities as a conditional use in its A-4 district, but after a public hearing, the Board of Zoning Appeals denied a permit to construct such a facility without stating a reason.[171] In addition to other NIMBY complaints, the main objection of residents was the potential traffic congestion caused by the proposed facility. However, a review of the transcript revealed that the only competent evidence was the testimony of a traffic engineer, who stated that the traffic impact would be less than that generated by the funeral home located nearby;[172] the court remanded for a proper hearing.[173]

2. AGE-RESTRICTED ZONES

The haphazard placement of assisted living facilities within local zoning ordinances makes it difficult for a developer to begin a project in a community because the developer may not be confident about how to approach the local zoning commission for approval. However, some municipalities have created age-restricted zones for exclusive use by the elderly.[174]

167. *Id.* at *17.
168. *Id.* at *13.
169. *Id.* at *14–17.
170. Heiney v. Sylvania Township Bd. of Zoning Appeals, 710 N.E.2d 725 (Ohio Ct. App. 1998).
171. *Id.* at 726.
172. *Id.* at 728. The other NIMBY grievances were residents wandering away from the facility and the dangers of having elderly people drive in the area. *Id.*
173. *Id.* at 728–29.
174. Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 364 A.2d 1016, 1021 (N.J. 1976).

For instance, Weymouth Township in New Jersey passed an ordinance that limited the use of mobile home parks to elderly people and families.[175] "Elderly" was defined as fifty-two years old or older.[176] This ordinance allowed an owner to file for a mobile home park license, and immediately was contested by a Taxpayers' Association.[177] After dismissing the spot-zoning claim, the New Jersey Supreme Court commented that ordinances must bear a "real and substantial relationship to the regulation of the land" and must advance one of the purposes stated in the enabling act—here, general welfare.[178] General welfare was stated to be mutable and reflect current societal notions.[179] After finding that general welfare encompasses housing needs, the court then noted that the United States and New Jersey were experiencing substantial elderly population growth without an adequate growth in housing designed for this population.[180] In fact, the New Jersey legislature had found that there was a significant need of housing for the elderly.[181]

Weymouth Township addressed this need locally by passing the ordinance that restricted mobile home parks to the elderly.[182] The court focused on the three practical reasons for this type of ordinance: mobile homes are an inexpensive form of housing, a mobile home park would provide the "age-homogeneous environment" that elderly persons generally seek, and mobile homes are a convenient size for persons with "physical and financial limitations."[183] The court then held that the ordinance was within the zoning enabling act.[184]

The court's holding was notable because it stated that "ordinances which regulate use by regulating identified users are not inherently objectionable."[185] The court observed that land use regulation cannot be separated completely from regulation of the users;[186]

175. *Id.*
176. *Id.*
177. *Id.* at 1022.
178. *Id.* at 1024.
179. *Id.* at 1025.
180. *Id.* at 1025–27. The court specifically highlighted the *Report of the President's Task Force on Aging*, which found that there was "ample evidence of the need for a range of housing and living arrangements suited to particular and varying circumstances of growing numbers of the older population." *Id.* at 1028.
181. *Id.* at 1029.
182. *Id.*
183. *Id.*
184. *Id.* at 1030.
185. *Id.* at 1031.
186. *Id.*

limitation on the utilization of land necessarily restricts those who use it.[187] Thus, ordinances may regulate land use by regulating those who utilize it (e.g., Weymouth Township's mobile home ordinance).[188]

In addition to considering the zoning enabling act and land use regulation by restricting those who may use the land, the New Jersey Supreme Court addressed constitutional challenges to the ordinance.[189] Under the federal equal protection claim based upon the Fourteenth Amendment, the court held that the ordinance must satisfy the rational basis test only.[190] Although the age limitation is arbitrary, any choice would be, and the legislative choice did not exceed the bounds of reasonable choice.[191] Also, under the New Jersey Constitution, the right to "decent housing" entailed a stricter test, but the Weymouth ordinance passed this test because the "classification . . . is based upon real factual distinctions, and also bears a real and substantial relationship to the ends which the municipality seeks to accomplish."[192]

With respect to the federal due process claim based upon the Fourteenth Amendment, the court held that this guarantee only required that a law need not be unreasonable and "that the means selected bear a real and substantial relationship to a permissible legislative purpose."[193] The test for this case was similar enough to the equal protection claim that the court did not bother to explain further and held that the Due Process Clause was not violated.[194]

Finally, the court addressed whether the ordinance created an impermissible exclusionary effect.[195] Noting that zoning for the elderly could be part of a balanced housing plan, such zoning could be used for exclusionary purposes.[196] If the plan was part of a "pattern of improper exclusion," the ordinance would be invalidated notwithstanding that it might benefit the elderly at the same time.[197]

187. *Id.*
188. *Id.*
189. *Id.* at 1033–37.
190. *Id.* at 1034.
191. *Id.* at 1035. The court noted that "the median age at which men and women become grandparents is only 57 and 54 respectively." *Id.*
192. *Id.* at 1037.
193. *Id.*
194. *See id.*
195. *Id.* at 1037–41. The court chose specifically not to rule on this issue because the parties did not try this case on this theory. *Id.* at 1041.
196. *Id.* at 1040.
197. *Id.*

In *Campbell v. Barraud*,[198] the Town of Brookhaven re-zoned a ninety-six-acre tract to a Planned Retirement Community residence district, which had a minimum age requirement of fifty-five.[199] It was not disputed that there was a general need for elderly housing in the Town of Brookhaven.[200] After dismissing a spot zoning claim, the court held that the ordinance did not violate the town's zoning authority or equal protection of the laws.[201] The court found it illogical to conclude that the town could provide for elderly housing but then not be able to reserve those areas for their use.[202] Thus, it was "essential to the achievement of the purpose" of the ordinance to grant exclusive usage rights to the elderly.[203]

In *Maldini v. Ambro*,[204] the Town of Huntington passed an amendment to their local zoning regulations that allowed for "facilities for aged persons" to be located in a residence district with single-family dwellings, churches, farms, schools, and libraries.[205] After a corporation was granted a reclassification for its tract, residents challenged the zoning ordinance with claims of increased traffic and reduced property values.[206] Dismissing these claims by holding that possible depreciation does not prevent zoning classifications to adapt to a changing society, the court further held that the ordinance was inclusionary in nature.[207] The court noted that this inclusionary nature was evident from the town board's conclusions: there was a shortage of housing for the elderly; without this senior citizen district, the need for elderly housing would be unmet; and the ordinance would not impose any "particular hardship on other groups of persons who suffer from significant lack of housing."[208] Consequently, the ordinance was held valid.[209]

198. 394 N.Y.S.2d 909 (App. Div. 1997).
199. *Id.* at 910–11.
200. *Id.* at 911.
201. *Id*. at 912. The court dismissed the spot zoning claim because "any disparity in zoning is not to be condemned where . . . the rezoning is an effort to satisfy a conceded public need for senior citizen housing, which need is also expressed in the comprehensive master plan." *Id.* (internal citation omitted).
202. *Id*. The court also noted that there was no "hint" of exclusionary zoning in this ordinance, nor did the plaintiffs suggest it. *Id*. at 913.
203. *Id.* at 912.
204. 330 N.E.2d 403 (N.Y. 1975).
205. *Id.* at 405.
206. *Id*. at 406. Again, note the typical NIMBY stance taken by the residents.
207. *Id*.
208. *Id*.
209. *Id*. at 405.

However, not all age-restricted zones are created with a laudable inclusionary mindset. In *Hinman v. Planning and Zoning Commission of Southbury*,[210] the town passed an amendment that created a "Senior Citizen Planned Community District," which stipulated that all projects in the district must be at least 400 acres in size and restricted to persons fifty years old and older.[211] The amendment was adopted due to a petition by owners of a 400-acre tract of land.[212] The court ruled that the legislature of Connecticut did not confer on local zoning authorities the power to zone for "classes of people," and questioned the necessity of an elderly community in a town of 4,200 people and 40.6 square miles.[213] Finally, and pointedly, the court stated that the amendment was designed to promote the financial benefit of the developers and not the general welfare of the community;[214] and, consequently, the court invalidated the amendment.[215]

Because of definitional problems or opportunistic amendments by local zoning boards, much-needed, relatively inexpensive, elderly housing is not built, or is sited on the outskirts of the community, thereby minimizing the appeal and usefulness of the facility to prospective residents and maximizing the inefficient use of land.[216] However, at times, the zoning boards have the public welfare in mind and create an inclusionary ordinance which meets the critical need for elderly housing while also placing them within and making them a part of the community.[217]

V. A Move Toward Inclusionary Thinking

Even though a national definition for an assisted living facility is lacking[218] and currently municipalities have zoned them in various districts,[219] there appears to be a convergence of a definition among the commentators, who undoubtedly will have an impact on the future of this type of housing, and in turn, other experts.[220] The federal

210. 214 A.2d 131 (Conn. C.P. 1965).
211. *Id.* at 131–32.
212. *Id*. at 132.
213. *Id.* at 132–33.
214. *Id*. at 134.
215. *Id*.
216. *See supra* Part IV.B.1.
217. *See supra* notes 204–09 and accompanying text.
218. *See supra* notes 9–36 and accompanying text.
219. *See supra* notes 138–215 and accompanying text.
220. *See supra* notes 31–34 and accompanying text.

government, the states, and the commentators agree that assisted living includes, at a minimum, sleeping accommodations and assistance with activities of daily living.[221] Nevertheless, even a common definition does little to create efficient, economical, and environmentally friendly land use when viewing elderly housing through the eyes of the predominant NIMBY attitude. Therefore, municipalities must begin to develop an inclusionary frame of mind when drafting zoning regulations similar to Weymouth Township,[222] the Town of Brookhaven,[223] and the Town of Huntington.[224]

A. Health Facility Model

An inclusionary model presented by Todd Swanson, a principal in Hooper, Lundy & Bookman, Inc., paired assisted living facilities with health facilities.[225] Suggesting that assisted living facilities should consider being part of an existing health facility, Swanson offered three different paradigms: Lease/Share Model, Joint Venture Model, and Direct Development.[226] The Lease/Share Model contemplates a ground lease or a physical space lease to the proposed assisted living facility.[227] However, these leases are characteristically complex because of the development process and various liability issues.[228]

Secondly, under the Joint Venture Model, the health facility participates as a partner with the assisted living facility.[229] While the assisted living facility is typically responsible for the construction and financing of the development, the health facility supervises and assists with health care and medical responsibilities.[230] As its contribution, the health facility could assign or lease the space needed for the new assisted living facility.[231] However, tax-exempt entities should be

221. *Id.*
222. *See* Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 364 A.2d 1016 (N.J. 1976).
223. *See* Campbell v. Barruad, 394 N.Y.S.2d 909 (N.Y. App. Div. 1997).
224. *See* Maldini v. Ambro, 330 N.E.2d 403 (N.Y. 1975).
225. *See Assisted Living Regulatory Environment Familiar Territory for Health Facilities*, 7 CAL. HEALTH L. MONITOR 4 (1999), WL 7 No. 8 Cal. Health L. Monitor 4.
226. *Id.*
227. *Id.*
228. *See id.*
229. *Id.*
230. *Id.*
231. *Id.*

wary of this model because the Internal Revenue Service has viewed these arrangements unfavorably.[232]

Finally, a health facility could undertake a Direct Development of an assisted living facility as an integral part of its operation.[233] By contracting various experts, the health facility could ensure compliance with all regulations and the development of a superior facility.[234]

B. Smart Growth

Through his work in the town of Ramapo and the subsequent litigation,[235] Robert Freilich developed an inclusionary model based on sequenced growth.[236] The municipality enacted a zoning ordinance that sequenced growth over approximately a twenty-year period based on the availability of public facilities.[237] The timed growth was integrated with a "capital improvement plan [to expand the public facilities], subdivision regulation, affordable housing, and zoning."[238] Because the public facilities were to be expanded according to a master plan over the twenty years, no permanent taking of any lands would occur,[239] and furthermore, the developer was able to accelerate

232. *Id.*
233. *Id.*
234. *Id.* Swanson emphasizes the need for experts by stating that "'end product success really requires a lot of up front effort in terms of marketing and market profiling.'" *Id.*
235. *See* Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972).
236. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 6–8 (1999). According to Freilich, this ordinance is in response to the transfer of the "cost of development from the developer, landowner, and consumer to the public sector [which] has led to: . . . destruction of environmental and agricultural resources; inefficient use of energy resources . . . unwillingness to provide adequate housing . . . [and] an increase in the cost of public sources." *Id.* at 66 (citation omitted).
237. *See id.* at 6–7. For example, in *Ramapo* the following public facilities were utilized as criteria: "1. sewers or an approved substitute; 2. drainage facilities; 3. parks or recreational facilities, including public school sites; 4. state, county, or town roads improved with curbs and sidewalks." *Id.* at 51 (citing AMENDMENTS TO TOWN OF RAMAPO BUILDING ZONE AMENDED ORDINANCE § 46-13.1(D) (1969)).
238. *Id.* at 7.
239. *See Planning Bd. of Ramapo*, 285 N.E.2d at 303–05. While "an ordinance that seeks to permanently restrict the use of property . . . must be recognized as a taking . . . . An appreciably different situation obtains [sic] where the restriction constitutes *temporary* restriction . . . ." *Id.* at 303. Although the court noted that this temporary time period was approximately a generation, the court still held the ordinance to not be a taking because the "pecuniary profits of the individual must in the long run be subordinated to the needs of the community." *Id.* at 303–04.

the date of use of the land by providing the necessary improvements at the developer's expense.[240]

The smart growth plan called for four tiers: the Urbanized Tier (central city), the Suburbs Tier (first or second ring of suburbs), the Urbanizing Tier (active growth), and the Conservation/Open Space Tier (agriculture and green space).[241] This plan recognizes that each tier requires a different approach in order to encourage smart growth.[242] Thus, the Urbanized Tier may receive subsidies to create revitalization and infill, the Suburbs Tier could require code enforcement, the Urbanizing Tier might charge new developments with the cost of expanding public facilities, and the Conservation/Open Space Tier is able to employ economic incentives and transfers of development rights to preserve the land.[243]

The cornerstone of this plan is the Urbanizing Tier where all active growth is channeled because it is served by public facilities and is experiencing urbanization.[244] This tier is generally demarcated by factors which can include:

> 1. the proximity to existing and planned transportation and transit corridors and corridor centers; 2. the degree of contiguity to already developed areas available for infill; 3. the recognition of planned public capital improvement projects currently served by sewer or logical capital improvement phasing; and 4. the development of mixed-use commercial and neotraditional residential centers.[245]

This tier allows local zoning boards to manage growth, combat sprawl, and promote responsible land use.[246]

C. Model Purpose Section for a Local Ordinance

A local comprehensive zoning ordinance must include a specific policy statement concerning the direction in which housing growth will occur within the community. If the policy statement is formu-

240. FREILICH, *supra* note 236, at 53. For example, in *Ramapo* a point system was utilized such that the availability and geographical proximity of public facilities produces a point total. *See id.* at 51–52. If the proposed development did not have the requisite number of points, the developer could construct recreational facilities or roads at the developer's expense in order to obtain the necessary quantity of points. *See id.* at 53.

241. *See id.* at 7–8.

242. *Id.* at 8.

243. *See id.*

244. *Id.*

245. *Id.*

246. *Id.*

lated with all segments of the population in mind (including, of course, the elderly), then the subsequent statutory provisions will reflect a land use pattern that will be economical and environmentally sound. The economic efficiency will be gained through proximate placement of residences near to places of work, shopping, grocery stores, and/or other providers of goods and services as well as the cessation of needless expansion of infrastructure. The environmental gains occur through the reduction in transportation ills, including exhaust fumes and consumption of nonrenewable resources (i.e., gasoline), the urbanization of environmentally sensitive lands, preservation of habitats, and the aesthetics of green spaces.

Because a policy statement necessarily will dictate the placement of new zones and amendment of the existing zones throughout the municipality, it is important to thoughtfully and carefully draft a truly inclusive declaration. For example, a model purpose section follows:[247]

(1) With respect to residential zoning, the purposes of this zoning ordinance are to:

> (a) State polices and create rules that provide a balance of housing for all age groups and for all income levels;[248]
>
> (b) Consider the soil type, terrain, and infrastructure capability when assessing the suitability of land for residential needs;[249]
>
> (c) Ensure the proximate placement of life necessities, social centers, and recreational facilities;[250]

247. *See, e.g.*, 9 ROHAN, *supra* note 80, § 53C.08[5], at 53C-404. This policy statement is a collage of the Rohan's commentary, various states' policy statements, and the author's ideas.

248. This is to avoid the unfortunate zoning practices that occurred in Mount Laurel and to extend those decisions from focusing on lower-income housing to including the elderly, the middle class, the middle-aged, the upper class, and the young.

249. This statement is designed to lead to, at a minimum, the adoption of a stop-and-think policy similar to the National Environmental Policy Act. Hopefully, local governments will think twice before approving the draining of wetlands or the placing of a mall on swampland.

250. The proximate placement should be defined as within walking distance or public transportation. The benefit will be two-fold: a reduction in the environmentally harmful effects of motor vehicles and the enabling of movement by the seniors who do not or cannot drive automobiles. Life necessities could be delineated as grocery stores, pharmacies, and places to purchase personal toiletries.

(d) Maintain, improve, or develop the nature and vitality of residential neighborhoods;[251]

(e) Evaluate the current and future demand for housing for specific segments of the population;[252] and

(f) Incorporate adequate provisions for existing and future needs of all segments of the community.[253]

A full model statute is not included because many of the local zoning ordinances are tailored to specific communities. However, if the policy statement or guiding force behind the zoning ordinance incorporates responsible land use, then the subsequent statutory provisions and rules should follow in like form.

VI. Conclusion

In the quest to meet the rising need of elderly housing, assisted living facilities represent another viable living option for senior citizens, but due to definitional problems, NIMBY reactions, and exclusionary zoning, these affordable facilities have been relegated to the outskirts of communities through zoning laws. Local governments must realize that placing the elderly away from the city center creates a sharp divide between the citizens of the community while establishing an inefficient and "brown" land use policy.

Therefore, to promote an efficient, economic, and "green" use of available land, inclusionary thinking must become the standard when municipalities draft zoning laws. Zoning ordinances should ensure that the elderly are part of the community and have easy access to recreational, medical, shopping, and mass transit facilities. As a consequence of this type of access, sprawl and the expenditure of public funds on needless infrastructure would be reduced while maintaining green spaces for habitat preservation, recreational activities, and sheer aesthetics. With heightened awareness and applied thought, assisted living facilities and communities can co-exist for mutual benefit.

251. This statement is to address legitimate NIMBY concerns and ensure the development of the community.

252. This statement demands a forward-looking and forward-thinking local government that should always be cognizant of the trends within its communities.

253. This statement is intended to capture the holistic vision of the local government in a master plan that can be shared with the community for comment and, if necessary, alteration.