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Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches

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CHALLENGING EXCLUSIONARY ZONING: CONTRASTING RECENT FEDERAL AND STATE COURT APPROACHES

I. Introduction

The zoning power, though based on the police power of the states,[1] has traditionally been granted to local communities through various state enabling statutes.[2] These enabling statutes permit local enactment of zoning ordinances only to the extent that they bear a substantial relation to the "health, safety, morals, or general welfare"[3] of the community.

With the migration of middle-class city dwellers to the suburbs after World War II,[4] zoning has become more than a means of maintaining the proper mix of land-use patterns in a community. Rather, in fear of overly rapid development and irreversible alteration of their community character,[5] towns have utilized the zoning power in an exclusionary fashion by such devices as minimum lot size,[6] lot width,[7] and exclusion of multiple dwellings.[8] The effect of these

1. Zoning is presumed to be a legitimate exercise of the police power which may limit an individual's property rights. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

2. All fifty states presently have state zoning enabling statutes. The early enabling statutes were based, to a large extent, upon the Standard State Zoning Enabling Act, which was recommended for adoption by the states by the United States Department of Commerce. 47 CONN. B.J. 249, 251 (1973). The original Standard Act, published in 1924, is now out of print, but the 1926 revision of the Act can be found in 3 RATHKOPF, ZONING AND PLANNING 100-1 to -6 (3d ed. 1972).

3. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

4. Between 1950 and 1966 while the population of the central cities increased by 7,400,000, the population growth in the suburbs was 36,500,000, almost five times that of the cities. Margolis, *Exclusionary Zoning: For Whom Does Belle Terre Toll?*, 11 CALIF. W.L. REV. 85, 91 n.19 (1974). Further, between 1960 and 1970 the number of industrial and commercial jobs in the central cities actually diminished from twelve million to eleven million, while employment in the suburbs increased from seven million to ten million. *Id.* at 91.

5. The incidence of exclusionary zoning is most prevalent in towns which have recently or will shortly experience rapid growth. Such growth is unsettling in its effects on communal character, municipal services, and budgets. Consequently, towns attempt to use certain exclusionary devices to stem growth or restrict it to development which produces high taxes and low demand for municipal services. *See* E. BERGMAN, ELIMINATING EXCLUSIONARY ZONING 5 (1974) [hereinafter cited as BERGMAN].

6. *See, e.g.*, Steel Hill Development, Inc. v. Town of Sanbornton, 338 F. Supp. 301 (D.N.H. 1972); Appeal of Concord Township, 439 Pa. 466, 268 A.2d 765 (1970).

7. *See, e.g.*, Klehr v. Zoning Bd. of Appeals, 24 Ill. App. 3d 512, 320 N.E.2d 498 (1974).

8. These ordinances permit only single-family detached dwellings, the traditional favorite of small communities. Zoning ordinances which permit total exclusion of multiple dwellings

practices[9] is essentially cumulative and has added to the already serious housing problem. If one town zones in an exclusionary manner, the effect on surrounding communities is negligible. However, where many do so, the effects are substantial, causing an increase in the price of suburban housing and a decrease in the amount of such housing available to low- and middle-income persons.[10]

In recent years, several constitutional and common law arguments have been directed at exclusionary zoning.[11] No argument has been met with consistent acceptance and thus exclusionary zoning remains a very unsettled area of the law. At the heart of the controversy is the time-honored tradition of local control.[12] Opponents of

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have been upheld in some cases. *See, e.g.*, Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955); Zelvin v. Zoning Bd. of Appeals, 30 Conn. Supp. 157, 306 A.2d 151 (C.P. 1973); McDermott v. Village of Calverton Park, 454 S.W.2d 577 (Mo. 1970); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958). *Contra*, Westwood Forest Estates, Inc. v. South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).

9. Other forms of exclusionary zoning include prohibition of mobile homes which eliminates an inexpensive and readily available form of housing. *See, e.g.*, Matthews v. Fayette County, 233 Ga. 220, 210 S.E.2d 758 (1974); Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962). When multiple dwellings are allowed, a common practice is to limit the majority of apartments to one bedroom, thereby making multiple dwellings unavailable for families with children.

In a study of the zoning laws of northeastern New Jersey, it was determined that the most common bedroom number restrictions limited 80% of the dwelling units to one bedroom, and up to 20% to two bedrooms. A very few towns permit a small number of three bedroom units. Williams & Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey*, 22 SYRACUSE L. REV. 475, 488 (1971). One town actually limited its occupancy to one preschool age child per dwelling unit, and forbade any occupancy at all by school-age children. *Id.* at 488 n.24.

10. Minimum building size requirements set minimum floor space and height guidelines. Contractors generally figure the cost of housing at $20.00 per square foot of floor space. Williams & Norman, *supra* note 9, at 481. Consequently, any ordinance setting a minimum floor space where less would be sufficient unnecessarily raises the cost of housing. Zoning ordinances which require a large frontage invariably raise the cost of upkeep of the house and the cost of various municipal services such as sewerage and street paving. Even more damaging and costly than the wide frontage requirement is the large lot zoning ordinance. Designed to maintain the rural character of neighborhoods, this ordinance encourages the construction of more expensive homes on larger lots, thereby reducing the amount of land available for construction, causing land prices to rise commensurately. Low-cost housing becomes unattainable as public housing authorities and low-income housing developers cannot economically build in accordance with the zoning regulations. The cost of housing rises and the construction of new housing decreases as fewer people are able to afford the available housing. *See* BERGMAN 69.

11. *See, e.g.*, Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2 HASTINGS CONST. L.Q. 179 (1975); 47 CONN. B.J. 249 (1973).

12. The rationale for endowing local government with the zoning power lies in the basic notions of American society that local rule is best. It is felt that municipalities are closest to

exclusionary zoning question whether suburban communities should be permitted to exempt themselves from sharing the burden of providing housing for all income levels.[13] They suggest a regional approach that would allocate low- and middle-income housing needs more evenly between suburban communities and central cities.[14]

In recent years, there has been a marked contrast in the decisions reached in state and federal courts in exclusionary zoning cases. This Note will examine recent judicial approaches to the exclusionary zoning problem and attempt to delineate the proper function of the courts in this area.

II. Federal Court Developments

Advocates of local control recently received support from the Su-

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local problems and thus most responsive to local needs and that local officials are most qualified to determine what ordinances are best for the community. Such control inevitably maximizes local interest. 47 CONN. B.J. 249 (1973). This local control over zoning has endured even in the present era of concentration of power. J. BABCOCK, THE ZONING GAME 15-19 (1966).

13. Restrictive zoning often results in an inequitable distribution of fiscal resources. As businesses and the more affluent city residents relocate to the suburbs, they carry with them the tax base upon which the central cities depend to finance their police, fire, and other municipal services. The suburbs gain the tax base and thus the quality of their municipal services improves while that of the core cities deteriorates. G. MULLER, EXCLUSIONARY ZONING: A CHALLENGE TO COMMUNITY DEVELOPMENT 11 (1972). Often communities not only zone to keep low-income groups out, but affirmatively zone to attract "tax ratables" *i.e.*, industry and high cost housing. This form of exclusionary zoning is called fiscal zoning. While exclusionary zoning generally must be disguised and concealed under other names, fiscal zoning can be utilized openly. This is because the creation of a sound fiscal base is a legitimate concern of local government. D. HEETER, TOWARD A MORE EFFECTIVE LAND-USE GUIDANCE SYSTEM 88-89 (1969). What eventually occurs in fiscal zoning is that communities limit the demand for municipal services that accompany low-cost housing, creating a strong tax base and low tax rate. This tends to attract businesses and industry to the suburbs. Thus, other communities and core cities are compelled to accept the costly burden of low-income groups. They thereby develop a weak tax base and a high property tax rate which in turn force businesses out of the cities.

In addition to the declining fiscal situation, as businesses move out of the cities and into the suburbs, the employees, who cannot afford to follow their jobs because of the exclusionary zoning, are compelled to travel long distances to work. BERGMAN 37. A 1964 survey by the Michigan University Survey Research Center found that 56% of the sample studied felt that being close to the household's place of work was important. More than half of these felt it to be very important in deciding where to live. A 1967 study by the Oakland Tribune indicated that nearness to work was the single most important consideration in selecting housing. Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URBAN LAW. 262, 271-72 (1975).

14. *See, e.g.*, Burns, *supra* note 11, at 179.

preme Court in *Village of Belle Terre v. Boraas*.[15] Belle Terre's[16] ordinance excluded multiple dwellings and limited the housing in the village to single family residences.[17] Appellees[18] did not challenge the restriction of homes to one-family residences, but rather challenged the definition of "family" contained in the ordinance,[19] and the subsequent restriction to such families, as a violation of appellees' first amendment rights.[20] In upholding the ordinance, Justice Douglas, writing for the seven member majority, spoke of the permissible goals of zoning, stating:[21]

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Given an expansive reading, *Belle Terre* may be interpreted as an endorsement of the right of municipalities to zone solely for one-family homes to the exclusion of multiple dwellings. Yet the ordinance in *Belle Terre* was not challenged as an exclusionary ordinance; rather it was attacked primarily on first amendment grounds.[22] The Court was not asked to consider (and did not consider) the exclusionary effects of the ordinance. Limited to its facts, therefore, *Belle Terre* would appear to permit zoning for aesthetic

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15. 416 U.S. 1 (1974).

16. The Village of Belle Terre, Long Island consists of approximately 220 homes housing 700 people in a total land area of less than one square mile. *Id.* at 2.

17. The ordinance excluded lodging houses, boarding houses, and fraternity houses as well as multiple dwellings. *Id.* Appellees were the owners of a house in the village. They leased the house to six unrelated college students. The owners were subsequently cited for violating the ordinance and they then brought an action to have it deemed unconstitutional. *Id.*

18. *Id.* at 7.

19. The word "family" as used in the ordinance means: "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage . . . ." *Id.* at 2.

20. In his majority opinion, Mr. Justice Douglas mentions the restriction to one-family residences only in passing. This may perhaps be seen as a sub silentio endorsement of such restrictions. Yet the Court was never called upon to decide the validity of the restriction, and there was never any claim made by appellees of a shortage of housing that could be alleviated by invalidating Belle Terre's zoning ordinance. *Id.* at 7.

21. *Id.* at 9.

22. *See* note 20 *supra*.

purposes, basically for wide open spaces, family values, and preservation of a rural community atmosphere, while leaving open the question of total exclusion of multiple dwellings.

The most distinguishing feature of *Belle Terre*, however, is that it dealt with a fully developed community and thus left open challenges to development plans of growing communities. Such a challenge was presented in *Construction Industry Association v. City of Petaluma*.[23]

The City Council of Petaluma, a developing community in California, implemented a phased growth plan, designed to limit new housing units to 500 each year.[24] Furthermore, an urban extension line was created beyond which no land would be annexed or municipal facilities extended.[25] The district court held that the plan restricted the right to travel of those wishing to settle in the city and thus was invalid.[26]

The district court, whose decision was handled down shortly after *Belle Terre*, distinguished that case, noting that the purpose of the Petaluma Plan was "to keep people out, a patent attempt to affect such excluded persons' right to travel"[27] whereas *Belle Terre's* ordinance was directed at preventing unmarried persons from living together under the same roof rather than in the village itself.[28] The *Petaluma* decision received criticism for misapplying the right to travel and for failing to define the limits of a municipality's responsibility towards the surrounding region.[29] Such criticism has been muted by the Ninth Circuit's recent reversal of *Petaluma*.[30] The court refused to consider the right to travel argument[31] and discussed at length plaintiffs' alternative claim that the plan was arbi-

23. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, No. 74-2100 (9th Cir. Aug. 13, 1975).

24. Alarmed by the accelerating growth rate in Petaluma, the town in 1972 adopted a series of ordinances which came to be known as the "Petaluma Plan." This plan set a maximum housing development growth rate of 500 dwelling units per year. The 500 figure is somewhat misleading as it applied only to housing units that were part of projects of five or more units. No. 74-2100, at 3.

25. 375 F. Supp. at 576.

26. *Id.* at 581.

27. *Id.* at 584 n.1.

28. *Id.*

29. *See, e.g.*, 3 FORDHAM URBAN L.J. 137 (1974); 36 OHIO STATE L.J. 128 (1975); 28 VAND. L. REV. 430 (1975).

30. No. 74-2100, at 10 (9th Cir. Aug. 13, 1975).

31. *Id.* at 10.

trary and unreasonable and thus violative of due process.[32] In reviewing the reasonableness of the plan, the court examined whether it was in furtherance of the general welfare.[33] The court pointed to *Belle Terre's* interpretation of the concept of public welfare as including the preservation of a rural environment and quiet family neighborhood, found similar interests present, and therefore upheld the plan as related to the state's legitimate interests.[34]

Petaluma furthermore held the plan to be inclusionary rather than exclusionary since it actually provided for some low- and middle-income housing.[35] The court felt that this fact distinguished it from cases that have invalidated exclusionary zoning ordinances.[36]

Finally, *Petaluma* is significant for its dicta on the role of the federal court in reviewing an exclusionary zoning challenge. In response to the argument that the Petaluma Plan did not adequately satisfy regional housing needs the court stated:[37]

> If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or the entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. . . . [T]he federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.

Both *Belle Terre* and *Petaluma* suggest that federal courts will not acknowledge equal protection arguments based on fundamental rights in challenges to exclusionary zoning devices. One possible reason is that the "alleged" right that exclusionary zoning directly affects is housing which has been expressly denied fundamental right status by the Supreme Court.[38] Thus a court will be reluctant

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32. *Id.* at 11-16.

33. *Id.* at 12-16.

34. *Id.* at 12-13.

35. The court of appeals in *Petaluma* noted that the plan "radically" changed the previous building pattern and required that housing permits be evenly divided between single-family and multiple-family dwellings. The plan also provided that approximately eight to twelve per cent of the new units be constructed specifically for low- and moderate-income persons. The court deemed the plan inclusionary rather than exclusionary. *Id.* at 14 n.16.

36. *Id.*

37. *Id.* at 15.

38. The Supreme Court in Lindsey v. Normet, 405 U.S. 56 (1972), in upholding the constitutionality of the Oregon Forcible Entry and Wrongful Detainer Statute, stated: "We

to permit a plaintiff to bypass this fact by arguing a denial of recognized fundamental rights that are only tangentially affected.

In respect to regional approaches to exclusionary zoning challenges, *Belle Terre* and *Petaluma* illustrate the instances where a federal court will refrain from such an approach but give no indication of the instances where a federal court might consider the needs of a region in reviewing the validity of a zoning device.

The alternative equal protection argument in challenging an exclusionary zoning device is to allege discrimination against a suspect class.[39] In reviewing such arguments, federal courts have been far more willing to strike down ordinances[40] or, at least to apply a regional approach in their analysis.[41]

In *Ybarra v. City of Town of Los Altos Hills*,[42] plaintiffs, Mexican-Americans, challenged a large lot ordinance on the basis that it discriminated against the poor.[43] The Ninth Circuit upheld the ordinance finding that it was rationally related to the legitimate governmental interest of preserving the town's rural environment.[44] The court rejected the claim that wealth was a suspect classification relying on *San Antonio Independent School District v. Rodriquez*.[45] The Supreme Court in *Rodriquez* posited two conditions under which poverty becomes a suspect classification: inability "to pay for some desired benefit" and "absolute deprivation of a meaningful opportunity to enjoy that benefit."[46] The court in *Ybarra* found that the plaintiffs satisfied the first criteria but failed to satisfy the second.[47] In respect to this latter finding, the court utilized a regional

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do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial [function]." *Id.* at 74. *See also* Citizen Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Prostrollo v. University of S.D., 507 F.2d 775 (8th Cir. 1974), *cert. denied*, 421 U.S. 952 (1975).

39. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

40. *See* text accompanying notes 55-65 *infra*.

41. *See* text accompanying notes 45-48 *infra*.

42. 503 F.2d 250 (9th Cir. 1974).

43. *Id.* at 253.

44. *Id.* at 254. The court here cited to *Belle Terre* to support the contention that the large lot ordinance was rationally related to preserving the rural environment. *Id.*

45. 411 U.S. 1 (1973).

46. *Id.* at 20.

47. 503 F.2d at 254.

approach and found that although there was no low income housing in the municipality, there was an ample supply elsewhere in the county, in areas "easily accessible to appellants' jobs and social services."[48] It may be inferred from this analysis, that had there been no housing in the vicinity of Los Altos Hills, the court would have found wealth to be a suspect classification and the ordinance would have been voided under strict scrutiny equal protection analysis.

In recent years numerous challenges to exclusionary zoning devices have been brought on racial discrimination grounds. Such challenges have had to initially confront the Supreme Court's holding in *James v. Valtierra*.[49] In *James*, the Court upheld California's requirement of referendum approval of all low rent public housing, reversing a district court's finding that such a referendum denied equal protection.[50]

When *James* was decided, its implication was uncertain. Taken to its logical conclusion, *James* appeared to place an imprimatur on a municipality's right to refuse low income housing.[51] A better interpretation is that *James* merely upheld legislative mechanisms such as referenda that grant the community a voice in matters of local concern.[52]

James also implies that racial disparity alone does not amount to racial discrimination.[53] Thus, only the strongest showing of a ra-

48. *Id.*

49. 402 U.S. 137 (1971).

50. 402 U.S. at 143.

51. The Court in *James* noted the long tradition in California of local referenda and the willingness to approve such referenda on housing issues. *Id.* at 141-42.

52. *See* Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740, *cert. granted*, 44 U.S.L.W. 3222 (U.S. Oct. 14, 1975). *Forest City* concerned a city charter provision that forbade rezoning of land without a 55 per cent favorable vote of the electorate in a city-wide election. The Ohio Supreme Court struck down the provision stating: "A reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public." *Id.* at 195, 324 N.E.2d at 746. The court distinguished *James* noting that it "did not concern zoning, but rather the approval or disapproval of low-rent public housing. The court deemed such a decision to properly involve community-wide policy-making and compared the requirement to similar mandatory referendums for approval of state constitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexation." *Id.* at 197, 324 N.E.2d at 747.

53. The Court stated: "The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact

cially discriminatory effect would convince a court to impose on a municipality the affirmative duty of providing low-income housing. Until recently, such affirmative duties had only been imposed on central cities.[54] In *United States v. City of Black Jack*[55] and *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[56] federal circuit courts have gone one step further and imposed such an affirmative duty on suburbs adjacent to central cities.

Black Jack involved a municipal zoning ordinance which prohibited the construction of multi-family dwellings, thereby precluding the construction of low- and moderate-income housing.[57] The ordinance was challenged under the Fair Housing Act of 1968[58] as racially discriminatory.[59] The court in striking down the ordinance found that a prima facie case of racial discrimination had been established.[60] In reaching this decision, the court looked to two factors: the ultimate effect of the ordinance and the historical context of the City's action. The ultimate effect was found to be the foreclosure of "85 percent of the blacks living in the metropolitan area from obtaining housing in Black Jack . . . when 40 percent of them

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aimed at a racial minority." 402 U.S. at 141.

54. *See, e.g.*, Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). However, in two recent Second Circuit decisions, Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) and Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974), it was held that once plans for low-income projects were begun, a governmental body need not have to justify a subsequent abandonment of the project by a showing of a compelling state interest. Both *Faraday* and *Acevedo* also illustrate instances where exclusionary zoning may be attacked under a Civil Rights Statute such as the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (1970).

55. 508 F.2d 1179 (8th Cir.), *cert. denied*, 95 S. Ct. 2656 (1975).

56. 517 F.2d 409 (7th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3265 (U.S. Oct. 23, 1975).

57. 508 F.2d at 1181-82. What is now the City of Black Jack, Missouri is composed of 1700 acres in the County of St. Louis. In 1970 the Black Jack area was unincorporated and was governed locally by the St. Louis County government. The county had adopted a master plan in 1970 for the area which was later to become Black Jack, designating 67 acres for multiple family construction. In 1970, the Inter Religious Center for Urban Affairs, an inter-racial group, obtained land in this unincorporated area for multi-family low-income housing. Within the 67 acres designated for such housing the proposed development met with strong community opposition, resulting in the incorporation of the 1700 acres as Black Jack by the St. Louis County Council. The City Council of Black Jack then enacted a zoning ordinance which prohibited the construction of any new multi-family dwellings anywhere in the town and made all existing ones non-conforming uses. *Id.* at 1181-83.

58. 42 U.S.C. §§ 3601-31 (1970).

59. 508 F.2d at 1181.

60. *Id.* at 1186.

were living in substandard or overcrowded units."[61] In examining the history of segregation in St. Louis the court took note that it was "in large measure the result of deliberate racial discrimination in the housing market by the real estate industry and by agencies of the federal, state and local governments."[62]

In *Metropolitan Housing Development Corp.* the Seventh Circuit reviewed the refusal of a residentially segregated suburban Chicago village to rezone a tract of land from single family to multiple family status, enabling the construction of a 190-unit townhouse development intended for subsidized occupancy by low-and moderate-income groups.[63] The court followed *Black Jack* and analyzed the town's refusal to rezone in "its historical context" and "ultimate effect."[64] In light of Chicago's history of segregation, the failure by Arlington Heights to sponsor low-income housing and the lack of alternative sites for the proposed housing, the court ruled the town's refusal to rezone violative of equal protection.[65]

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61. *Id.*

62. *Id.*, *quoting* United States v. City of Black Jack, 372 F. Supp. 319, 326 (E.D. Mo. 1974). The court also noted the context in which the city's action was taken, and the fact that the exclusion of apartments would "contribute to the perpetuation of segregation in a community which was 99 percent white." *Id.* The holding in *Black Jack* may be tainted by the particular facts of the case. The zoning ordinance in question reduced the amount of land available for multiple-family housing only after the sponsors of a particular development, an inter-racial group, announced plans for the development. It would appear, therefore, that the ordinance was designed specifically to enforce racial segregation.

63. 517 F.2d at 411. St. Viator, a Catholic religious order, selected the Metropolitan Housing Development Corp., a non-profit developer of low- and moderate-income housing, to develop fifteen acres of the order's land for such housing. The land was situated in an area zoned for single-family dwellings, and the proposed development would have been the only subsidized housing in Arlington Heights, despite a great demand for such housing. The developer applied for a zoning change, which was denied by the Plan Commission, as not in conformity with the town's comprehensive plan of development. The town's plan relegated apartments to "buffer zones," or areas of transition between single-family zoning and commercial, industrial, or other high intensity uses. *Id.*

64. *Id.* at 413.

65. *Id.* at 413-14. The court noted that Arlington Heights was neither responsible for, nor active in, the segregation of Chicago, but the court also noted that Chicago's segregation was exploited by Arlington Heights to achieve similar segregation in their village:

> Merely because Arlington Heights did not directly create the problem does not necessarily mean that it can ignore it. . . .
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> Arlington Heights has been ignoring . . . the . . . problem [of segregated housing]. Indeed it has been exploiting the problem by allowing itself to become an almost one hundred percent white community. . . . Because the Village has so totally ignored its responsibilities in the past we are faced with evaluating the effects of governmental action that has rejected the only present hope of Arlington Heights making even a

Since *Black Jack* and *Metropolitan* concern predominately white suburbs adjoining racially segregated cities, both cases will have limited significance in respect to isolated or developing communities in more rural areas. Furthermore, in future cases similar to *Black Jack* and *Metropolitan*, courts may still be reluctant to strike down exclusionary zoning ordinances on racial discrimination grounds since such ordinances are primarily economic devices. In the past, courts have consistently held that such economic discrimination does not become racial discrimination "merely because there is a statistical correlation between poverty and ethnic background."[66] *Black Jack* and *Metropolitan* are significant, however, in their willingness to impose an affirmative duty on adjacent suburbs to eliminate the segregated ghettos of the central cities.

Constitutional challenges to exclusionary zoning ordinances in federal courts thus must allege more than a mere denial of equal protection of the laws. In light of *Belle Terre*, it is apparent that federal courts would validate exclusionary zoning laws passed for purely aesthetic and "family" considerations under the rational basis test.[67] However, where the ordinance enforces or perpetuates residential segregation, federal courts will invalidate the ordinance under the strict scrutiny test.[68] A similar result may be reached where, even absent racial considerations, there is no housing available in the region for the poor. It is then that wealth becomes a suspect classification, triggering the strict scrutiny analysis by the court.[69]

III. State Developments

A zoning ordinance will normally be challenged in a state court as inconsistent with the state enabling act.[70] It may also be attacked on constitutional grounds. To pass constitutional muster under federal and state constitutions, an exclusionary zoning ordinance must be a reasonable exercise of the state's police power and thus cannot be "clearly arbitrary and unreasonable, having no substan-

small contribution toward eliminating the pervasive problem of segregated housing. *Id.* at 414-15.

66. Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974).

67. *See* text accompanying notes 15-22 *supra*.

68. *See* text accompanying notes 55-66 *supra*.

69. *See* text accompanying notes 45-48 *supra*.

70. *See* text accompanying notes 1-3 *supra*.

tial relation to the public health, safety, morals, or general welfare."[71] Due to the paucity of federal exclusionary zoning cases, state courts are not often constrained by stare decisis in determining what constitutes an "arbitrary and unreasonable" exercise of the police power. Furthermore, if the state court bases its decision on state constitutional grounds, it may hold the police power up to a stricter standard than is discernable from federal cases.

Recently, a number of state courts have imposed such standards to impute the housing needs of a surrounding region to a single municipality.[72] This approach is not without precedent. Almost fifty years ago, the Supreme Court, in *Euclid v. Ambler Realty Co.*[73] recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[74] Prior to 1949, courts ignored this caveat in *Euclid* and decided zoning cases as if municipalities were self-contained units.[75] Then, in *Duffcon Concrete Products v. Borough of Cresskill*,[76] the New Jersey Supreme Court looked beyond municipal boundaries and permitted a town to zone out industry where it was shown that more suitable land for industrial development existed in a neighboring municipality.[77] The

71. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). The courts will not substitute their judgment for that of the legislature when it is fairly debatable whether the zoning ordinance is an unreasonable exercise of the police power. Zahn v. Board of Pub. Works, 274 U.S. 325, 328 (1927).

Zoning ordinances are also often challenged as an unjust taking of property under the fifth amendment. *See generally* SAX, *Taking and the Police Power*, 74 YALE L.J. 36 (1964). Such zoning, however, does not normally come under the rubric of "exclusionary zoning" since it is the owner who is making the challenge not someone prevented from living on the property because of the ordinance. It is better catergorized as land use control. *See generally* Comment, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 U.C.L.A. L. REV. 1655 (1974). There has been an increase in challenges to such land use control due primarily to the recent increase in land use legislation prompted primarily by environmental concerns, *see* Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876 (1972), and landmark preservation, *see* Note, *Landmark Preservation: The Problem of the Tax-Exempt Owner*, 3 FORDHAM URBAN L.J. 123 (1974). Although outside the scope of this Note, such legislation is significant for the philosophy it espouses: that property rights are inviolable only to the extent they do not adversely affect neighboring property interests.

72. *See* text accompanying notes 79-90 *supra*.

73. 272 U.S. 365 (1926).

74. *Id.* at 390.

75. 1972 URBAN L. ANN. 239, 240 (1972).

76. 1 N.J. 509, 64 A.2d 347 (1949).

77. The court in *Duffcon* ruled that it was not necessary for the Borough of Cresskill to

traditional zoning concept of the municipality as a "self-contained community with its own residential, business, and industrial areas"[78] was thus breached by the court.

In 1970, the Pennsylvania Supreme Court, in *Appeal of Girsh*[79] struck down a village zoning ordinance which failed to provide for apartment housing.[80] The court found an obligation on the part of the village to provide for apartments if it were "located . . . where apartment living is in demand."[81] The court in *Girsh* did not rely on regional statistics to find a demand for apartments, but found such demand in the mere fact that a developer wished to build them in the town. Through similar reasoning, the court in *Girsh* restricted its decision to "[logical] place[s] for development to take place"[82] thereby limiting its impact on developed communities.

The most extensive recent opinion on exclusionary zoning ordinances was handed down by the New Jersey Supreme Court in *Southern Burlington NAACP v. Township of Mount Laurel*,[83] where the court considered a comprehensive exclusionary zoning scheme[84] which limited housing in Mount Laurel to one-family residences, with minimum lot size area, lot width, and building size require-

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zone for industry where there was adequate land available in the nearby Hackensack River Valley for industrial purposes. The court stated: "The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning." *Id.* at 513, 64 A.2d at 350.

78. Valley View Village, Inc. v. Proffett, 221 F.2d 412, 418 (6th Cir. 1955).

79. 437 Pa. 237, 263 A.2d 395 (1970).

80. *Id.* at 246, 263 A.2d at 399. The ordinance did not explicitly prohibit apartments and did provide for variances to the zoning scheme for uses for which there were no specific provisions. In theory, then, apartments could be built by obtaining a variance. The court stated that this was an insufficient means of providing for apartments, because a variance was available only in restricted cases and the property owner had to sustain a very heavy burden to prove grounds for the variance. *Id.* at 240-41, 263 A.2d at 396.

81. *Id.* at 246, 263 A.2d at 399.

82. *Id.* at 244, 263 A.2d at 398. "[F]ormerly 'outlying,' somewhat rural communities, are now becoming logical areas for development and population growth — in a sense, suburbs to the suburbs. With improvements in regional transportation systems, these areas also are now more accessible to the central city." *Id.*

83. 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 96 S. Ct. 18 (1975). The general-ordinance requirements practically allowed only homes within the financial reach of the middle class. In 1971 the average value of the town's dwellings was $32,500; the average value is undoubtedly much higher today. *Id.* at 164, 336 A.2d at 719.

84. *Id.* at 164-68, 336 A.2d at 719-22.

ments.[85] The court in *Mount Laurel* found the major part of the zoning plan unconstitutional under the state's zoning enabling act and the New Jersey State Constitution.[86] The court was faced with the precise determination of what constitutes the general welfare, and based its decision on the critical shortage of housing in New Jersey and especially the scarcity of low- and moderate-income housing.[87] The court called for a more regional interpretation of general welfare and noted that:[88]

> the universal and constant need for such [low- and moderate-income] housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.

Thus, under *Mount Laurel*, municipalities are no longer viewed as separate entities but rather are treated as parts of a much larger region, and they are charged with a duty to consider the effects of their legislative enactments on that region.[89]

The New Jersey Supreme Court, however, limited its decision to developing communities, defining them as communities which:[90]

> have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth.

Absent a strong showing of conscious residential segregation, therefore, constitutional challenges to exclusionary zoning ordinances based on denial of equal protection rights will probably fail.[91]

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85. *Id.* at 174, 336 A.2d at 725.

86. *Id.*

87. *Id.* at 173-81, 336 A.2d at 724-26.

88. *Id.* at 179, 336 A.2d at 727-28.

89. *See also* Scott v. City of Indian Wells, 6 Cal.3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 20, 283 A.2d 353, 358 (Super. Ct. 1971); National Land Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 528, 215 A.2d 597, 610 (1965). In recent years there has been a growing trend to increase the role of the state and, to a lesser extent, the region in land-use planning. For a comprehensive survey see Note, *State Land Use Regulation—A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869 (1972). This expansive definition of general welfare results, in part, from the closer interrelationships existing between towns now than when zoning regulations were first instituted. 47 CONN. B.J. 249, 252-53 (1973).

90. 67 N.J. at 160, 336 A.2d at 717.

91. *See* text accompanying notes 67-69 *supra*.

Ybarra suggests that wealth as a suspect classification may also be invoked to trigger the strict scrutiny test where there is no housing available for the poor both in the municipality and surrounding region.[92] This concept of the unavailability of housing appears to be a more decisive factor in the recent state court cases of *Mount Laurel* and *Girsh*.[93] Whereas federal courts are reluctant to interfere with what is clearly the prerogative of the state, state courts are more likely to compel a community to zone affirmatively for low- and modernate-income housing. Yet the criteria utilized by state courts is unclear and the decisions leave major questions unanswered. In *Township of Williston v. Chesterdale Farms, Inc.*,[94] the Pennsylvania Supreme Court, relying on its prior decision in *Girsh*, struck down as mere "tokenism" a township ordinance which allocated only 80 of the town's 11,589 acres for apartments.[95] However, the court never stated what the town's "fair share" of apartments would be. The two cases of *Girsh* and *Mount Laurel* also impose the affirmative duty on "developing communities," yet provide no guidelines as to when a community becomes developed so as to permit it to zone exclusively. Nor do they outline the method of determining the "demand for housing" in the town. Similarly, if the court adopts a regional interpretation to determine the demand for housing, what is to prevent a suburban town from pointing to the large supply of apartments in the nearby central city to prove there is adequate low- and moderate-income housing. Additionally, the courts do not consider the municipality that zones to attract industry from the increasingly tax-poor central cities.[96] Since *Mount Laurel* and *Girsh* are seminal cases in a developing jurisprudence in the zoning area, these considerations may be neglected for some time. In the interim significant legislative developments are helping to fill in the gaps left by the courts.

IV. Legislation

In recent years several communities and states have adopted zoning schemes which comport with the *Mount Laurel* and *Girsh*

92. *See* text accompanying notes 45-48 *supra*.
93. *See* text accompanying notes 79-90 *supra*.
94. ___ Pa. ___, 341 A.2d 466 (1975).
95. *Id.* at ___, 341 A.2d at 467.
96. *See* note 13 *supra* and accompanying text.

decisions. One such scheme is the Planned Unit Development (PUD).[97] Under this plan, the governing body of the municipality determines the percentage of housing and open space to be established in a given area.[98] It is then the task of the local planning commission, working with a large-scale developer, to develop the area according to the legislative mandates.[99] This results in the development of miniature, self-contained communities which can be established near other residential areas with very little effect on the other communities' municipal services.[100]

More all-encompassing regional plans have also been approved on the condition that sufficient quantities of low- and moderate-income housing are provided. For example, in *Golden v. Planning Board*,[101] the New York State Court of Appeals approved a comprehensive zoning plan which restricted the use of some property for up to eighteen years.[102] The plan was designed to permit residential development to proceed apace with the growth of municipal services,[103] thus alleviating the problems which can accompany rapid residential development. Ramapo's "Time Controls" provided sufficient quantities of low- and moderate-income housing and the court approved the plan.[104]

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97. Appeal of Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968). The court in *Mount Laurel* noted with approval that the town of Mount Laurel had established some PUD districts. However, as the court also noted, the PUD districts' projects were beyond the financial reach of low- and moderate-income families. Ordinances regulating the PUD projects restricted the number of bedrooms and children that were permitted to reside in the developments, and required the developer to pay the tuition and other school expenses of all children in the PUD housing in excess of .3 per apartment unit. Other specified contributions and requirements pushed rents beyond the reach of low- and middle-income persons. 67 N.J. at 168-69, 336 A.2d at 721-22.

98. 429 Pa. at 629-30, 241 A.2d at 83.

99. *Id.*

100. This can also provide for the existence of low- and moderate-income housing side-by-side with more expensive homes within the PUD. *Id.* at 635-36, 241 A.2d at 86.

101. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

102. The plan was the result of increased population and the problems of providing adequate municipal services. It required developers to obtain special permits from the town board in order to begin residential construction. The issuance of the permits was based upon the availability of five essential services:(1) public sanitary sewers; (2) drainage facilities; (3) recreation facilities and schools; (4) roads; (5) firehouses. Each service was given a specified number of "development points" and a total of 15 points was needed for the special permit to issue. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44.

103. *Id.* at 367, 285 N.E.2d at 295, 334 N.Y.S.2d at 143.

104. *Id.* at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 153. The court also found time controls

Another type of regional plan is a state-wide land-use regulation plan. Under this, a state land-use commission is created to establish standards for development.[105] Oftentimes, local governments still retain some control over local zoning subject, of course, to such uses as are delineated by the state.[106]

Although it is a desirable goal to have an orderly development of community property, rezoning sometimes acts as a disruptive force in established communities where life styles have previously been set. Thus, in formulating reforms in regional zoning plans,[107] the legislature must be wary of the important distinction between developing and developed communities. Certainly, a greater burden should be placed on developing communities to zone inclusively as there is less chance of disrupting an already established life pattern.

To avoid as much disruption as possible a state may enact legislation creating a state review agency.[108] This would consist of a state

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valid even though not specifically authorized in the enabling statute. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 145.

105. In 1961 Hawaii became the first state to adopt a state-wide land-use regulation plan. HAWAII REV. STAT. §§ 205-1 to -15 (1968), *as amended*, (Supp. 1974).

106. Under the Hawaii plan, the state land-use commission establishes standards for development and these, coupled with the statutory standards in the zoning act, provide guidelines for local government. *Id.* § 205-2. The local governments retain some control over local zoning subject to the uses delineated by the state. *Id.*

107. Several regional bodies have been established with increased responsibility for development and conservation. For example, the Bucks County (Pennsylvania) Housing Allocation Plan sets forth the housing needs of each community and specifies the number of units required to be built from 1970-1985 according to income levels. The plan is based on population projections converted into housing needs on a municipality by municipality basis. *See* Note, *Regional Housing Allocation Plans: A Case History of the Delaware Valley Regional Plan*, 7 URBAN LAW. 292, 305 (1975), which reproduces the housing allocation planning table of Bucks County.

The advantages of such a plan are several. It provides a numerical guide which helps a court determine whether a particular municipality has zoned exclusively. Thus, if a town is allocated forty-two units of housing for those earning $5000 to $10,000, and it fails to provide that quota, it may be deemed to have zoned in an exclusionary manner. It also sets a limit on the number of low-income housing units that a community will be required to accept, assuring each municipality that it must provide only its "fair share" of low-income housing.

108. Massachusetts has established a procedure by which the state reviews local zoning decisions. A qualified developer proposing to build low- or moderate-income housing may apply directly to the town's board of zoning appeals for a permit to build such housing. MASS. GEN. LAWS ANN. ch. 40B, § 21 (1973). The board, after public hearings, then makes a decision on the application. If the application is denied, or is "granted with such conditions and requirements as to make the building or operation of such housing uneconomic," the applicant may appeal the local decision to the state's Housing Appeals Committee in the Department of Community Affairs. This committee consists of five members, three of whom are appointed by the commissioner and two of whom are appointed by the governor. *Id.* ch. 23B,

zoning law review board, staffed by professional planning experts. Under this plan, the agency would be given power to review zoning laws. The agency would examine the effects of various regulations as well as the character and scope of development of a given community in order to make the most rational decision.

Besides the possibility of a state review agency, a system of "shifting presumptions" in court review of zoning legislation can be established.[109] Under this proposal, if an ordinance exists in an already established community, it is presumed valid although its effects may be exclusionary.[110] On the other hand, laws of developing communities with exclusionary effects are presumed invalid until the municipality meets its burden of proving the reasonableness of the law.

Since the majority of zoning cases are decided on the state level and involve the most direct interpretations of general welfare, it would enhance the decision-making process in the courts if zoning enabling acts contained specific provisions setting forth the housing policy of the state. If, for example, a state were to declare the policy of providing adequate low- and moderate-income housing for families near their place of employment, courts could utilize this legislative pronouncement in defining more precisely what general welfare is.[111]

V. Conclusion

The practice of exclusionary zoning presents one of the most difficult problems in land use planning. Dealing with it requires a care-

§ 5A. The committee, in the case of a denial of the permit, considers whether the denial was "reasonable and consistent with local needs." *Id.* ch. 40B, § 23. In the case of an application with conditions imposed which make the construction of low- and middle-income housing uneconomic and which is not consistent with local needs, the committee may issue the permit to the applicant. *Id.* The statue also defines the term "consistent with local needs" as requiring both the town and the committee to balance "the regional need for low and middle income housing" with "the number of low income persons in the city or town affected . . . ." *Id.* § 20.

109. Normally a zoning ordinance is accorded every presumption in favor of its validity. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974). However, some courts have adopted a shifting presumption, whereby once a zoning ordinance excludes a use favored by the state or has exclusionary effects, it is presumed invalid and the burden of proving its validity rests with the government. *See, e.g.*, Bristow v. Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971).

110. *See, e.g.*, Bristow v. Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971).

111. *See* note 13 *supra*.

ful balancing between the need for low-cost housing in the suburbs and the desire of suburban communities to maintain their desirable rural atmosphere and low population density. Recent federal decisions have voided restrictive ordinances on racial grounds. The decision in *Mount Laurel* is the inevitable result of zoning patterns that fail to cope with the housing problems facing our cities.

Suburban communities must realize that they cannot forever shut out the problems of the cities and that they cannot, by their zoning laws, trap thousands of people in the cities for lack of access to suburbia. Reasoned, orderly development of the suburbs is a desirable, indeed, inevitable goal. Such development must provide for adequate amounts of low- and moderate-income housing. Numerous forms of housing are available which are low-cost but still quite attractive and can easily fit in the semi-rural atmosphere of suburban communities. As the quality of life in the cities deteriorates, and the contrast between city and suburb becomes more pronounced, the solutions will become more drastic and the goal of orderly development will give way to the need for dramatic reform.

James C. Quinn