BEYOND INVALIDATION: THE JUDICIAL POWER TO ZONE

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INTRODUCTION

Recent decisions redefining the limits of municipal zoning authority have stimulated vigorous legal commentary on the nature and propriety of exclusionary zoning devices.[1] Commentators have consistently condemned zoning practices designed to exclude certain groups from a community. Despite increasing recognition that exclusionary zoning in a community presents serious problems, few viable remedies have appeared to combat its ill effects. The absence of curative legislation places responsibility for redress of the wrongs inherent in exclusionary zoning with the judiciary. Yet courts have usually abstained or have provided ineffective relief when faced with an exclusionary ordinance. The victims of exclusionary zoning are thus left without a remedy, while municipalities are encouraged to continue exclusionary practices.

A court has three options for resolving an exclusionary zoning case: it can uphold the municipal zoning scheme; it can invalidate the scheme and remand the matter for municipal reconsideration; or it can invalidate the scheme and provide affirmative relief to the injured parties. This Note focuses upon the affirmative remedies courts have employed when an ordinance is held exclusionary and hence invalid.

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1. For extensive bibliographies of the recent commentaries see Township of Williston v. Chesterdale Farms, Inc., 7 Pa. Commw. 453, 463-64 n.3, 300 A.2d 107, 112 n.3 (1973); *Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 465, 627 (1971). The most frequently employed exclusionary devices are large-lot zoning, *e.g.*, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Appeals, 419 Pa. 504, 215 A.2d 597 (1965); Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959), and apartment exclusion, *e.g.*, Cosmopolitan Nat'l Bank v. Village of Mount Prospect, 22 Ill. 2d 463, 177 N.E.2d 365 (1961); Fanale v. Borough of Hasbrouk Heights, 26 N.J. 320, 139 A.2d 749 (1958); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

It will analyze the cases in which courts have sought to provide effective relief and will discuss the problems these decisions raise. Finally, the Note will consider municipal defenses to judicial incursion into the field of zoning.

I. Traditional Principles

Zoning litigation traditionally involves three parties: the landowner/developer who desires to make the most economically profitable use of his property; the neighbor who wants to maintain the neighborhood status quo; and the municipality, which zones and serves as the protector of the public interest. An additional interest, however, has also been recognized:

> A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district. The strictly local interests of the town must yield if it appears that they are plainly in conflict with the general interests of the public at large.[2]

If the public at large has a protectable interest, any party excluded from a community should have standing to bring an action to invalidate the offending ordinance. The traditional rule, however, is that standing is afforded only to an "aggrieved person,"[3] one who suffers "a pecuniary impact upon some property interest by way of the zoning enactment."[4] Thus in all states except New Jersey[5] the

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2. Simon v. Town of Needham, 311 Mass. 560, 565-66, 42 N.E.2d 516, 519 (1942) (dictum).

3. *See, e.g.*, Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases*, 6 Akron L. Rev. 189 (1973); Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 Mich. L. Rev. 1070 (1966); Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 Stan. L. Rev. 774, 795-97 (1971); Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 Vand. L. Rev. 341, 354-60 (1970). *See also* 3 R. Anderson, The American Law of Zoning § 21.05 (1968).

4. Feiler, *Zoning: A Guide to Judicial Review*, 47 J. Urban L. 319, 324 (1970).

5. N.J. Stat. Ann. tit. 40, § 55-47.1 (Supp. 1973) gives standing to "other interested parties" to attack zoning ordinances, thus encompassing persons excluded from the community by a particular zoning scheme. *See* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971), *on remand*, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974). It has

rights of excluded persons can be vindicated only by the landowner/developer.

A developer desiring to build in a restricted community faces the strong presumption of validity accorded all zoning legislation as well as the traditional judicial deference to the municipal prerogative.[6] In *Village of Euclid v. Ambler Realty Co.*[7] the Supreme Court established two legal principles that provide the basis for the municipal zoning power: separation of uses, including the exclusion of apartments from single-family residential zones, is a legitimate use of municipal authority;[8] the municipality's decision will not be upset by a court if the question presented is fairly debatable.[9] These principles have allowed municipal discrimination against apartments and judicial deference to such discrimination. When a court finds, however, that the developer has proved that an ordinance or its application is arbitrary or unreasonable, it can either invalidate the ordinance and return the matter to the municipality, or grant the developer some measure of affirmative relief. Reliance upon the municipality to correct the exclusionary effect has proven ineffective. In *Appeal of Girsh*[10] a property owner had unsuccessfully sought municipal approval to build apartments on his land. The Pennsylvania supreme court held that a zoning ordinance that makes no provision for apartments was an unconstitutional prohibition of free entry into a community. A remarkable series of events followed the invalidation of the ordinance: (1) the township rezoned to create an apartment district that did not, however,

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been suggested that the statute may have been unwittingly passed without consideration of its potential impact. N.Y. Times, Jan. 25, 1970, § 8, at 9, col. 1. The issue of standing for non-residents in exclusionary zoning cases was recently decided by the United States Supreme Court. Warth v. Selden, 43 U.S.L.W. 4906 (U.S. June 25, 1975) (standing denied).

6. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see* Note, *Removing the Bar of Exclusionary Zoning to a Decent Home*, 32 OHIO ST. L.J. 373 (1971), for an argument against the presumption of validity for exclusionary zoning ordinances.

7. 272 U.S. 365 (1926).

8. *Id.* at 394-95; *see* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1091 (1964), for a criticism of the continuing validity of the distinction between apartments and detached dwellings for zoning purposes.

9. 272 U.S. at 388. It has been suggested that the fairly debatable rule has no independent significance but is merely a tool in enunciating the court's reasoning when the equities are balanced in favor of the zoning authority. Scott, *Judicial Review of Zoning Decisions in Illinois*, 50 ILL. B.J. 228, 235 (1971).

10. 437 Pa. 237, 263 A.2d 395 (1970).

encompass plaintiff's property; (2) plaintiff brought an unsuccessful mandamus action against the building permit officer to compel permit issuance; (3) the municipality announced plans to condemn plaintiff's property for a public park; (4) plaintiff sued to prevent the condemnation and to challenge the dilatory tactics of the municipality. Finally, the Supreme Court of Pennsylvania ordered that building permits be issued.[11] Nonetheless, after five years of continuous litigation, the property remains undeveloped. The area's economy has so changed that it has become unprofitable for the landowner to develop his property at the zoning density for which he originally applied.[12]

II. New Approaches

Although the Pennsylvania court expressed concern over a municipality's ability to exclude certain groups by preventing the construction of suitable housing, the court's decisions do not remedy the problem. To avoid the *Girsh* scenario, the court could have enjoined the municipality from preventing the desired development. A recent line of Florida decisions demonstrates the utility of such injunctions.[13]

In *Burritt v. Harris*[14] the property owner was repeatedly denied

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11. Order No. MP-12, 271 (Aug. 29, 1972); Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. Pa. L. Rev. 1029, 1080-82 & n.202a (1972) [hereinafter cited as Krasnowiecki]; *accord*, Casey v. Zoning Hearing Bd., ... Pa. ....., 328 A.2d 464 (1974).

12. Address by Professor Jan Krasnowiecki, Washington University School of Law, Feb. 27, 1974. *See also* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970), in which the Supreme Court of Pennsylvania invalidated two and three acre minimum lot requirements. The municipality thereafter subjected the property to subdivision, sewer, water and site planning restrictions that have effectively prohibited development of the property. Address, *supra*.

In National Land & Inv. Co. v. Easttown Township Bd. of Appeals, 419 Pa. 504, 215 A.2d 597 (1965), the court invalidated a four acre minimum lot size requirement in a residential district, yet did not grant the requested building permits. The township subsequently "threatened to rezone to three acre minimum lot sizes, reading the Pennsylvania Supreme Court's decree narrowly as affecting only four acre minimum lot sizes. Rather than face another protracted court battle, National Land settled the dispute by accepting a two acre minimum lot size." Krasnowiecki, *supra* note 11, at 1080. Twelve years after the original action commenced, Appeal of Nat'l Land & Inv. Co. (No. 1), 11 Ches. Co. 436 (Pa. C.P. 1963), the property in question remains undeveloped. Address, *supra*.

13. The Florida cases discussed in the text do not involve questions of exclusionary zoning. They are significant in their approach to the scope of judicial authority in zoning matters generally.

14. 172 So. 2d 820 (Fla. 1965).

rezoning even though he requested a classification consistent with surrounding uses. The Florida supreme court held:

> It is not the function of a court to rezone property, but, the facts and circumstances of this case considered, it is our function to determine at what point zoning restrictions become arbitrary. The evidence having conclusively shown the petitioner's property to be unfit for residential purpose, it is our view that *petitioner's rights should be settled here by holding the respondents are required to rezone petitioner's property to a classification not more restrictive than industrial "A"* [the classification requested by petitioner].[15]

A later case refined the *Burritt* rule, holding that while the trial court may not direct a rezoning, it may enjoin enforcement of any classification more restrictive than that requested by the landowner.[16] While *Burritt* appears to be the general rule in Florida,[17] recent

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15. *Id.* at 823.

16. City of Miami Beach v. Weiss, 217 So. 2d 836 (Fla. 1969). For a general discussion of litigation techniques under the *Weiss* doctrine see Memorandum from Daniel R. Mandelker to Walter Beckham entitled Availability of Specific Relief in Florida Zoning Cases, June 8, 1971 (on file with *Urban Law Annual*).

17. *E.g.*, Stokes v. City of Jacksonville, 276 So. 2d 200 (Fla. Dist. Ct. App. 1973); Dade County v. Moore, 266 So. 2d 389 (Fla. Dist. Ct. App. 1972); City of Miami v. Schutte, 262 So. 2d 14 (Fla. Dist. Ct. App. 1972); City of South Miami v. Martin Bros., 222 So. 2d 775 (Fla. Dist. Ct. App. 1969); Prestige Homes of Tampa, Inc. v. City of Hillsborough, 220 So. 2d 427 (Fla. Dist. Ct. App. 1969); *accord*, Daraban v. Township of Redford, 383 Mich. 497, 176 N.W.2d 598 (1970).

The Virginia supreme court recently adopted a modified version of the Florida approach. In City of Richmond v. Randall, ... Va. ....., 211 S.E.2d 56 (1975), the trial court held a challenged ordinance invalid and ordered the City Council either to enact a new zoning classification for the property that would allow construction of the proposed building, or to enact the specific permit ordinance proposed by the landowner and sponsored by the planning commission. The supreme court agreed that the ordinance was invalid but held that the trial court's first order transgressed the legislative prerogative, and the second order, by foreclosing the council's right to amend the permit ordinance and impose conditions upon the requested use, infringed upon legislative discretion. *Id.* at ....., 211 S.E.2d at 61-62. The court suspended the adjudications of invalidity for a prescribed period of time and remanded the cause to the City Council for further legislative action:

> Since City made no showing of an alternative reasonable use, the new decree will enjoin Council during that period from taking any action which would disallow the one use shown by the record to be reasonable, *subject to Council's right under its charter to amend a permit ordinance and impose reasonable conditions not inconsistent with such use.* The new decree will further provide that if Council fails to comply within the time prescribed, the

intermediate court decisions depart from the limited interpretation of the rule. When an ordinance is held invalid, these later decisions permit a trial court to direct a rezoning in accordance with the landowner's request.[18] In other words, the courts need not merely rely upon an injunction against enforcement of a particular classification. Such holdings bring these lower Florida courts in line with the Illinois rule of judicial review in zoning matters.

Illinois permits a trial court, upon finding an ordinance to be invalid, to order the municipality to permit the requested use.[19] This approach prevents further litigation by preventing the local governmental body from simply rezoning to another classification that still denies the landowner's proposed use. Furthermore, the landowner may not proceed with a use other than the one the court considered reasonable when it invalidated the ordinance.[20]

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adjudications of invalidity will become operative and the injunction will become permanent, provided that landowners shall not put their property to any use other than the use shown by the record to be reasonable.

Id. at....., 211 S.E.2d at 62 (emphasis added); *accord*, Board of Supervisors v. Allman, ... Va. ....., 211 S.E.2d 48 (1975). Emphasis is added to the *Randall* holding to remind the reader of the potential abuse that may arise from a municipality's imposition of added conditions for development. *See* note 12 *supra.*

18. *See* Davis v. Situs, Inc., 275 So. 2d 600 (Fla. Dist. Ct. App. 1973); Board of County Comm'rs v. Soto, 259 So. 2d 196 (Fla. Dist. Ct. App.), *cert. denied*, 267 So. 2d 83 (Fla. 1972); William Murray Builders, Inc. v. City of Jacksonville, 254 So. 2d 364, 367 (Fla. Dist. Ct. App. 1971), *cert. denied*, 261 So. 2d 845 (Fla. 1972): "We therefore hold that the zoning regulation in question . . . isn't fairly debatable . . . . Appellant's property should be rezoned for apartment use in accordance with the appellant's application, a use which is consistent with the surrounding areas and circumstances." *Cf.* City of Miami v. Saussele, 239 So. 2d 631 (Fla. Dist. Ct. App. 1970). *Contra*, Board of County Comm'rs v. Ralston, 284 So. 2d 456 (Fla. Dist. Ct. App. 1973); City of Miami Beach v. Breitbart, 280 So. 2d 18 (Fla. Dist. Ct. App. 1973). *Ralston* and *Breitbart* rejected both judicial power to rezone and the power to establish a minimum restriction as authorized in *Burritt* and *Weiss.*

19. Franklin v. Village of Franklin Park, 19 Ill. 2d 381, 167 N.E.2d 195 (1960); Sinclair Pipe Line Co. v. Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

20. Sinclair Pipe Line Co. v. Richton Park, 19 Ill. 2d 370, 378-79, 167 N.E.2d 406, 411 (1960). Fiore v. City of Highland Park, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968), *cert. denied*, 393 U.S. 1084 (1969), upheld the Illinois judicial rezoning remedy. Plaintiff sought to build apartments in a single-family zone. During litigation the City rezoned the property to an office and research zone. The trial court held this classification too restrictive and hence invalid. The court also held the original single-family classification invalid, but since this question was no longer in controversy, the appellate court reversed this determination. The City rezoned *back* to the single-family classification and the trial

Although the Florida and Illinois approaches to judicially fashioned remedies in zoning litigation provide effective and efficient methods for rapidly concluding such disputes, both leave two difficult questions unanswered. First, does judicial fashioning of affirmative relief in zoning litigation invade the legislative sphere? Secondly, should such judicial relief be applied universally or selectively?

Most courts have indicated that zoning is a legislative function and refuse to sit as super-zoning boards,[21] thus taking a firm position on the separation of powers issue. On the other hand, courts that have granted affirmative relief to a property owner have failed to address this issue directly. One court skirted the problem by claiming that granting the property owner's requested classification is analogous to a writ of mandamus.[22] Another suggested that a point

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court *again* held it invalid and ordered that plaintiff be permitted to build apartments. The City appealed on the ground that the *Sinclair Pipe Line Co.* doctrine constituted judicial usurpation of legislative powers. Affirming the decision below, the court of appeals stated:

> We have the utmost respect and deep regard for the philosophy embodied in the principle of separation of powers of the three branches of government. However, a City which is an appellant in zoning litigation, cannot parlay the doctrine of separation of powers into an authorization to exercise its delegated legislative powers after the case is decided adversely to it and remanded to the trial court with directions, and void the opinion and mandate of the reviewing court. . . .

93 Ill. App. 2d at 33, 235 N.E.2d at 27-28. For recent decisions affirming the propriety of *Sinclair Pipe Line Co.* see First Nat'l Bank of Skokie v. Village of Morton Grove, 12 Ill. App. 3d 589, 299 N.E.2d 570 (1973); Chicago Title & Trust Co v. County of Du Page, 12 Ill. App. 3d 386, 298 N.E.2d 259 (1973); Bass v. City of Joliet, 10 Ill. App. 3d 860, 295 N.E.2d 53 (1973); Kraegel v. Village of Wood Dale, 10 Ill. App. 3d 486, 294 N.E.2d 64 (1973); LaSalle Nat'l Bank v. City of Chicago, 130 Ill. App. 2d 457, 264 N.E.2d 799 (1970). City of Richmond v. Randall, ... Va. ....., 211 S.E.2d 56 (1975), adopted a modified Florida approach to judicial remedies, *see* note 17 *supra*, and rejected the position developed in *Sinclair Pipe Line Co.*: "We believe these holdings, which compel affirmative action by legislative bodies, go too far. The injunction is a more traditional remedy and one less offensive to the concept of separation of powers." *Id.* at ....., 211 S.E.2d at 61 n.3.

21. *See, e.g.*, COME v. Chancey, 289 Ala. 555, 269 So. 2d 88 (1972); Shelburne v. Buck, 240 A.2d 757 (Del. 1968); City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 307 A.2d 563 (1973); Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971).

22. Sinclair Pipe Line Co. v. Richton Park, 19 Ill. 2d 370, 379, 167 N.E.2d 406, 411 (1960). This analogy is contested on the ground that mandamus is not appropriate to compel a zoning decision properly committed to legislative discretion. Krasnowiecki, *supra* note 11, at 1062-63; *accord*, 3 R. ANDERSON, *supra* note 3, at § 22.06 and cases cited therein. *See also* Curry v. Young, 285 Minn. 387, 173 N.W.2d 410 (1969).

exists beyond which the separation of powers doctrine will not protect a municipality's legislative power to zone.[23]

One commentator argues that a distinction should be drawn between affirmative relief being granted to a landowner who appeals a variance denial[24] and a case in which an ordinance is held unconstitutional.[25] In the former, once the claimant establishes a hardship, he is only entitled to the *minimum* departure from the ordinance necessary to remove the hardship and not necessarily to permission for the proposed use. In the latter case, the municipality may liberalize its ordinance while litigation is pending as to its constitutionality and, failing to do so, cannot complain when the proposed use is ordered by the court.[26] Others suggest that no separation of powers issue arises when a court grants a landowner relief by ordering a zoning reclassification since local governments are not the type of legislative bodies entitled to judicial deference.[27] In summation, it appears courts will employ the separation of powers rationale as a tool to refuse affirmative relief to plaintiffs who successfully challenge an ordinance. Yet a court that does grant affirmative relief will either ignore the separation of powers issue,[28] emphasize practical

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23. Fiore v. City of Highland Park, 93 Ill. App. 2d 24, 235 N.E.2d 23 (1968), *cert. denied*, 393 U.S. 1084 (1969); *see* first quotation in note 20 *supra*. *See also* City of Richmond v. Randall, ... Va. ....., 211 S.E.2d 56 (1975), which stated that zoning is a legislative function:

> But when the evidence shows that the existing zoning ordinance is invalid produces no evidence that an alternative reasonable use exists, then no legislative options exist and a court decree enjoining the legislative body from taking any action which would disallow the use shown to be reasonable is not judicial usurpation of the legislative prerogative.

Id. at ....., 211 S.E.2d at 61 (footnote omitted).

24. A variance is an authorization to construct a building that is prohibited by the zoning ordinance. "A variance is granted to render justice in unique and individual cases of practical difficulties or unnecessary hardship resulting from a literal application of the zoning ordinance." 2 R. ANDERSON, *supra* note 3, at § 14.02.

25. Krasnowiecki, *supra* note 11, at 1059-64.

26. *Id.*

27. Cohn & Hyman, *Daraban — Round Three*, 51 MICH. ST. B.J. 80, 82-83 (1972).

28. *See, e.g.*, Davis v. Situs, Inc., 275 So. 2d 600 (Fla. Dist. Ct. App. 1973); Board of County Comm'rs v. Soto, 259 So. 2d 196 (Fla. Dist. Ct. App.), *cert. denied*, 267 So. 2d 83 (Fla. 1972).

considerations necessitating the remedy,[29] or assert that the relief is within the scope of the court's equitable powers.[30]

The second question—whether the judicial power to fashion affirmative remedies in zoning cases should be uniformly or only selectively employed—is the more difficult. Whenever a zoning ordinance is challenged, the property owner inevitably argues that the restriction operates to deprive him of the developmental value of his land. Allegations that a zoning ordinance is exclusionary, however, are less frequent. The injurious effects of an exclusionary restriction reach beyond the developer/landowner by depriving excluded groups of access to the community. Since judicial zoning is clearly an incursion on the municipal prerogative, arguably the power should be exercised in only the latter, more extreme situation. Yet, as the Florida and Illinois cases indicate, this is not what has in fact occurred.[31]

Few courts have held ordinances exclusionary and fewer still have fashioned affirmative relief. While the remedies employed by the Florida and Illinois courts are available in all zoning matters, they have yet to be applied in an exclusionary context. Other examples of judicially imposed remedies in cases holding a zoning ordinance invalid include ordering issuance of building permits,[32] requiring a municipality to plan for adequate housing to meet regional needs,[33] and, in an extreme case, requesting court appointed planners to rezone an area within a community.[34] The factors that persuade a court to provide an affirmative remedy include the good or bad faith of the municipality, and the urgency of municipal and regional housing needs.[35]

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29. *See* text at notes 19-20 *supra.*

30. *See* note 56 *infra.*

31. *See* note 13 *supra.*

32. *See* text at note 11 *supra*; Township of Williston v. Chesterdale Farms, Inc., 7 Pa. Commw. 453, 300 A.2d 107 (1973).

33. Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div.), *aff'd*, 67 N.J. 151, 336 A.2d 713 (1975) (municipality's duty to plan for housing extended beyond "local" needs to its "fair share of the regional burden").

34. Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 329 A.2d 89 (L. Div. 1974).

35. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div.), *aff'd*, 67 N.J. 151, 336 A.2d 713, (1975); Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, 329 A.2d 89 (L. Div. 1974); Township of Williston v. Chesterdale Farms, Inc., 7 Pa. Commw. 453, 300 A.2d 107 (1973).

In *Township of Williston v. Chesterdale Farms, Inc.*[36] plaintiff, encouraged by the Pennsylvania supreme court's decision in *Girsh*,[37] alleged that an ordinance, which failed to provide for apartments, was invalid. While the action was pending, the Township amended the ordinance to permit apartment classification in a limited area by special exception.[38] Since the new district did not include plaintiff's land, it again sued to have the ordinance declared invalid. The court held the ordinance unconstitutional, both before and after the amendment, concluding that the Township had failed to assume its "fair share" of the regional burden to meet the housing shortage.[39] The court considered the amended ordinance an inadequate response to the area-wide housing problem, noting that "(1) the requirements for construction of apartments are such that only high-cost, low density units can feasibly be constructed; and (2) the ground area zoned for apartment use is effectively so small in relation to the township as to be a mere token in response to the mandate of *Girsh*."[40]

Recognizing the futility of merely invalidating the ordinance and sending the matter back to the local government for resolution,[41] the court ordered the Township to grant plaintiff the necessary building permit to complete the apartment complex as planned. The form of relief chosen was expeditious, conclusive and sanctioned by the Pennsylvania supreme court in its clarification of *Girsh*.[42] Furthermore, in a recent revision of zoning appeal procedures, the state legislature has specifically authorized the relief granted by the court.[43]

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36. 7 Pa. Commw. 453, 300 A.2d 107 (1973). *Cf.* Ellick v. Board of Supervisors, ... Pa. Commw. ....., 333 A.2d 239 (1975) (successful challenge to ordinance which failed to provide for town houses).

37. *See* text at notes 10-11 *supra.*

38. A special exception will be granted without a showing of hardship upon satisfaction of conditions prescribed in the ordinance. 2 R. ANDERSON, *supra* note 3, at § 14.03.

39. Township of Williston v. Chesterdale Farms, Inc., 7 Pa. Commw. 453, 468-70, 300 A.2d 107, 115-16 (1973).

40. *Id.* at 473, 300 A.2d at 117.

41. "In the process of remedying the constitutional flaw, the local decision-making machinery will again respond to the political pressures which caused the original ordinance to exclude apartments." *Id.* at 481, 300 A.2d at 121, *quoting* Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634, 656 (1971).

42. *See* text at note 11 *supra.*

43. PA. STAT. ANN. tit. 53, § 11011 (1972):

(1) In a zoning appeal the court shall have power to declare any ordinance or map invalid and to set aside or modify any action, decision or order of

Although a court-ordered building permit is an efficient means of implementing a zoning decision, it is also a highly visible judicial incursion into the municipal prerogative. Since only Pennsylvania authorizes such judicial power, other courts have attacked the implementation problem by other means.

In *Southern Burlington County NAACP v. Township of Mount Laurel*[44] a lower New Jersey court dealt with a municipality's reluctance to provide housing for its low-income residents. The challenged zoning ordinance had no provision for moderate- and low-priced apartments. The poor were left with a choice between living in shanties and abandoning the town. The local government's sole concern was with "those development plans which will provide direct and substantial benefits to our *taxpayers*" rather than with the needs of lower-income citizens.[45] Finding no valid justification for the ordinance,[46] the court concluded that the duty "to promote the general welfare"[47] transcended the private welfare of those in control of municipal government. Utilizing a technique employed in federal desegregation decisions,[48] the court ordered the municipality to under-

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the governing body, agency or officer of the municipality, brought up on appeal. (2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on appeal, *it may order the described development or use approved as to all elements or it may order it approved as to some elements* . . . .

(Emphasis added). *But cf.* Ellick v. Board of Supervisors, ... Pa. Commw. ....., 333 A.2d 239 (1975) (narrow reading of provision regarding acceptable grounds for judicial intervention).

44. 119. N.J. Super. 164, 290 A.2d 465 (L. Div.), *aff'd*, 67 N.J. 151, 336 A.2d 713 (1975).

45. *Id.* at 170, 290 A.2d at 468.

46. *Id.* at 176, 290 A.2d at 472:

Today, when municipalities give reasons for the exclusion of certain uses, although they gloss them with high-meaning phrases, they lack sincerity. It is not low-cost housing which ferments crime; it is the lower economic strata of society which moves in, yet no ordinance would dare raise that objection to prohibit them and expect to succeed. Local legislative bodies know better than to state that more low-income producing structures will mean a higher tax rate.

See 8 URBAN L. ANN. 193, 203-04 (1974).

47. N.J. STAT. ANN. § 40:55-32 (1967); *see* 26 RUTGERS L. REV. 401 (1973).

48. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), *rev'd and remanded*, 94 S. Ct. 3112 (1974); Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), *aff'd in part, rev'd in part per curiam*, 461 F.2d 1171 (5th Cir. 1972)

take a study of the local and "regional" need for low- and middle-income housing. Upon completion of the study, the Township was ordered to implement an affirmative housing program based upon a plan that met with court approval. While a court-ordered study permits municipalities to retain their planning and zoning authority within judicially defined limits, it may also permit them to evade their court-ordered responsibility by excessive delay.

III. Judicially Imposed Zoning

A recent decision has introduced a new planning approach. After an exclusionary ordinance is found invalid the court, not the municipality, develops and orders the implementation of a remedial plan. The zoning ordinance of the Township of Washington, New Jersey, an exclusive area of expensive homes, had no provision for apartments. When a developer purchased a 30 acre tract, the Township responded by increasing his minimum lot size requirement from 10,000 square feet to two acres and then denied the developer a variance for apartments. *In Pascack Association v. Mayor & Council*[49] plaintiff-developer challenged both the denial of a variance and the ordinance's constitutionality in that it failed to permit construction of multi-family housing at a time when such housing was in great demand both locally and regionally.[50] Noting the local and regional housing shortage and the high price of homes in the community,[51] the court invalidated the ordinance. By failing to provide suitable housing for the low- and middle-income segment of the area's popu-

(en banc); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

49. 131 N.J. Super. 195, 329 A.2d 89 (L. Div. 1974). *Pascack* is a culmination of three earlier unpublished opinions from the bench cited as *Pascack I* (Dec. 20, 1972) (initial invalidation of the municipal zoning ordinance); *Pascack II* (Oct. 4, 1973) (court appointment of planning consultants); *Pascack III* (Jan. 25, 1974) (hearing on consultant's recommendation). (Opinions on file with *Urban Law Annual.*)

50. *See* Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 Syracuse L. Rev. 475 (1971), for an excellent empirical analysis of the housing shortage and potential of four northeastern New Jersey counties. Bergen County, which includes Washington Township, is located in the area but was excluded from the study because it was already highly developed. *Id.* at 479 & n.10.

51. *Pascack I*, *supra* note 49, at 12. The average market value of a house in Washington Township was $40,000, requiring a minimum down payment of $8,000 and an annual income of $19,000 to meet bank standards for a mortgage loan.

lation, the Township had failed in its statutory obligation to promote the general welfare.[52]

Following this decision, the Township amended its ordinance and established a 34 acre apartment district.[53] Only five acres, however, were suitable for apartments, and plaintiff's tract was not included in the rezoning.[54] Plaintiff complained that the amendment did not comply with the court order because it precluded apartment construction and was therefore inconsistent with local and regional economic needs.

The *Pascack* court, which had retained continuing jurisdiction,[55] concluded that the Township had acted in bad faith and announced that it would appoint planning consultants to recommend a com-

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52. N.J. STAT. ANN. § 40:55-32 (1967). The court rejected the township's conclusion that plaintiff had not met his statutory obligation necessary for a variance. *Id.* §§ 40:55-39(c), (d) provide that a variance from the zoning classification shall be granted not only upon a showing of "undue hardship," *see* note 24 *supra*, but also for a "special reason." The "special reason" for a variance in an exclusionary zoning context appeared first in De Simone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 267 A.2d 31 (1970). There, a non-profit housing sponsor obtained a variance to build low- and moderate-income apartments in a single-family district. Neighbors in the district claimed no "special reason" existed for granting the variance, and the New Jersey supreme court held "as a matter of law in light of public policy . . . , that public or, as here, semi-public housing accommodations to provide safe, sanitary, and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason adequate to meet [the statutory] requirement." *Id.* at 442, 267 A.2d at 38-39.

See Note, *The New Jersey Judiciary's Response to Exclusionary Zoning*, 25 RUTGERS L. REV. 172, 179 (1971), which suggests that *De Simone* will have a negligible effect on proposed privately developed multi-family housing because the court's express reference to the need for public and semi-public housing accommodations as a special reason for a variance is susceptible of a narrow reading. The *Pascack* court, however, found the "special reason" requirement satisfied when privately-financed rental housing for the middle-class was proposed in an area of critical housing shortages. *Pascack I*, *supra* note 49, at 25-26; *accord*, Brunetti v. Mayor & Council, 130 N.J. Super. 164, ..., 325 A.2d 851, 853 (L. Div. 1974).

53. Township of Washington, N.J., Ordinance No. 73-1, Jan. 29, 1973.

54. *Id.* The amended ordinance also imposed restrictions on density, minimum floor area, and the permissible number of bedrooms per unit.

55. The Florida courts are also authorized to retain jurisdiction to assure municipal compliance with their zoning decisions. City of Miami Beach v. Weiss, 217 So. 2d 836, 838 (Fla. 1969); Memorandum, *supra* note 16, at 4.

munity zoning plan.[56] The consultants[57] thereafter recommended rezoning plaintiff's property for apartment use subject to certain regulations and controls.[58] At a hearing on the merits of the consultants' proposal, plaintiff's experts testified that apartments built at 15 to 17 units to the acre would provide housing at affordable rents.[59] Plaintiff's experts argued that any density lower than 15 units per acre would increase the developer's costs and result in prohibitively expensive apartments. The court nevertheless relied upon the consultants' expertise and adopted their recommended density of nine units per acre.[60]

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56. The court reluctantly granted this remedy citing Baker v. Carr, 369 U.S. 186 (1962), and the racial desegregation decisions, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and Brown v. Board of Educ., 349 U.S. 294 (1955), as precedents for invoking this equitable authority. It appreciated that courts should not have to resolve zoning disputes in this manner, "but where someone . . . is suffering as a result of the abdication of . . . [municipal] responsibility, the Court has no alternative but to carry it out." *Pascack II*, *supra* note 49, at 22.

It appears that one of the appointed consultants, Professor Jerome Rose of Rutgers, also had mixed reactions to the advisability of judicial intervention in the zoning field. Citing recent federal and state cases in which courts have taken an active role in developing an exclusive community into a socially balanced community, *e.g.*, Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973) *cert. denied*, 414 U.S. 1144 (1974); Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), *aff'd in part, rev'd in part per curiam*, 461 F.2d 1171 (5th Cir. 1972) (en banc); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div.), *cert. granted*, 62 N.J. 190, 299 A.2d 724 (1972), Rose viewed the traditional judicial role as changing to one in which "courts . . . have undertaken the delicate and difficult task of maintaining community balance that the legislatures have been reluctant to accept. This is an unfortunate development because the nature of the problem is one that is best resolved by the kinds of political negotiation and compromise upon which a democratic legislative process is based." Rose, *The Courts and the Balanced Community: Recent Trends in New Jersey Zoning Law*, 39 J. AM. INST. PLANNERS 265, 274 (1973). Rose also agreed with the *Pascack* court, however, that when the legislature abdicates its responsibility, the courts must step in and fill the void. *Id.*

57. Professors Jerome Rose and Melvin Levin of Rutgers.

58. The consultants recommended, *inter alia*, a maximum density of nine units per acre as applied to plaintiff's property. Compare this recommendation with the contested municipal ordinance, which permitted up to fifteen units to the acre. Township of Washington, N.J., Ordinance No. 73-1, Jan. 29, 1973. Recall, however, that the ordinance limited property suitable for apartments to five acres or 75 total units. The consultant's density recommendation affected all of plaintiff's 30 acres for a total of 270 units.

59. *Pascack III*, *supra* note 49, at 56-77.

60. Pascack Ass'n v. Mayor & Council, 131 N.J. Super. 195, ..., 329 A.2d 89, 97 (L. Div. 1974).

The conclusion reached in *Pascack* was unsatisfactory to all parties. Plaintiff claimed it could not build economically under the nine unit per acre density. Nor was the Township pleased that two zoning ordinances had been invalidated and a third imposed upon it by the court.

Pascack, however, can provide a valuable lesson in implementing judicial decisions that invalidate exclusionary zoning. Use of a planning consultant provides a compromise between two extreme positions determined solely by considerations of self-interest. The developer seeks maximum profits. Excluded groups seek a place to live. Both unquestioningly support local housing development. Fearing uncontrolled growth and a rising tax rate,[61] the municipality opposes any such development. Therefore, only a neutral planner can view the entire situation fairly and provide a solution that meets the needs of each group. Furthermore, the use of expert consultants meets the criticism that courts lack the planning expertise to enter the zoning field. Although utilization of the expert planner to fashion judicial remedies for exclusionary zoning is only a partial solution, it can provide a means for the rational introduction of multi-family housing into exclusively residential communities.

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61. New Jersey state government does little to help municipalities finance local services. In 1969, for instance, New Jersey ranked 41st in state aid for municipal education. It is suggested that this forces municipalities toward "fiscal zoning," *i.e.* using land controls to attract good ratables and discourage bad ratables, such as low-income housing. Williams & Norman, *supra* note 50, at 477 & n.6. *See also* Williams, *The Three Systems of Land Use Control,* 25 J. URBAN L. 80 (1970). It has also been suggested that "fiscal zoning" has actually backfired on the municipalities:

> In practice, the attempted cure of financial problems by using the zoning power, designed to *regulate*, for the purposes of *exclusion* is disastrous. First of all, the zoning power, not designed as a fiscal device actually becomes self-destructive when applied to taxes. Since property taxes are based on market value, the limitation of land available for high-density residential development in the face of demand for such development can do nothing but drive up the prices. An attempt to reduce taxes by creating a land shortage will in most cases, have just the opposite effect.

Mezey, *Beyond Exclusionary Zoning—A Practitioner's View of the New Zoning,* 5 URBAN LAW. 56, 63 (1973). A recent study proposes that exclusionary zoning is not fiscally motivated and that increased state aid to education would have a negligible effect on the concentration of the inner city poor. Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor,* 82 YALE L.J. 483, 484, 501-02 (1973). *But cf.* Ruvoldt, *Educational Financing in New Jersey:* Robinson v. Cahill *and Beyond,* 5 SETON HALL L. REV. 1, 20-25 (1973).

IV. Municipal Response to Judicial Zoning

As the limited number of zoning cases in which affirmative judicial relief is employed indicates, very few courts favor this solution. Fifty years of judicial deference to municipal autonomy in zoning and planning is difficult to overcome. In addition, the threat of judicial interference has caused municipalities to develop various defensive measures.

Among the more popular evasionary tactics are municipal plans to control growth, voter referendums to approve public housing, and environmental defenses. Controlled growth plans have met with mixed success in the courts. The New York high court upheld a plan to control growth by phasing the extension of municipal services within the community over an 18 year period.[62] Development would be permitted only when the extension of service facilities was imminent, thus allowing the community effectively to prevent development, in some areas, for up to 18 years.[63] A federal district court, however, recently invalidated a plan that limited the number of building permits for new housing each year to one-quarter of the annual growth rate.[64] The court found that the plan violated the constitutional right of non-residents to travel into the community.[65]

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62. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (4-3 decision).

63. Responding to the assertion that the zoning ordinance created by the plan fostered localism and was exclusionary, the court stated that,

> far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient use of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth.

30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152. Commentators have both praised and criticized this decision. *Compare* Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 Fla. St. L. Rev. 234 (1973), *with* Elliot & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls*, 1 Hofstra L. Rev. 56 (1973), *and* Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 Stan. L. Rev. 585 (1974).

64. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *order stayed pending appeal*, 5 Environmental Rptr., No. 14, at 429 (1974) (Douglas, Circuit Justice, 1974).

65. 375 F. Supp. at 581-86. Interstate travel is a "fundamental" constitutional right and can be abrogated or limited only for a compelling state reason. Memorial

Clearly, a court must attempt to draw the line between legitimate land use planning and illegitimate exclusionary schemes.[66]

An additional device that has successfully inhibited judicial interference in zoning matters is the municipal referendum. The referendum procedure permits municipal voters to reject a zoning board's decision to allow subsidized public or semi-public housing and appears all but immune from judicial interference.[67] The justification for referendums—providing the electorate with a voice in decisions affecting the future development of their own community—has precluded judicial inquiry into the municipal motive for the referendum.[68]

Environmental justifications may also be raised to avoid judicial invalidation of an exclusionary ordinance. In one instance, immediately after a developer had purchased local property, the town rezoned to an excessively large minimum lot size requirement.[69] The town argued that the proposed development would cause immeasurable ecological harm.[70] The Second Circuit reluctantly upheld the

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Hospital v. Maricopa County, 415 U.S. 250, 258 (1974); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974), in which the Court found no violation of the right to travel in a zoning scheme that prohibited more than two unrelated persons from sharing a dwelling in the community. *See* 8 URBAN L. ANN. 193, 198-99 (1974). The Petaluma plan was designed primarily to prevent rapid growth caused by its proximity to San Francisco, yet the court did not distinguish between interstate and intrastate travel. *Accord,* King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970).

66. Local governments may also assert that they are in the process of completing a comprehensive growth plan thereby delaying a final decision on their exclusionary zoning scheme. *See* Zelvin v. Zoning Bd. of Appeals, 30 Conn. Supp. 157, 306 A.2d 151 (C.P. Hartford County 1973).

67. *See* James v. Valtierra, 402 U.S. 137 (1971); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969); Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972); Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court,* 59 CALIF. L. REV. 1384 (1971). *But see* Smith v. Township of Livingston, 106 N.J. Super. 444, 256 A.2d 85 (Ch. Div. 1969). The referendum technique is not, however, limited to subsidized housing. In a recent referendum the voters of Boulder, Colorado, endorsed a resolution directing the city government to curb the municipal growth rate pending the completion of a definitive examination of the city's growth capabilities, thereby adding the planned growth defense to its referendum. 60 GEO. L.J. 1363 (1972).

68. James v. Valtierra, 402 U.S. 137, 141, 143 (1971).

69. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972).

70. *Id.* at 960.

ordinance, affording the municipality and its environmental concerns the benefit of the doubt.[71]

While municipal defense mechanisms may not conclusively preclude judicial invalidation of an exclusionary zoning ordinance, they may weigh heavily in a court's final decision. Comprehensive planning, voter referendums, and environmental protection are valid concerns and responsibilities implicit in municipal land use programs. While these concerns deserve recognition, they should not provide absolute protection for an ordinance designed to exclude unwanted groups from a community. Yet in attempting to resolve this conflict fairly, a court faces the difficult task of discerning the municipal motive. The key to municipal defense techniques is that they inject more substantive issues into zoning litigation that the developer must disprove and the court must disbelieve. The burden is on the challenger. These mechanisms enhance the possibility that the challenged ordinance will withstand attack and hence avoid imposition of affirmative judicial relief.

CONCLUSION

Mere judicial invalidation of an exclusionary ordinance provides no relief to persons excluded from the community. Courts that invalidate an ordinance and return the matter for municipal resolution can expect only delay and evasion. On the other hand, courts that provide an affirmative solution to exclusionary zoning face the claim of judicial usurpation of the legislative function. In addition, courts are forced to consider increasingly persuasive municipal defenses to exclusionary zoning schemes.

Courts should not be compelled to resolve the problems created by exclusionary zoning.[72] Permanent solutions to the problem lie in

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71. On reviewing the record, we have serious worries whether the basic motivation . . . was not simply to keep outsiders . . . out of the town. . . . But, at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may stand for the present as a legitimate stop-gap measure.

Id. at 962. *See also* Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971), for a successful environmental defense to prevent a low-income housing project.

72. *See* Note, *Toward Improved Housing Opportunities: A New Direction for Zoning Law*, 121 U. PA. L. REV. 330 (1972).

a regional, as opposed to a local, concept of land usage.[73] Until this solution is accepted, however, the judiciary must carry the remedial burden:[74] "We can say that the judicial branch . . . is powerless to grant any relief [in this area]. But if we are powerless to grant relief in the zoning field, then we ought to get out of the zoning field altogether and . . . decide [no] zoning cases."[75] Because courts do in fact decide exclusionary zoning cases, they should provide remedies that successfully conclude the litigation and protect the substantive rights involved.[76]

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73. *See, e.g.*, Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1; Haar, *Regionalism and Realism in Land Use Planning*, 105 U. PA. L. REV. 515 (1957); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970); Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?*, 3 CONN. L. REV. 244 (1971); Weinberg, *Regional Land-Use Control: Prerequisite for Rational Planning*, 46 N.Y.U.L. REV. 786 (1971); Comment, *Exclusionary Land-Use Techniques: Judicial Response and Legislative Initiative*, 22 DE PAUL L. REV. 388 (1972); Note, *Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107; 71 YALE L.J. 720 (1962).

74. Until the problems of regionalism and parochialism are resolved, "the courts will of necessity muddle unwillingly through the legislative void." Feiler, *Metropolitization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655, 662 (1971).

75. *Pascack II*, *supra* note 49, at 18.

76. "When the property rights of an individual and the interests of the community collide, the conflict must be resolved. To expedite a full and final resolution, a court confronted with the conflict must have the power not only to adjudicate the dispute but also to order action not inconsistent with its adjudication." City of Richmond v. Randall, ... Va. ....., 211 S.E.2d 56, 61 (1975).