ALTERNATIVES TO *WARTH v. SELDIN:* THE POTENTIAL RESIDENT CHALLENGER OF AN EXCLUSIONARY ZONING SCHEME

CATHERINE MEIER WALSH*

Local governments are vested with zoning powers to design comprehensive land use plans which will serve the health, safety, morals and welfare of the community.[1] The exercise of this power results in a division of the municipality into districts with differing restrictions or exclusions on the use of each district's land. By excluding certain buildings, structures, and uses of land, local governments not only achieve their goal of insuring compatible growth and development within the area, but may also exclude certain classes of people from the area.[2]

Exclusionary zoning is the use of otherwise legitimate land use practices to deny low-income and minority persons access to the suburban housing market. Exclusion may be accomplished through a variety of zoning techniques that limit the number of multi-family dwellings, prohibit mobile homes, and set minimum building, bedroom and lot-size requirements.[3] The primary effect of such zoning

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*B.A., University of North Carolina at Chapel Hill, 1973; J.D., Washington University, 1976.

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

2. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 1.13 (1968) [hereinafter cited as ANDERSON].

3. Six major exclusionary devices and their effects are as follows: (1) *Minimum building-size requirements* — directly influence housing costs. (2) *Single-family restrictions* — effectively preclude the influx of those who cannot afford a home of their own because the most promising opportunity for good inexpensive housing is to be found in some form of multiple dwellings. (3) *Restrictions on the number of bedrooms* — the number of bedrooms is often restricted when multiple dwellings are permitted. The most frequent provision requires that 80% of the dwellings have only one bedroom, permits two bedrooms in 20% of the units, and permits no units with more than two bedrooms. Clearly, dwellings subject to such restrictions do not provide the type of housing needed by most families. (4) *Prohibition of mobile homes* — may discourage the in-migration of inner city residents who cannot afford more expensive housing. (5) *Frontage and lot-width requirements* — street paving, sewers, curbs and storm controls require wide lots and are often too costly for moderate income families. (6) *Lot size requirements* — large lots not only increase costs but may curtail the availability of land for multi-family dwellings. *See* Williams & Norman, *Exclusionary Land-Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 481-84 (1971). *See also* Brooks, Exclusionary Zoning,

practices is to raise the price of land and ultimately the cost of dwelling units within the municipality. The secondary and often the intended effect is the exclusion of persons from lower socio-economic groups who cannot afford to pay the price of access.[4]

Those excluded from the suburb's housing, education, social and economic resources are the prime victims of restrictive zoning practices.[5] Nevertheless, this class of potential residents has traditionally been denied standing to attack such ordinances because the standing requirements in zoning litigation have been strictly interpreted by the courts.[6] Traditionally, only those with a property interest in land subject to the ordinance have been afforded standing. Thus, under the traditional view a potential resident, because he is not a landowner, is said to lack the necessary "personal stake" in the dispute.[7] This

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Planning Advisory Report No. 254, at 3 (American Society of Planning Officials, Chicago, Ill., 1970), *cited in* Lauber, *Recent Cases in Exclusionary Zoning, in* I MANAGEMENT & CONTROL OF GROWTH 465, 474 (R. Scott ed. 1975).

4. *See* Moskowitz, *Standing of Future Residents in Exclusionary Zoning Cases*, 6 AKRON L. REV. 189, 190 (1973). Due to the disproportionately high number of black and Spanish-speaking Americans in the lower-income groups, economic segregation is usually accompanied by racial segregation as well. *See generally* Aloi, *Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment*, 6 SW. U.L. REV. 88 (1974); Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9; Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1969 U. TOL. L. REV. 65; Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land-Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

5. One commentator has stated, "Such practices contribute directly to the inferior education lower-income children receive by confining them to what are generally conceded to be inferior and economically segregated inner-city schools." Lauber, *supra* note 3, at 465. Also, potential residents excluded by suburban zoning schemes are denied better employment opportunities as more and more industrial establishments move to outlying suburbs. Between 1960 and 1970, the number of jobs in central cities decreased from 12 to 11 million, while jobs in the suburbs increased from seven to ten million. The number of reverse commuters increased by 72.7% in the last decade to 1.46 million, even though transit schedules continued to favor incoming rather than outgoing commuters in peak hours. Many workers are forced to make a choice: either commute as much as five hours per day at a cost of as much as fifteen dollars per week to a job in the suburbs or do without work at all. *See* Lauber, *supra* note 3, at 465-66.

6. *See generally* 3 ANDERSON, *supra* note 2, § 21.06.

7. Baker v. Carr, 369 U.S. 186, 204 (1962). A potential resident is afforded standing only if he joins in an action with a present resident or developer who does have a property interest. *See* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968); Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1974); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788

restrictive interpretation of the standing requirements in zoning litigation was reaffirmed in 1975 by the United States Supreme Court. In *Warth v. Seldin*[8] the Supreme Court held that potential residents, city taxpayers, developers and homebuilders' associations do not have standing to challenge the validity of the exclusionary zoning practices when none of the plaintiffs either own land or propose to build on a particular site within the suburb.[9]

Warth is an ominous precedent for potential resident challengers of exclusionary schemes.[10] Nevertheless, an examination of state and federal case law both prior and subsequent to *Warth* indicates a slight but growing liberalization of the standing requirements in zoning litigation. In future litigation, a potential resident's likelihood of success in reaching the merits of his challenge[11] will depend upon: (1) whether the exclusionary impact of the ordinance is racial or economic; (2) whether there are statutory as well as constitutional grounds for the challenge; or (3) whether the state courts have recognized a cause of action broad enough to protect a potential resident's interests. This Note will examine these alternatives and outline the cause of action or claim that a potential resident must plead in order to be granted standing. To accomplish this goal it is first necessary to analyze the general prerequisites of standing to sue in zoning litigation and scrutinize the Supreme Court's recent decision in *Warth*.

(5th Cir. 1972); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1970), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

8. 422 U.S. 490 (1975) (5-4 decision).

9. *Id.* at 502-08.

10. Justice Brennan, writing for the dissent, summed up the apparent import of the majority opinion in these words:

> Thus, the portrait which emerges . . . is one of total, purposeful, intransigent exclusion of certain classes of people from the town, pursuant to a conscious scheme never deviated from. . . . Yet the Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority and building company plaintiffs that they will not be permitted to prove what they have alleged — that they could and would build and live in the town if changes were made in the zoning ordinance and its application — because they have not succeeded in breaching before the suit was filed, the very barriers which are the subject of the suit.

Id. at 523.

11. When the court denies standing it often acts with some knowledge of the merits of the claim and with the view that the claimant does not deserve relief. *See* Barlow v. Collins, 397 U.S. 159 (1970) (Brennan, J., concurring and dissenting); Association of Data Serv. Organizations v. Camp, 397 U.S. 150 (1970); Ayer, *The Primitive Law of Standing in Land-Use Disputes: Some Notes from a Dark Continent*, 55 IA.L. REV. 344, 348-52 (1969); *cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 503 (1965).

I. The Prerequisites for Standing to Sue in Zoning Litigation

Often the most difficult hurdle for the plaintiff to overcome in zoning litigation is the threshold issue of standing.[12] Only "persons aggrieved" by the zoning ordinance are allowed to challenge its constitutionality in the state court.[13] The "persons aggrieved" standard has also been used to determine who may participate in[14] or seek judicial review of[15] administrative proceedings for special permits, variances or exceptions to the zoning ordinance.[16] Because of legislative failure to define who is a "person aggrieved," the term has been judicially defined.[17] To fit within the court's definition of an aggrieved person the plaintiff must be "specifically, personally, and adversely affected by the administrative decision."[18] The majority of state courts have interpreted this language to require that the plaintiff have a legal or equitable interest in the property affected by the zoning decision.[19] Therefore, only landowners or developers submitting a specific housing application or petitioning for a zoning variance are granted standing by the state courts.[20]

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12. *See* 3 Anderson, *supra* note 2, § 21.05.

13. Constitutional challenges are a major weapon for plaintiffs in zoning litigation. The device most often used to test the validity of a zoning ordinance or planning scheme is the declaratory judgment. The majority of these challenges are brought in state court alleging violations of state constitutions because the complaint fails to allege a substantive federal question. *See* 1 *id.* § 2.01; 3 *id.* §§ 16.09, 24.01, 24.03. *See also* note 24 *infra.*

14. The first step for obtaining special permits, variances or exceptions is the filing of a petition before a board of adjustments (or board of appeals). The board of adjustments has original jurisdiction to consider applications for special permits and exceptions, plus whatever additional original jurisdiction is delegated to it by the municipality under applicable state law. *See* 3 Anderson, *supra* note 2, §§ 16.02, 16.03, 16.05, 16.11; 2 A. Rathkopf, The Law of Zoning and Planning § 4C-1 (1972).

15. In turn, proceedings to review the decision of the board of adjustment may be taken to a state court at the instance of "a person or persons jointly or severally aggrieved" by this decision. *See* 3 Anderson, *supra* note 2, § 21.02.

16. The courts have assumed that the indicia of a "person aggrieved" by an administrative zoning decision are the same as those that determine whether a person has sufficient grounds to raise a constitutional claim. *Id.* § 16.11. *But see* Note, *Extending Standing to Nonresidents: A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 Vand. L. Rev. 341, 345 (1971).

17. *See* Note, *Standing to Appeal Zoning Determinations: "The Aggrieved Person Requirement,"* 64 Mich. L. Rev. 1070, 1072 (1966); Comment, *"The Aggrieved Person" Requirement in Zoning*, 8 Wm. & Mary L. Rev. 294 (1967).

18. Note, *Extending Standing to Nonresidents*, *supra* note 16, at 355.

19. *Id.*; 3 Anderson, *supra* note 2, § 16.11.

20. Nonlandowners and developers without specific site plans have generally been denied standing by the state courts. *See, e.g.*, City of Greenbelt v. Jaegar, 237 Md. 456, 206

Nonresidents of the municipality are generally held to lack sufficient legal or equitable title in local land to challenge the validity of the regulations.[21] In a growing minority of jurisdictions, however, the definition of "person aggrieved" has been somewhat relaxed to include a select group of nonresidents who own land adjoining the disputed area. Under the rationale utilized by these courts, standing is granted because the nonresidents' property is considered to be sufficiently affected by regulations on the neighboring property.[22] Following this trend toward liberalization, one state legislature has gone so far as to recognize that any person residing "within or without the municipality" has standing to attack a zoning ordinance.[23]

Plaintiffs challenging exclusionary zoning practices in federal court[24]

A.2d 694 (1965); Wood v. Freeman, 43 Misc. 2d 616, 251 N.Y.S.2d 996 (Sup. Ct. 1964), *aff'd*, 24 App. Div. 2d 704, 262 N.Y.S.2d 431 (1965); Commonwealth v. County of Bucks, 8 Pa. Commw. 295, 302 A.2d 897 (1973).

21. *See* note 17 *supra*. *See also* Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1054 (1972).

22. One of the first state cases to announce the right of a nonresident to challenge a neighboring zoning ordinance was Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954). In *Cresskill* residents of a neighboring municipality challenged a Dumont zoning amendment on the ground that it "fail[ed] to take into consideration the physical, economic and social conditions prevailing throughout the entire area . . . and the use to which the land in the region can and may be put most advantageously . . . in utter disregard of the contiguous residential areas of the plaintiff boroughs." *Id.* at 240, 104 A.2d at 442. The court did not deal directly with the standing issue because two plaintiffs owned property in the affected area and this was considered sufficient to sustain the action. The importance of the case lies in the fact that the court established that a municipality's zoning responsibility does not halt at its boundary lines and that a municipality "owes a duty to hear *any* resident and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights" as they would their own residents and taxpayers. *Id.* at 247, 104 A.2d at 445-46 (emphasis added). *Cresskill* can thus be read to expand the group of challengers to include those neighboring property owners injured by a municipality's zoning laws. *See also* Foran v. Zoning Bd. of Appeals, 158 Conn. 331, 260 A.2d 609 (1969); Pattison v. Corby, 226 Md. 97, 172 A.2d 490 (1961); Allen v. Coffell, 488 S.W.2d 671 (Mo. 1972); Daly v. Eagan, 77 Misc. 2d 279, 353 N.Y.S.2d 845 (Sup. Ct. 1972); Anderson v. Island County, 81 Wash. 2d 312, 501 P.2d 594 (1972).

23. N.J. STAT. ANN. § 40:55-47.1 (Supp. 1975); *see* note 135 and accompanying text *infra*.

24. To bring suit in federal court the plaintiff must, of course, first satisfy jurisdictional prerequisites. The Constitution provides that federal courts will be given jurisdiction over cases "arising under" the Constitution and laws of the United States. U.S. CONST. art. III, § 2. 28 U.S.C. § 1331(a) (1970), gives district courts jurisdiction over all civil actions where the matter in controversy exceeds $10,000 and arises under federal law. A number of statutes grant jurisdiction without regard to the amount in controversy in many areas that fall under the general "federal question" jurisdiction. For example, 28 U.S.C. § 1343(3) (1970), gives original jurisdiction to district courts in all civil rights litigation without the $10,000 jurisdictional amount.

Federal challenges to exclusionary ordinances are often brought against the city and its

under either the Constitution or a federal statute must satisfy similar standing requirements.[25] A "case or controversy"[26] and an "adversary conflict"[27] involving neither a "political question"[28] nor a "hypothetical set of facts"[29] are required. In *Association of Data Processing Service Organizations v. Camp*[30] the Supreme Court reevaluated the law of standing[31] and announced a broad two-pronged test:[32] the plaintiff must allege (1) that the challenged action has caused him "injury in fact," and (2) that the interest he seeks to protect is arguably within the "zone of interests" to be protected or regulated by

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councilmen who have implemented the zoning regulations. These suits often seek relief under the fourteenth amendment and the civil rights statutes, 42 U.S.C. §§ 1981-83 (1970). Several courts have held that a city official is a "person" within the meaning of § 1983 and that a federal court has jurisdiction under 28 U.S.C. § 1343 (1970), over an action to enjoin him from enforcing an allegedly unconstitutional statute. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976); Ybarra v. City of the Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974). At other times a challenger will seek review of actions taken by a federal agency in charge of the location and site plan for a public housing project. *See* notes 101-15 and accompanying text *infra*. Often, however, a potential resident challenger lacks any type of substantive federal question and must thus rely solely on available state relief.

25. *See generally* Comment, *Standing to Challenge Exclusionary Local Zoning Decisions: Restricted Access to State Courts and the Alternative Federal Forum*, 22 SYRACUSE L. REV. 598 (1971). Federal courts have generally required that the challenging party hold a property interest. In some instances, however, adjoining landowners and adjoining municipalities have also been afforded standing to challenge an ordinance affecting their property. For example, in River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968), a New Jersey township was afforded standing to challenge a New York township's rezoning of adjoining land from one acre residential to office park. The New Jersey township alleged that the rezoning would result in a reduction in its revenues as a result of a depreciation in property values and at the same time require additional expenditures to cope with increased traffic. *Id.* at 685. The court found such allegations to be "a sufficiently direct injury to give the township standing." *Id.* at 687. This holding indicates that standing in a zoning controversy in federal court should not be restricted only to persons whose property is located within the municipality which enacted the ordinance in question.

26. U.S. CONST. art. III, § 2.

27. *See* Flast v. Cohen, 392 U.S. 83 (1968). The courts seek assurance that "questions [will] be framed with the necessary specificity to assure that constitutional challenges [will] be made in a form capable of judicial resolution." *Id.* at 106.

28. *See* Baker v. Carr, 369 U.S. 186 (1962).

29. *See* Muskrat v. United States, 219 U.S. 346 (1911).

30. 397 U.S. 150 (1970). *Data Processing* and a companion case, Barlow v. Collins, 397 U.S. 159 (1970), were decided the same day.

31. For discussions of the federal law prior to *Data Processing* see K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.04 (1958); Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 648-58 (1973).

32. 397 U.S. at 152-53.

the statute or constitutional guarantee in question.[33]

The "injury in fact" requirement has enjoyed considerable flexibility.[34] Racial, economic, aesthetic and even environmental injuries[35] have sufficed. The party seeking to redress such injuries, however, must himself specifically be harmed, and the injury, although slight, must still be real and direct, and not hypothetical or conjectural.[36] For the

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33. Although *Data Processing* was an interpretation of the "person aggrieved" language in the Administrative Procedure Act, 5 U.S.C. § 702 (1970), courts have since construed its holding broadly, applying it generally to all cases where standing of the parties is at issue. The *Data Processing* test has been applied in several recent exclusionary zoning cases. *See* Warth v. Seldin, 422 U.S. 490 (1975) (standing denied to low-income inner city residents seeking to move out to the suburbs because they had "no injury in fact"); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976) (standing granted to individual builders, homebuilders association and landowners challenging city's "population cap" because they had "injury in fact"); Park View Heights Corp. v. City of Black Jack, 467 F 2d 1208 (8th Cir. 1972) (standing granted to development corporation and potential residents challenging total exclusion of multifamily dwellings because they had social, economic and racial "injury in fact").

34. *See* Dugan, *Standing to Sue: A Commentary on Injury in Fact*, 22 CASE W. RES. L. REV. 256, 260 (1971). The "injury in fact" test (1) insures that the traditional requirements of a "case or controversy" have been satisfied, U.S. CONST. art. III, § 2, and (2) insures that the parties have the necessary "personal stake" in the outcome and that the issues are presented with "concrete adverseness." Baker v. Carr, 369 U.S. 186, 204 (1962).

35. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973); note 43 *infra*.

36. O'Shea v. Littleton, 414 U.S. 488 (1974). As a general rule, courts will allow organizations to assert the interests of their members in a small number of "special circumstances" which particularly favor organizational standing. An organization must have statutory authorization to serve as representative of its members or regularly represent its members at administrative hearings. These "special circumstances" are often available to organizations in civil rights litigation. *See* NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449, 459-60 (1958). Additionally, an organization will have the right to represent its members only where it can show a special on-going relationship between itself and those whose rights are allegedly violated. In that event it must plead individualized harm to itself or its members. For example, in Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court denied standing to an environmental group claiming a "special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country" for asserting no individualized harm to itself or its members. *Id.* at 730. *See also* Simon v. Eastern Ky. Welfare Rights. Organization, 96 S. Ct 1917 (1976). An analysis of prior exclusionary zoning decisons uncovers a willingness to grant housing organizations standing where a property interest or proposed building site is also involved. In Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968), one of the first public housing cases to explore standing, plaintiffs included two nonprofit tenants' organizations consisting of low-income blacks and Puerto Ricans. The court granted the association standing because it had a personal stake in the outcome and was asserting a protectible right. In Sisters of Providence v. City of Evanston, 335 F. Supp. 396 (N.D. Ill. 1971), three nonprofit housing organizations were

latter reason, federal courts, when interpreting the "injury in fact" requirements in exclusionary zoning cases require that the aggrieved party have an ownership interest or other interest in the land.[37] This position is consistent with the state courts' definition of "person aggrieved."[38]

The second prong of the *Data Processing* test, the "zone of interests" requirement, is a "protective intent analysis" which often turns on the nature and the source of the claim asserted.[39] Using the "zone of interests" test in a proceeding under a federal statute the standing question becomes whether the statutory provisions, which are based on congressionally created rights, can properly be understood as granting persons in the plaintiff's position a right to judicial relief.[40] Since the "zone of interests" may reflect "aesthetic, conservation and recreational, as well as economic values,"[41] courts in exclusionary zoning cases could constitutionally expand the protections accorded to potential residents.[42] But despite the Supreme Court's recent liberalization of the standing requirements in other fields, it has recently espoused a more

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allowed to sue on behalf of their members who would be denied housing if the property were not rezoned. The court stated that "this alone would be sufficient for standing." *Id.* at 401. The court indicated that the nonprofit associations had a stake in the outcome of the controversy because they had expended time and effort in their attempts to encourage low- and moderate-income housing in the area. Finally, in Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972), the court held that two associations sponsoring a housing development had standing to question whether the purpose and effect of an exclusionary ordinance was to exclude low- and moderate-income individuals from a suburb of St. Louis. The court stated that standing would be granted "where the interests of the party asserting the right and the party in whose favor the right directly exists is sufficiently close." *Id.* at 1214. In *Black Jack* the developers and potential residents had identical interests: to overturn the discriminatory zoning that blocked the construction of multi-racial federally subsidized housing. The *Black Jack* court relied heavily on Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91 (8th Cir. 1956), which established the "sufficient closeness of interests" test for determining whether one has standing to assert another's interests.

37. *See* Warth v. Seldin, 422 U.S. 490 (1975); note 43 *infra.*

38. *See* text accompanying notes 13-23 *supra.*

39. *See* Scott, *supra* note 31, at 663.

40. The *Warth* Court noted early in its opinion that "the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." 422 U.S. at 500, *citing* Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

41. Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 154 (1970).

42. Evans v. Lynn P-H EQUAL OPPORTUNITY IN HOUSING ¶13,712 (2d Cir. June 2, 1975) *see* notes 91-116 and accompanying text *infra.*

restrained view in zoning litigation.[43]

II. *Warth v. Seldin:* A Strict Interpretation of the Standing Requirements in Zoning Litigation

In 1975 the task of applying the new standing test to the exclusionary zoning context first came before the Supreme Court. In *Warth v. Seldin*,[44] potential residents of Penfield, New York, challenged as exclusionary the town's zoning ordinance under which ninety percent of the land was zoned for single-family detached housing.[45] This ordinance also fixed lot sizes, floor areas, lot widths and setbacks for dwellings. Only three-tenths of one percent of the vacant land was available for multi-family structures. Where the ordinance did permit multi-family low-income housing, it limited density to twelve units per acre, limited the portion of the lot which could be occupied by the dwellings, and required a minimum number of garage and unenclosed parking facilities for each unit.[46] Plaintiffs were potential residents of Penfield: low- and moderate-income blacks and Puerto Rican residents of Rochester,[47] and persons working in Penfield who could not afford to

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43. In contrast to the federal courts' more restrained use of standing in zoning litigation, standing to sue has been freely construed by the courts in the suits concerning the environment (United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973)), tax (Flast v. Cohen, 392 U.S. 83 (1968)), competition (Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970)), and administrative law (Barlow v. Collins, 397 U.S. 159 (1970)). For example, in *SCRAP* the Supreme Court afforded standing to environmental groups seeking an injunction against an I.C.C. freight rate increase. Plaintiffs (SCRAP) alleged that the rate increase would have an adverse impact on the human environment. SCRAP claimed that each of its members suffered direct economic, recreational and aesthetic harm as a result of the adverse environmental effect of the railroad rate structure. The Court found specific, although not significant, "injury in fact," declaring that "we have allowed important interests to be vindicated by plaintiffs with no more at stake than a fraction of a vote." 412 U.S. at 689 n.14. *See generally*, Davis, *supra* note 31; Moskowitz, *supra* note 4; Note, *Extending Standing to Nonresidents*, *supra* note 16; Comment, *Standing to Challenge Administrative Actions*, 23 Vand. L. Rev. 814, 817 (1976).

44. 422 U.S. 490 (1975).

45. *See* Petitioners' Brief for Certiorari at 2910 app. D, Warth v. Seldin, 422 U.S. 490 (1975).

46. *Id.* at 5.

47. Plaintiffs alleged that defendants' practices and policies of excluding low-income persons and members of minority groups resulted in a denial of the "right to raise their children in an integrated environment and obtain the benefits of the improved housing conditions and community services of Penfield." *Id.* at 9.

live there.[48] Also joined as plaintiffs were Rochester taxpayers,[49] two nonprofit associations concerned with low-income housing,[50] and the Rochester Homebuilders Association, Inc.[51] None of the plaintiffs had a

48. Plaintiff commuters asserted economic injury due to the burdensome commuting expenses they incurred each year. *Id.* at 7-8.

49. *Warth* suggests city taxpayers will no longer be able to challenge a suburban zoning scheme. In *Warth* taxpayers from the adjoining suburb of Rochester claimed that they were suffering economic injury through increased taxes. They argued that Penfield's zoning practices forced them to provide more tax-abated low and moderate-cost housing than would otherwise have been required. The Supreme Court found the line of causation between Penfield's alleged exclusionary actions and injury suffered by Rochester taxpayers to be both remote and attenuated. Indeed, the Court went so far as to declare their pleadings "an ingenious academic exercise in the conceivable." 422 U.S. at 508-10. The Supreme Court failed even to mention the federal taxpayer standing cases which the lower court made such great efforts to distinguish. *See* 495 F.2d 1187, 1190-91 (2d Cir. 1975). In Flast v. Cohen, 392 U.S. 83 (1968), plaintiff was afforded standing on the basis of his status as a federal taxpayer, based on his allegation of a violation of a specific congressional spending limitation. The plaintiff taxpayers' claims in *Warth* did not attack a spending measure of Congress, and thus the Supreme Court apparently felt the case was not in point. In Frothingham v. Mellon, 262 U.S. 447 (1923), standing was afforded to a local taxpayer. The direct and immediate interest protected in that case was that of a "taxpayer of a municipality in the application of its monies." *Id.* at 486. The taxpayers in *Warth* were not "of the municipality" which they were suing; nor were they attacking an "application" of that municipality's monies. *See also* Doremus v. Board of Educ., 342 U.S. 429 (1952) (Court required a direct injury to the taxpayer of the local government as a prerequisite for taxpayer standing). No suggestion is made even by the *Warth* dissenters, that the taxpayers should have been afforded the opportunity to assert their claims in court. Certainly this is an appropriate reading of the taxpayer standing cases. *But see* Aloi, *Recent Developments in Exclusionary Zoning, supra* note 4, at 142-46.

50. The Housing Council claimed that standing should be conferred because one of its members, Penfield Better Homes, had been denied approval of a specific housing project in 1969. The Court admitted that in 1969 the Housing Council would have been entitled to standing. Absent a viable project site in 1972, however, the Housing Council had no present right to represent Penfield Better Homes. 422 U.S. at 516-17. Justice Brennan, dissenting, advocated opening the door to allegations of *past* injury (which members of these organizations clearly made) and to *future* intent to develop suitable housing in Penfield: "past experiences, if proven at trial, will give credibility and substance to the claim of interest in future building activity in Penfield." *Id.* at 530.

Metro-Act of Rochester unsuccessfully claimed an interest in the litigation on several grounds. First, it claimed a "special interest" in housing. The Court rejected this contention applying the rationale of *Sierra Club* that "public interest" alone was an insufficient basis for standing. Secondly, Metro-Act's claim of standing as a taxpayer of Rochester failed because the alleged injury was too remote and attenuated. Thirdly, Metro Act's claim of standing as representative of individual appellants seeking housing in Penfield failed because the individuals had no standing. Fourthly, Metro Act claimed standing because one of its members was Director of Penfield Better Homes. This claim was found without merit, however, because Better Homes itself was denied standing. Finally, the Court refused to afford Metro Act standing to assert the claims of its members living in Penfield. *Id.* at 510-14. For a discussion of standing for organizations see note 36 *supra.*

51. Rochester Homebuilders Association was a builder's trade association that

legal or equitable property interest within Penfield. The Supreme Court, affirming the decisions below,[52] found that the allegations of social and economic injury, absent a proposed building site, were insufficient to give plaintiffs standing to attack the ordinance; that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harmed *him*, and that he *personally* would benefit in a tangible way from the court's intervention.[53]

The *Warth* Court dealt specifically with the "injury in fact" portion of the *Data Processing* test. The Court refused to follow the lead of the Eighth Circuit which had recognized the "economic" injury suffered by potential residents excluded by a suburban zoning ordinance.[54] Instead, the Court determined that for a nonresident plaintiff to meet the "injury in fact" portion of the *Data Processing* test he will be required to allege some direct relationship to a "specific project site."[55] This result conflicts with a line of cases in which physical, economic and social injuries[56] similar to those present in *Warth*[57] had been found sufficient

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attempted to intervene as plaintiff. In doing so Homebuilders sought to represent its members who it claimed had been denied the opportunity to build low-income housing in Penfield. Permission to intervene as a party plaintiff was denied because of a failure to show the existence of any direct, immediate or present harm to its members. 422 U.S. at 514-16.

52. *Id.*, *aff'g* 495 F.2d 1187 (2d Cir. 1974).

53. *Id.* at 507-08.

54. Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212-14 (8th Cir. 1972); *see* notes 59-66 and accompanying text *infra*.

55. 422 U.S. at 507-08 & n.18. In the majority's opinion, absent any present proposal for a building site, alleged injury in fact is legally insufficient. Without a direct and immediate injury to itself or its members, an association, even under the most liberal rules of standing law, will not be entitled to judicial review of the merits of its dispute. *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

56. Justice Brennan recognized this "injury" in his dissent where he argues that "it is abundantly clear that the harm *alleged* satisfied the 'injury in fact,' economic or otherwise." 422 U.S. at 525 (citing *Data Processing*). *See* Comment, *Standing to Challenge Exclusionary Local Zoning Decisions*, *supra* note 25, at 618 & n.80; Comment, *The "Aggrieved Person" Requirement*, *supra* note 17, at 304; *cf.* Sager, *supra* note 4, at 785. *But see* Aloi, *Recent Developments in Exclusionary Zoning*, *supra* note 4, at 88, 104-11.

57. For example, plaintiff Ortiz was a Spanish-American who was dissatisfied with rearing his children in the decaying inner-city section of Rochester. Accordingly, in 1968, he began searching for a home in one of the surrounding suburban towns. He attempted to rent or buy a home in Penfield where until 1972 he had been employed. But because no multi-racial, low- or moderate-income housing units were available, petitioner was forced to reside in Wayland, New York, 42 miles from Penfield. Travel one way to his job in Penfield took at least one hour and ten minutes; in bad weather, about two hours. The cost of gasoline alone, commuting to and from his job, was approximately $666.00 per year. 422

to give potential residents standing.[58] A good illustration of the trend that had been emerging prior to *Warth* is *Park View Heights Corp. v. City of Black Jack.*[59] The *Black Jack* court, one of the first to apply the *Data Processing* test in the zoning area, implied that "economic" injury in fact would suffice to meet the first prong of the new standing test.[60]

In *Black Jack,* the Eighth Circuit dealt almost exclusively with the standing of parties[61] to litigate the validity of an ordinance which effectively prohibited construction of multi-racial, federally subsidized moderate- and low-income housing in a St. Louis suburb.[62] Plaintiff

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U.S. at 503 nn.13 & 14.

The injury to the *Warth* plaintiffs was not limited to burdensome commuting problems and costs. Plaintiffs sought housing in Penfield, but were excluded because of their income level. The inner-city environment in which they resided was characterized by dilapidated, substandard housing, violence and insufficient community services. Since defendants' zoning scheme resulted in the exclusion of low-income persons and members of minority groups, plaintiffs alleged they were being denied their rights to rear their children in an integrated environment and obtain the benefits of the improved housing conditions and community services in Penfield. *See* Petitioners' Brief for Certiorari at 7-9, Warth v. Seldin, 422 U.S. 490 (1975).

58. The dissent points out "that the harms claimed [by the potential residents] . . . are obviously *more* palpable and concrete than those held sufficient to sustain standing in other [federal] cases." 422 U.S. at 525 (Brennan, J., dissenting). *See* Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1216 n.10 (8th Cir. 1972). Similarly, the Fifth Circuit in Crow v. Brown, 457 F.2d 788, 790 (5th Cir. 1972), *aff'g* 332 F. Supp. 382 (N.D. Ga. 1971), approved injuries similar to those alleged by the plaintiffs in *Warth.* Individual plaintiffs in *Crow* contended "that they [were] being denied access to [low-rent] public housing outside of the racially impacted areas of Fulton County because of the actions of the County officials [due to arbitrary action and thoughtless inaction of the County]." The court rejected the suggestion that the parties lacked the requisite injury. *Accord,* Shannon v. HUD, 436 F.2d 809, 818 (3d Cir. 1970) (held sufficient an allegation that the concentration of low-income residents in a low-income project would adversely affect not only investments in homes and businesses, but the quality of their daily lives). The *Warth* Court distinguished these cases on the basis that they each involved a particular project under construction, thus easing plaintiffs' burden of showing the causal connection between defendants' action and plaintiffs' injury. 422 U.S. at 507-08 & nn.17-18. This single factor should not be determinative of whether plaintiffs are actually suffering injury. Petitioners' Brief for Certiorari at 16- 18, Warth v. Seldin, 422 U.S. 490 (1975); Aloi, *Recent Developments in Exclusionary Zoning, supra* note 4, at 137 (suggesting that there is some support for a grant of standing in the absence of a specific project site based on the notion of discriminatory effects of a facially neutral zoning scheme).

59. 467 F.2d 1208 (8th Cir. 1972).

60. *Id.* at 1214, 1216 & n.10.

61. Plaintiffs were: (1) Park View Heights Corp., which was formed by two churches to sponsor the housing development, and held exclusive title to the land, (2) Inter-Religious Center for Urban Affairs, Inc. (ICUA), which had advanced substantial "seed money" for initial development of the project, and (3) eight individual residents of the City of St. Louis who wanted to move to the county. None could afford county housing, though they would have qualified for the proposed Park View Heights apartments. *Id.* at 1210 & n.2.

62. *Id.* at 1210.

Park View Heights Corporation sought to sponsor such housing in St. Louis County in order to improve the economic, educational and recreational environment available to moderate- and low-income tenants.[63] Plaintiff Inter-Religious Center for Urban Affairs, Inc. (ICUA), a development corporation, signed a sales contract to buy land in an unincorporated area of the county and subsequently transferred its rights under the contract to the Park View Heights Corporation. Soon after the initial application for housing subsidies to the federal government was made, area residents began active opposition to the proposed location. This opposition culminated in the incorporation of the city of Black Jack and passage of a zoning ordinance that prohibited multi-family dwelling units in the city. The district court held that only Park View Heights Corporation, the owner of the site, had standing to challenge the ordinance.[64] On appeal, all plaintiffs were found to have standing to challenge the ordinance. The Eighth Circuit held that ICUA's advancement of "seed money" and the time and energy expended in planning and developing the project gave it a "personal stake" in the outcome sufficient for standing to litigate its claim. The court further held that ICUA and Park View's "economic interests" satisfied the "injury in fact" test: "It is as important to protect the right of sponsors and developers to be free from unconstitutional interferences in planning, developing and building an integrated housing project, as it is to protect the rights of potential tenants of such projects."[65] More importantly, the court also found that Park View and the individual plaintiffs as potential residents could assert their alleged economic and social injuries:

> The statistics cited by the plaintiffs indicate a great need to provide low and moderate income housing in the suburban area, a need which Park View and ICUA are trying to fill. Any attempt to interfere with this program may work a visible and immediate hardship on the class of low and moderate income citizens of the City of St. Louis.[66]

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63. *Id.*

64. 335 F. Supp. 899, 902 (E.D. Mo. 1971), *rev'd*, 467 F.2d 1208 (8th Cir. 1972).

65. 467 F.2d at 1212.

66. *Id.* at 1216 n.10. The court, having recognized that the individual plaintiffs had standing to attack the ordinance, *id.* at 1214, determined further that "the hardship to the parties of withholding judicial consideration . . . compels an immediate resolution of this controversy." *Id.* at 1216.

While the language of *Black Jack* would appear encouraging to potential residents, the case in fact does little to assure the availability of a federal forum to vindicate an excluded

The *Warth* Court, however, did not accept the Eighth Circuit's views of "economic" injury in fact. The Court was not convinced that the out-of-the-pocket losses and denial of specifically enumerated services in Penfield were the immediate and direct result of defendants' exclusionary actions.[67] The *Warth* Court chose instead to determine "injury in fact" by focusing initially on whether there was a particular project site. The absence of a particular project site in *Warth* became a prima facie indicator of no "injury in fact," and in the Court's view, provided the essential fact distinguishing *Warth* from *Black Jack* and prior cases in which potential residents, who had joined with project site owners, had been granted standing.[68] In adopting the project/no project distinction as its indicator of injury in fact, the Court was able to reconcile *Warth* with prior decisions striking down exclusionary schemes, [69] and at the same time deny standing to the potential residents of Penfield.

The question that remains after *Warth* is the real value of the thin project/no project line separating those plaintiffs with from those without standing. The fact that a particular project is under construction might ease plaintiffs' burden of showing the causal connection between defendants' actions and plaintiffs' injuries. But it is clearly arguable that this test is not determinative of whether plaintiffs are actually suffering injury.[70] A comparison of the complaints in *Warth* to those in earlier cases, including *Black Jack*, shows that the injury to potential residents in the "no project" case is just as severe as the hardship experienced where a project is underway.[71] The Supreme Court, however, appears to have spoken definitively on this point. In *Warth* there was no project and no standing for potential residents. In *Black Jack* there was a project and standing for both the developers and potential residents to assert their interests. Without a project then the result seems clear: no standing for anyone. Therefore, the potential

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resident's claim for equal housing opportunity. In view of the Supreme Court's recent decisions in Dandridge v. Williams, 397 U.S. 471 (1970), James v. Valtierra, 402 U.S. 137 (1971), and San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), it appears that equal housing opportunity remains a nonprotectible "economic matter" which is not subject to strict constitutional scrutiny as are the "suspect" classifications of race, religion and nationality.

67. *But see* 422 U.S. at 524-25 & nn.3-4 (Brennan, J., dissenting).

68. *See* note 58 *supra.*

69. 422 U.S. at 508 & n.18.

70. *See* Petitioners' Brief for Certiorari, at 18, Warth v. Seldin, 422 U.S. 490 (1975).

71. *See* note 58 *supra. See generally* Aloi, *Recent Developments in Exclusionary Zoning, supra* note 4, at 136-39, 146-53.

resident must either find a way to satisfy the project/no project test or find a means to circumvent the *Warth* result.

III. ALTERNATIVES TO *Warth v. Seldin*

A. *The Potential Racial Impact of an Exclusionary Ordinance*

The potential resident seeking a means to circumvent the *Warth* Court's requirement of a "particular project site" to demonstrate "injury in fact" should consider whether the complaint in that case was faulty in failing to allege purposeful racial or ethnic discrimination.[72] Had the *Warth* plaintiffs been able to prove that they had suffered direct racial discrimination as a result of the Penfield ordinances, the Court might have allowed plaintiffs' standing based on a violation of the fourteenth amendment.

Prior case law suggests that courts are aware that many exclusionary ordinances evince a purpose or effect to discriminate on racial grounds.[73] In such cases plaintiffs have been successful in invoking the fourteenth amendment and the civil rights acts[74] to strike down ordinances as

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72. The Court noted, "As we read the complaint, petitioners have not alleged that respondents 'refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of race, color, . . . or national origin.*' " 422 U.S. at 513 n.21. Justice Powell indicated that the Supreme Court treated plaintiff's complaint as one alleging wealth discrimination. In its statement of the case, the Court described plaintiffs' claim as one in which "the town's zoning ordinance, by its terms and as enforced by the defendant[s] . . . effectively excluded persons of low and moderate income." *Id.* at 493. Further, the Court characterized the minority status of some plaintiffs as "coincidental." *Id.* at 502. In fact, the *Warth* complaint failed to allege the minority status of some plaintiffs in the case. The Court's refusal to find that the complaint alleged "purposeful racial or ethnic discrimination" is an affirmation of its view that the deprivation of constitutional rights by reason of race was not in issue. *Id.* at 513 n.21.

73. Compare the notable absence of statistical data indicating racial discrimination in *Warth* with Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1975). While not expressly involving the standing issue, *Arlington Heights* aptly illustrates the federal courts' continuing sensitivity to racial discrimination in zoning law. In *Arlington Heights* a Chicago suburb refused to rezone church-owned land from single-family to multi-family for a housing project. The Court of Appeals for the Seventh Circuit accepted the plaintiffs' argument that the refusal to rezone had a racially discriminatory effect and perpetuated the segregated character of Arlington Heights in contravention of the fourteenth amendment. After examining demographical statistics, the court concluded that no other suitable site for such housing was available and that the unjustified exclusion of the project would preclude the possible increase in the black population of the village. (27 out of 64,884 people in the village were blacks.) *See* Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970). *But see* Ybarra v. City of the Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).

74. 42 U.S.C. §§ 1981-83 (1970).

exclusionary. Curiously, no specific test for standing was discussed in most of those cases; the courts simply granted standing in "bold" or "visceral" statements.[75]

Sisters of Providence of St. Mary of the Woods v. City of Evanston,[76] illustrates judicial sensitivity to the racial impact of certain exclusionary techniques and the reluctance of some courts to deny standing to those injured by such practices. Plaintiffs[77] in *Sisters of Providence* claimed that the denial of their petition to rezone land for a proposed housing project was arbitrary and was designed to perpetuate existing racial segregation in Evanston, Illinois. The court specifically dealt with the standing of each plaintiff.[78] First, the court held that the Sisters, owner of

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75. *See* 9 SUFFOLK U.L. REV. 944, 955 (1975). For example, in Sisters of Providence of St. Mary of the Woods v. City of Evanston, 335 F. Supp. 396, 402 (N.D. Ill. 1971) the court granted potential residents standing with this statement: "The interests of the individuals in this case are . . . not so remote as to deny them standing."

76. 335 F. Supp. 396 (N.D. Ill. 1971).

77. Plaintiffs included: Sisters of Providence, owner of the tract in question; Interaction, Inc., a corporation dedicated to providing better housing for low- and moderate-income families which sought to purchase the Sisters' property if a higher density zone could be obtained; Evanston Neighbors at Work, a nonprofit corporation that sought to organize low- and moderate-income housing; Evanston Housing Center, a corporation similar to Neighbors; and individual plaintiffs who lived in substandard housing and who were prospective tenants of the proposed development. *Id.* at 398.

78. *Cf.* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). There the court held that city officials had *willfully deprived* low-income blacks of their housing rights under the fourteenth amendment. The court did not consider whether standing existed for the remaining plaintiffs — a civil rights organization, potential residents, and the Buffalo Diocese but simply found that the Association (developer) had proved a "high stake in the litigation which it ha[d] instituted in order to provide the blacks in Lackawanna with sufficient facilities." *Id.* at 112. Evidence of racial discrimination was abundant. A man-made and city-approved physical barrier actually segregating the black community from the rest of the city existed in Lackawanna. The city was divided into three wards. The first ward, where 98.9% of the city's nonwhite residents lived, had the worst housing, highest density, highest crime rate and worst air pollution. Railroad tracks, with a single bridge for connection, separated the first ward from the rest of the city. Nonwhites comprised one-tenth of the city's total population but 35.4% of the first ward's population. No resident of the first ward was a member of the all-white planning and development board and only one first ward resident was on the city council. The city's three housing projects were all located in the first ward, and for a long time the best one was restricted to whites. Finally, although many blacks sought to move out of the first ward, no contractor would build suitable housing in the third ward. 436 F.2d at 110. Plaintiffs' plan to build a low-income housing project in the third ward caused vigorous opposition, including the institution of this suit. Likewise in Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970), the court recognized that the effect of a referendum which prevented the construction of a low-income housing project was to deny decent housing and an integrated environment to low-income residents of Union City. *Id.* at 295-96. Potential residents and an organization which promoted housing for Spanish-speaking residents of

the tract of land, had a personal stake in the outcome and that the arbitrary denial of rezoning violated their property rights under the fourteenth amendment. Curiously, the court noted that the Sisters themselves might not be directly affected "in terms of racial discrimination" by the city's refusal to rezone.[79] To the court, however, the fact that the Sisters had not been directly affected by the rezoning denial in terms of racial discrimination was not determinative of their right to bring suit.[80] A second plaintiff, Interaction, also had an interest in the land in question as prospective vendee.[81] In addition, it had completed sufficient preliminary work in planning the project to insure a requisite "personal stake" in the litigation. The court added that Interaction *also* was suing on behalf of the individuals *who would be denied* housing if the property were not rezoned, declaring that "[t]his alone would be sufficient for standing."[82]

Sisters of Providence is typical of the federal courts' less rigorous approach to the standing doctrine when plaintiffs allege injury due to an ordinance's serious racial impact. Thus, in *Dailey v. City of Lawton*[83] the court also granted a developer, whose civil rights had not been impinged, standing to assert the rights of a potential resident who had no interest in the land affected by the zoning decision.[84] By implication

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the county were implicitly afforded standing, since the issue was not raised in the case.

79. 335 F. Supp. at 400.

80. *Id.*

81. Interaction was formed to purchase the Evanston tract for low-income housing. In a federal court and under the traditional zoning approach of the state court, a vendee under a conditional sales contract is deemed to have a sufficient interest in the property to confer standing. In jurisdictions applying more stringent standing requirements he has standing if joined with the vendor in a suit to appeal the denial of a petition to rezone. *See* 3 ANDERSON, *supra* note 2, § 21.07; Note, *Standing to Appeal Zoning Determinations*, *supra* note 17, at 1074-77; Comment, *The "Aggrieved Person" Requirement in Zoning*, *supra* note 17, at 297-300.

82. 335 F. Supp. at 401. The two community organizations, Neighbors and Center, were granted standing under the same rationale. *Id.*

83. 425 F.2d 1037 (10th Cir. 1970). In *Dailey* a developer sponsoring a low-income housing project in a predominately white section of the city was joined by a potential black tenter of project space. Plaintiffs sued under the Civil Rights Act of 1891, 42 U.S.C. § 1983 (1970), alleging that their fourteenth amendment rights had been denied by the city's refusal to issue a building permit or make a zoning change.

84. *But see* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976). In *Petaluma* the court was faced with deciding the standing of a homebuilders association and individual landowners challenging the city of Petaluma's recently enacted five-year housing and zoning plan. The city, alarmed by its accelerated growth, adopted a land use plan which amounted to a "population cap" sheltering the city from in-migration. The plan called for a housing development growth

then, the potential renter was afforded standing along with the developer: "It was enough for the complaining parties to show that the local officials [were] effectuating the discriminatory design of private individuals."[85] While the potential renter had been subjected to racial discrimination,[86] it is unclear what civil rights of the developer were denied.

Sisters of Providence and *Dailey*[87] illustrate the possibility of a

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rate not to exceed 500 dwelling units per year. Each dwelling unit represented three people. The 500 unit figure was somewhat misleading, however, because it applied only to housing units that were part of projects involving five units or more. Thus, the 500-unit figure did not reflect any housing and population growth due to construction of single-family homes or even four-unit apartment buildings not part of a larger project. The plan also included a 200-foot wide "green belt" around the city to serve as a boundary for urban expansion. Plaintiffs challenged the city's growth plan, alleging that it violated their constitutional "right to travel." The city challenged the standing of the landowners and the association to maintain the suit. The Ninth Circuit applied the *Data Processing* tests and refused plaintiffs standing to assert the right to travel claim. The court found plaintiffs' claim to be asserted not on their own behalf, but on the behalf of a group of unknown third parties allegedly excluded from living in Petaluma. Accordingly, the court, citing *Warth*, ruled that the plaintiffs' right to travel claim fell "squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others to obtain relief from injuries to themselves." *Id.* at 905. Plaintiffs were, however, afforded standing to maintain their action on alleged due process violations.

Petaluma may have some import for several reasons. It implies that the "right to travel" may be a legitimate basis for challenging an exclusionary ordinance, if brought by a proper party. The court declared that this right would be a proper allegation to be asserted by those "whose mobility is impaired." *Id.* at 904. At first glance, this would seem to indicate that potential residents of an area excluded by zoning ordinances could challenge them on the basis of a deprivation of their right to travel, enter, and live within the exclusionary area. But *Petaluma* does not go so far: it specifically endorses *Warth*. The court's final remarks, concluding the discussion of the "right to travel" claim, casts doubt upon what would seem to have encouraged the potential resident challenger. The court, however, left open the federal court door for plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinance, would be able to reside in the community. *Id.* at 905.

But *Petaluma*, despite its apparent endorsement of a novel claim in the zoning field — the right to travel — offers little more opportunity to potential resident challengers than does *Warth*. In fact, *Petaluma*, if interpreted broadly, is even more restrictive than *Warth*. After *Petaluma*, a developer may no longer be able to allege a violation of the civil rights of a potential resident of his housing project unless he, himself, personally suffers similar deprivations. This casts doubt on the views expressed by the courts in both *Dailey* and *Sisters of Providence*, where developers were indeed allowed to assert the civil rights and injuries of potential residents. *See* Note, *Freedom of Travel and Exclusionary Land Use Regulations*, 84 YALE L.J. 1564 (1975). *See generally* Rasmussen v. City of Lake Forest, 404 F. Supp. 149 (N.D. Ill. 1975).

85. 425 F.2d at 1039.

86. *Id.* at 1039-40.

87. *See also* Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972), where the court afforded standing to a developer and the potential residents of low-

successful challenge by potential residents if they are able to make strong allegations of racial discrimination. In this situation standing becomes a less important issue, or is sometimes overlooked completely, so that the court can meet head-on the "real and direct prejudice" of the exclusionary scheme.[88] Given this perspective, *Warth* may simply be a case of faulty pleadings. Like *Dailey* or *Sisters of Providence*, the plaintiffs in *Warth* brought their claims under the fourteenth amendment and the civil rights acts. Furthermore, the Penfield ordinance may have been marred by the same purposeful scheme of direct prejudice as those of the former cases. The principal distinction alluded to by the Court is that the grievances expressed by the *Warth* plaintiffs were primarily economic[89] rather than racial in nature. If the potential residents of Penfield had been able to point to a serious racial impact of the ordinances, the Court probably would have concerned itself more with correcting social ills, attaching less significance to the issue of plaintiffs' standing.[90]

B. *A Statutory Basis for the Challenge: The Expanding "Zone of Interests"*

As a second alternative to *Warth*, a potential resident should attempt to attack an exclusionary ordinance on statutory rather than constitutional claims. This response to the *Warth* result would attempt to capitalize on the exercise of the congressional power to grant standing by statute to persons who would otherwise lack it.[91] Even absent a

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and moderate-income housing in Atlanta. The court held that the individual plaintiffs had standing to challenge the ominous trend in Atlanta toward a black inner city and a white suburban ring.

88. *See* note 78 *supra*.

89. The allegations were primarily of lost wages, commuting expenses, high taxes and lost development advantages. *See* notes 47-49, 57, 72 *supra*. Only one housing organization and three of the potential residents alleged racial injury. Metro Act claimed that its members were "losing the benefits of living in an integrated community." Petitioners' Brief for Certiorari at 12, Warth v. Seldin, 422 U.S. 490 (1975). The potential residents alluded to a denial of their right to live in an integrated environment. *Id.* at 8-9. *See* 422 U.S. at 503 & nn.13-16.

90. Particular attention should be paid to the suit recently filed in the Eastern District of Pennsylvania by both present and future residents of Easttown Township. They challenge the racially discriminatory effect of Easttown's zoning practices and procedures that operate to deny them equal opportunity in access to housing. Irby v. Easttown Township, Civil No. 75-3452 (E.D. Pa. 1976).

91. *See* Warth v. Seldin, 422 U.S. at 514, *citing* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212, where Justice White wrote in a concurring opinion:

particular housing site, a potential resident will be afforded standing if he can show that "an invasion of a statutory duty had or is likely to occur."[92] Because the "zone of interests" of several relevant statutes are today viewed broadly, a potential resident is often held to be within the protective intent of these statutes. Thus, by bringing a statutory claim the potential resident may be afforded standing to attack the exclusionary scheme.[93]

Recent case law suggests that potential residents will be granted standing if they seek relief within the statutory confines of Title VI of the Civil Rights Act of 1964[94] (Title VI) or Title VIII of the Civil Rights Act

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Absent the Civil Rights Act of 1968, I would have a great difficulty in concluding that petitioners' complaint in this case presented a case or controversy within the jurisdiction of the district court under Article III of the Constitution. But with that statute purporting to give all those who are authorized to complain to the agency the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case.

92. Evans v. Lynn, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,712 at 14,534 (2d Cir. June 2, 1975), *citing* O'Shea v. Littleton, 414 U.S. 488, 494 n.2 (1974).

93. The *Warth* Court's approach rejects an earlier decision by a New York district court. Though that case dealt with a challenge to an administrative ruling by an agency of the federal government, rather than a zoning ordinance, the focus of the case was on plaintiffs' desire to obtain adequate low-income housing near a proposed government office building. The plaintiffs did not reside within the affected area. In Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D.N.Y. 1972), a civic organization and residents of the town of Brookhaven sought a preliminary injunction against the occupancy by the IRS and the General Services Administration (GSA) of a new building being constructed in the town. They complained that adequate housing for low-income and minority groups was not available in the town and that the GSA should have assured adequate housing before locating a substantial federal installation in that town. *Id.* at 1028. The defendants argued that the plaintiffs lacked standing to assert enforcement of an executive order that would require the GSA to give consideration to the "impact" of the facility on the entire community. No plaintiff was currently employed at the facility. The court based its grant of standing on two practical considerations: there was no one else in a position to represent the prospective employees who would work in the alleged facility; and nonemployees might be affected by an increased demand for low-income housing, and come within the ambit of those affected by "the impact [the] selection [would] have on improving social and economic conditions in the area" within the meaning of the executive order. *Id.* at 1029. The court concluded that "it was only necessary that plaintiffs be within the zone of interests to be protected or regulated." *Data Processing* and *Norwalk CORE* were cited as controlling. *Id.* Unlike *Warth*, the civic organization was not required to allege a "special circumstance" giving it the right to be a representative of potentially injured members. *See* note 36 *supra*. Secondly, the plaintiffs could allege *potential* and *future* injury to themselves and those whom they sought to represent. This rationale was rejected by the Supreme Court in *Warth* which held that the injury must be direct and immediate. 422 U.S. at 514-17.

94. 42 U.S.C. §§ 2000d-2000d-4 (1970), requires federal agencies affirmatively to effectuate the Act's anti-discrimination policy in programs receiving federal assistance: "No person in the United States shall, on the grounds of race, color, or national origin, be

of 1968[95] (Title VIII). In *Trafficante v. Metropolitan Life Insurance Co.*[96] the Supreme Court declared that the civil rights acts indicate a congressional intent to define standing as broadly as is permitted by the case or controversy requirement of Article III.[97] The *Trafficante* Court held that white tenants alleging injury pursuant to section 810(a) of the Civil Rights Act of 1968 have standing to challenge the discriminatory refusal of the owner to rent to nonwhites.[98] The Court stated that the "definition of 'person aggrieved' " contained in section 810(a) is broad, as it is defined as "any person who claims to have been injured by a discriminatory housing practice."[99] The Court concluded that Congress intended persons in plaintiffs' position — residents of the housing facilities — to be able to sue as private attorneys general.[100]

A recent federal decision* has extended this statutory grant of standing to *potential* as well as *actual* residents of a housing project. In *Evans v. Lynn* [101] a complaint was brought by minority residents forced to reside in racially concentrated areas of the county because of the alleged discriminatory land use practices of the town of New Castle, New York.[102] The complaint stated that in 1969 New Castle decided to

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excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

95. 42 U.S.C. §§3601-31 (1970), requires similar effectuation of its fair housing practices: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.* § 3601.

96. 409 U.S. 205 (1972).

97. *Id.*

98. Plaintiffs alleged that as the result of such discrimination they had been injured in that they had lost the social benefits of living in an integrated community, had missed business and professional advantages which would have accrued if they had lived with members of minority groups, and had suffered embarrassment and economic damage in social, business and professional activities from being "stigmatized" as residents of a white ghetto. *Id.* at 208.

99. *Id.*

100. The Court relied in part on the clear congressional purpose in enacting the 1968 Act:

> The dispute tendered by this complaint is presented in an adversary context. . . . The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is . . . the "whole community" . . . and as Senator Mondale [who drafted § 810(a)] said, the reach of the proposed law was to replace the ghettos by "truly integrated and balanced living patterns."

Id. at 111.

**Ed. Note:* see addendum

101. P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,712 (2d Cir. June 2, 1975).

102. The court characterized the town as a predominantly white (98.7%) and well-to-do enclave, 90% of which is zoned for single-family residential development on parcels more

install a sanitary sewer system in a section of the town. Thereafter the town made application to the United States Department of Housing and Urban Development (HUD) for federal financing of the projects. HUD was specifically notified that blacks, Spanish-speaking persons, and all other persons of low-income would be denied the opportunity to benefit from federal funding of the sewer project because New Castle's housing and zoning laws prevented the development of low- and moderate-income housing. Nevertheless, HUD granted $385,000 for the project. Plaintiffs brought suit to enjoin HUD from granting the funds, claiming that such a grant violated Title VI[103] and Title VIII.[104]

Initially, the *Evans* court determined that plaintiffs were "arguably within the zone of interests" protected by the statutes.[105] The court next held that sewer funds are "housing and development" funds within the meaning of Title VIII.[106] Finally, the court concluded that plaintiffs had been "injured in fact" by the nonenforcement of Title VIII "purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII by the agencies' administration of grants related to housing or urban development and not because plaintiffs have any connection with New Castle or would even try to live there."[107]

Evans indicates that when a suit is filed under an applicable statute courts may be willing to deal with the rights of potential residents

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than one acre, with a median value of single-family homes in 1970 in excess of $50,000. The town had thwarted the New York State Urban Development Corporation's attempt to construct within its borders a small 100-unit low-cost housing facility and thus in the words of the court below "continues to be resistant to attempts to alter its present housing character." *Id.* at 14,531.

103. 42 U.S.C. §§ 2000d-2000d-4 (1970).

104. 42 U.S.C. §§ 3601-31 (1970).

105. The issue presented was whether Titles VI and VIII impose a duty on federal agencies to act on behalf of the county residents to "affirmatively further fair housing" and to withhold otherwise proper grants if such policies are not complied with. *See* P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,712 at 14,532 (2d Cir. June 2, 1975).

106. *Id.* at 14, 533-34. The court relied on dictum from Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417 (1968), where Justice Stewart wrote, Title VIII at least is a "detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority."

107. P-H EQUAL OPPORTUNITY IN HOUSING ¶13,712 at 14, 535 (2d Cir. June 2, 1975). None of the plaintiffs had been refused the sale or rental of housing in New Castle. Further, the plaintiffs neither had any interest in land within the town, nor any connection with plans or proposals to construct housing for them within the town. In this respect, plaintiffs in *Evans* were identical to plaintiffs in *Warth*, leading the *Evans* court to distinguish *Warth* on the basis of the nature of the pleadings. In *Evans* there was an alleged violation of a statutory duty; in *Warth* no such statutory allegation was made. *Id.* at 14, 534.

complaining of exclusionary zoning and land use policies. Plaintiffs in *Evans* sought to obtain their objective — the opening of suburbs to low-income groups and minorities — not by a frontal attack on New Castle on the theory of unconstitutional zoning, but indirectly by an oblique attack on HUD for failing, in making the sewer grant, affirmatively to promote fair and suitable housing pursuant to Title VIII. Additionally, plaintiffs asserted that in making the sewer grant HUD "assist[ed] and encourag[ed] New Castle in its practices of racial discrimination"[108] and denied plaintiffs their right to participate in the receipt of federal benefits in derogation of Title VI.[109]

Another potential source of statutory relief for plaintiffs seeking to move out of the inner city and into the suburbs is the Housing and Community Development Act of 1974 (HCDA).[110] Passage of the HCDA sets the stage for judicial recognition of standing for potential residents by explicit statutory protections even broader than those recognized in *Evans*. The Act articulates a policy of favoring the dispersal of low-income housing and tying community development grants to housing assistance plans[111] in order to accommodate the needs of those "expected

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108. *Id.* at 14,537. (Moore, C. J., dissenting).

109. *Id.*; *cf.* Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971); Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971). In the *Gautreaux* cases black tenants and applicants for public housing filed companion cases against the Chicago Housing Authority (CHA) and HUD claiming that the two agencies had violated statutory (42 U.S.C. §§ 1981-83) and constitutional (fourteenth amendment) obligations by discriminatory tenant assignment and site selection policies and practices. The suit against HUD successfully alleged that the federal government had assisted CHA in achieving its discriminatory results. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971). Three years later the district court entered a remedial order in the cases, by now consolidated, requiring CHA to select sites for future public housing in predominantly white areas of Chicago. Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973). But it confined the site selection to the geographical bounds of the city and required only that HUD use its best efforts to assist CHA. *Id.* at 691. The Seventh Circuit reversed the district court order and imposed a metropolitan-wide plan. Gautreaux v. CHA. 503 F.2d 930 (7th Cir. 1974). The Supreme Court affirmed. Hills v. Gautreaux, 96 S. Ct. 1538 (1976). For a more thorough discussion of the *Gautreaux* litigation see Rubinowitz & Dennis, *School Desegregation v. Public Housing Desgregation: The Local School District and the Metropolitan Housing District*, 10 URBAN L. ANN. 145 (1975).

110. 42 U.S.C. §§ 5301-17 (Supp. IV, 1974).

111. One of Congress' goals is to reduce "the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income." 42 U.S.C. § 5301(c)(6). *See* City of Hartford v. Hills, 408 F. Supp. 889 (D. Conn. 1976), where the city challenged the surrounding communities' rights to receive federal funds under the HCDA, unless they complied with the Act's purpose.

to reside in the community."[112] HUD strengthened this notion by regulations expanding the Act's "zone of interests" to include those persons "planning or expected to reside in the community as a result of planned or existing employment facilities."[113] A central city resident — potential suburban resident — holding or desiring a suburban job "is more likely to be injured in fact and is within the zone of interests established by the statute to complain of CD funding to a locality that has submitted an inadequate housing assistance plan or has failed to implement its plan."[114] The policy of the Act could thus be carried out by enjoining or limiting federal subsidies to jurisdictions with exclusionary land use schemes. This action, in turn, would stimulate low-income housing in those areas.[115]

While some plaintiffs have capitalized on the advantages of the statutory approach, the plaintiffs in *Warth* were not as resourceful. The *Warth* plaintiffs very well might have been granted standing on the basis of a statutory right had they asserted it.[116] Indeed, the majority implies as

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The district court permanently enjoined the suburban towns around Hartford from making HCDA expeditures because of their failure to provide low-income housing, give feasible priority to activities which would benefit low- and moderate-income families, or adequately address regional housing needs. The court stated that "[t]he plaintiffs' allegations, and the statutory language, make it clear that the City falls within the 'zone of interests' created by the Act." *Id* at 894. Of the potential resident plaintiffs, the court declared, "As poor persons living in Hartford in substandard hosing, they are certainly within the 'zone of interests' created by the 1974 Act." *Id.* at 895.

112. 42 U.S.C. § 5301 (Supp. IV, 1974).

113. 24 C.F.R. § 570.303(c)(2) (1975). The legislative history emphasizes consideration of those who could be expected to reside there, including present and future employees of proposed facilities. *See* H.R. REP. No. 114, 93d Cong., 2d Sess. 17 (1973).

114. Franklin, *Open Communities Litigation and the Housing and Community Development Act of 1974*, in NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, EXCLUSIONARY LAND USE LITIGATION POLICY AND STRATEGY FOR THE FUTURE 83, 94-95 (1974). *See also* Kushner, *Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974*, 11 URBAN L. ANN. 37, 67-68 & nn. 133-36 (1976).

115. This remedy is a far more manageable one for federal courts than the reform of local land use regulatory policy. Generally, the latter remedy has been instituted only by the state courts. *See* The Potomac Institute, Inc., Memorandum 75-5, June 30, 1975, at 6. Kushner & Werner, *Metropolitan Desegregation After* Milliken v. Bradley: *The Case For Land Use Litigation Strategies*, 24 CATHOLIC U.L. REV. 197, 215 & n.107 (1975).

116. The *Warth* plaintiffs raised only constitutional challenges to the Penfield ordinances. The amicus brief of the Lawyers Committee for Civil Rights Under Law argued that the individual *Warth* plaintiffs' allegations did state colorable claims under Title VIII and that the Penfield members of plaintiff Metro Act were "persons aggrieved" within § 3610 of Title VIII. Section 3610 refers to § 810 of the 1968 Civil Rights Act which provides in pertinent part that "Any person who claims that he will be irrevocably injured

much: "We intimate no view as to whether had the complaint alleged purposeful racial or ethnic discrimination, Metro Act would have stated a claim under § 3604."[117] If Metro Act, one of the nonprofit organizations concerned with better housing in the Rochester area, had asserted a claim based on behalf of its low-income members, a cause of action under Title VIII of the Civil Rights Act,[118] the *Warth* plaintiffs may well have been afforded the opportunity to litigate their claims on the merits.

Contrasting this more indirect statutory approach to the direct constitutional attack in *Warth,* the proper strategy becomes apparent. A potential resident, instead of challenging the locality's zoning decisions directly, should carefully investigate the federally-subsidized development opportunities available to the town. By bringing a complaint against the federal agency responsible for dispensing funds for the town's housing, social and recreational improvements, he can attack the town's discriminatory housing practices indirectly. Brought under the protective auspices of Title VI and Title VIII, or the HCDA, where standing is an automatic statutory grant, an attack on a federal agency's violation of its affirmative duty to comply with federal equal housing opportunity mandates will likely succeed.

C. *Bringing Suit in State Court: A Cause of Action Broad Enough to Protect a Potential Resident*

The independent development of both standing and zoning law at the state and federal levels provides a potential resident challenging an exclusionary scheme with a third alternative to circumvent the *Warth* result: sue in state court.[119] Recent case law at the state level has necessitated reform of the standing requirements in zoning matters. This is an indirect outgrowth of the federal courts' traditional

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by a discriminatory housing practice that is about to occur . . . may file a complaint with the Secretary." The *Warth* Court indicated that "It [was] significant [that] . . . petitioners nowhere adopt[ed] this argument." 422 U.S. at 513 n.21.

117. *Id.* The statute reads in pertinent part:

> [I]t shall be unlawful —
> (a) To refuse to sell or rent after the making of a bonafide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny,* a dwelling to any person because of race, color, religion or national origin.

42 U.S.C. § 3604(a) (1970) (emphasis added).

118. 42 U.S.C. §§ 3601-31 (1970).

119. *See generally* Comment, *Standing to Challenge Exclusionary Local Zoning Decisions, supra* note 25.

inclination to leave to the state judiciary review of questions of state law.[120] Indeed, the most sympathetic interpretation of the reasons behind the *Warth* opinion may be attributed to a recognition of the federal/state dichotomy.

The Ninth Circuit in another recent federal zoning case, *Construction Industry Association of Sonoma County v. City of Petaluma*,[121] relied on the doctrine of "state prerogative" in zoning matters to remove themselves from what has been called the "remedial thicket."[122] The Ninth Circuit declared:

> If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or 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.[123]

Thus *Warth* and *Petaluma* simply reiterate a time-honored principle of federalism: that state courts should be the primary reviewers of disputes involving state laws, including state and local exclusionary zoning regulations.[124]

Historically, then, the state court would seem to be the proper arbitrator of a potential resident's attack on an exclusionary ordinance. Two additional recent developments make the state court an even more likely forum for review. The first of these developments is the willingness of some state courts to examine a single locality's alleged

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120. Murdock v. Memphis, 87 U.S. 590 (1874). *See also* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 174, 336 A.2d 713, 725 *cert. denied*, 423 U.S. 808 (1975). ("We reach this conclusion under state law and so do not find it necessary to consider federal constitutional grounds urged by plaintiffs.").

121. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976).

122. The *Warth* court noted that "zoning laws and their provisions long considered essential to effective urban planning are peculiarly within the province of state and local authorities." 422 U.S. at 508 n.18.

123. 522 F.2d at 908. *See also* Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585, 608-11 (1974).

124. For example, the Supreme Court, with one exception, has not decided a case on the use of police power in zoning law since 1928. During the intervening 48 years the state courts have passed on nearly 10,000 such decisions. *See* Williams, Doughty & Potter, *Exclusionary Zoning Strategies: Effective Lawsuit Goals & Criteria*, in I MANAGEMENT & CONTROL OF GROWTH 477, 483 (R. Scott ed. 1975).

exclusionary ordinance in terms of regional needs. The second development is their willingness to institute affirmative action programs which order a broad restructuring of the locality's land use policy.[125] These developments broaden the substantive rights of potential residents and thereby allow for a concomitant expansion of the standing requirements in state courts.

While zoning disputes before state courts generally have not focused on the question of standing, they nevertheless suggest a movement to recognize the protectible interests of those outside the borders of the town. In this regard some state courts, particularly in Pennsylvania and New Jersey, have begun to examine zoning practices from a broad geographical perspective, focusing on regional growth and development.

The Pennsylvania Supreme Court has consistently refused to allow municipalities to exclude, through various zoning techniques, people seeking a "comfortable place to live."[126] In *Appeal of Girsh*[127] the court, recognizing that apartment living is a "fact of life" for which suburban communities must provide, invalidated a zoning ordinance that prohibited plaintiffs' proposed apartment development.[128] Subsequent

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125. *See, e.g.*, Note, *Beyond Invalidation: The Judicial Power to Zone*, 9 URBAN L. ANN. 159 (1975).

126. National Inv. Co. v. Kohn, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965). In *Kohn* the court struck down a four-acre minimum lot size restriction on township land, holding that the township could not use its zoning to "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live." *Id.* The court went on to declare that "a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid further burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid." *Id.* Here there was no standing problem because the action was brought by a developer who owned land affected by the exclusionary zoning regulation.

127. 437 Pa. 237, 263 A.2d 395 (1970).

128. The court stated that perhaps in an ideal world

> planning and zoning would be done on a *regional* basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality . . . to close its doors at the expense of surrounding communities and the central city.

Id. at 245 n.4, 263 A.2d at 399 n.4.

The Pennsylvania court later applied the same rationale in Township of Willistown v. Chesterdale Farms, Inc., ___ Pa. ___, 341 A.2d 466 (1975). Here plaintiff was seeking a building permit to complete an apartment complex as planned. The ordinance failed to provide for any apartment development in the area of plaintiff's land. The court held the ordinance unconstitutional, concluding that the township had failed to assume its "fair share" of the regional burden to meet housing shortage as required by *Girsh*.

Pennsylvania courts have repeatedly held that exclusionary zoning is unconstitutional, insisting that one locality has no right to decide who may or may not live within its confines, while disregarding the interests of the surrounding area.[129]

In only one of these Pennsylvania cases, however, has standing been directly at issue. In *Commonwealth v. Bucks County*[130] minority and low-income residents of Bucks County sued to invalidate the exclusionary zoning practices of defendant and all its municipalities. The court affirmed the holding of the lower court that any relief would be premature and merely advisory because plaintiffs had no present interest in a particular parcel of land and had not applied for building permits.[131] The *Bucks* court's denial of standing is in line with the Supreme Court decision in *Warth*. At the same time, however, the case appears to be in direct conflict with the underlying rationale of the majority of Pennsylvania cases. Their overriding concern with regional welfare would seem to suggest that a potential resident of a town, already a resident of the "region" should be afforded standing to challenge an ordinance as violating the region's welfare as well as his own individual, social, educational and housing rights. The rationale behind this view is simple: since the courts now admit that social and economic injury is not confined by political lines, there is no reason why judicial review should be confined by political lines.[132] The *Bucks* decision may thus be best explained as a failure to follow the trend toward an awakening sensitivity to the relationship between zoning practices and a wide range of contemporary social, economic, environmental and racial problems.

The New Jersey courts have also begun to incorporate an expanded concept of regional welfare into their decisions dealing with the validity of local zoning ordinances.[133] In a recent decision the New Jersey

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129. *See, e.g.*, Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970) in which the court declared, "a scheme of zoning that has an exclusionary purpose or effect is not acceptable in Pennsylvania." *Id.* at 470, 268 A.2d at 766.

130. 8 Pa. Commw. 295, 302 A.2d 897 (1973), *cert. denied*, 414 U.S. 1130 (1974).

131. *Id.* at 295, 302 A.2d at 902.

132. *See* Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634, 651 (1970); 25 HASTINGS L.J. 739, 760 (1974).

133. The most extensive consideration of regional housing needs in an exclusionary zoning context in New Jersey is provided in Oakwood at Madison Township, 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). *See* Furman (author of original trial court opinion and final case on appeal), *Regional Housing Needs: Oakwood at Madison, in* I MANAGEMENT & CONTROL OF GROWTH, 499 (R. Scott ed. 1975). *See also* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975)

Supreme Court struck down a zoning ordinance that restricted lot sizes of multi-family structures in order to maintain "an elite community of high-income families with few children."[134] State constitutional and statutory provisions, however, provide the foundation for the regional approach that New Jersey courts are beginning to take to both standing and zoning law.[135] This approach becomes even more apparent when examining a recent decision by the New Jersey court which may predict the future posture of the state judiciary in zoning matters. *Southern Burlington County NAACP v. Township of Mt. Laurel*[136] illustrates the developing willingness of the New Jersey Court to institute affirmative action programs calling for broad restructuring of an entire region's land use policy and suggests why a potential resident has a greater likelihood of being granted standing in a state rather than a federal court.

In *Mt. Laurel* plaintiffs attacked the township's exclusionary system of land use regulation on the ground that low- and moderate-income families were unlawfully excluded. The plaintiffs fell into four categories: (1) present residents of the township residing in dilapidated and substandard housing; (2) former residents who were forced to move elsewhere because of the absence of suitable housing; (3) nonresidents living in substandard central city housing in the region who desired to secure decent housing elsewhere within their means; and (4) three organizations representing the housing and other interests of racial

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cert. denied, 423 U.S. 808 (1975); Desimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 267 A.2d 31 (1970). *But see* Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962).

134. Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. at 446, 320 A.2d at 227. Plaintiffs were composed of two groups: two developers who owned vacant land in Madison Township, and a class of low-income individuals who resided outside Madison Township by reason of the newly adopted zoning restrictions.

135. *See* N.J. STAT. ANN. § 40:55-47.1 (Supp. 1975), which provides:

> [A]ny person, whether residing *within* or *without* the municipality whose right to use, acquire, or enjoy property *is* or *may be affected* by an action under the act to which this act is a supplement, or whose rights to use, acquire, or enjoy property under any other law of this state or the United States has been denied, violated, or infringed by an action or a failure to act . . . may bring suit under the New Jersey zoning provisions.

(emphasis added). Additionally, other legislation in Massachusetts, Alabama and New York puts an end to land use planning which remains unconcerned with the regional needs of potential residents. *See, e.g.*, Aloi & Goldberg, *Racial and Economic Exclusionary Zoning*, *supra* note 4, at 54-58.

136. 67 N.J. 151, 336 A.2d 713 (1975), *aff'g* 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972).

minorities. The township initially challenged plaintiffs' standing to bring the action on appeal. The court dismissed the defendants' charge stating that the resident plaintiffs and *both* categories of nonresidents had standing to sue.[137] The court then found that over the years Mt. Laurel " 'ha[d] acted affirmatively to control development and to attract a selective type of growth' "[138] and that through its zoning ordinance "exhibited economic discrimination in that the poor were deprived of adequate housing and the opportunity to secure 'construction of subsidized housing.' "[139] The court directed itself to the same issues that later arose in *Warth:* whether potential residents can challenge a system of land use regulation that makes it physically and economically impossible for them to buy or rent low- and moderate-income housing in the municipality, and whether a township can exclude such persons from living within its confines because of the limited extent of their income and resources.[140] The New Jersey court concluded that as a matter of substantive state law every municipality must accept its fair share of regional housing needs within its boundaries.[141] The court then focused the remainder of its opinion on the nature of the remedy for the exclusionary wrong. The remedy called for by the court was a reform of local land use controls, with the court intervening only if the township failed to perform as directed.[142]

The dissimilar treatment of exclusionary zoning disputes in the state and federal courts explains the dichotomy of treatment received by the plaintiffs in *Warth* and *Mt. Laurel.* In *Warth* plaintiffs with claims identical to those in *Mt. Laurel* were refused standing.[143] The most sympathetic interpretation of *Warth* may be the Supreme Court's

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137. *Id.* at 159 n.3, 336 A.2d at 717 n.3.

138. *Id.* at 170, 336 A.2d at 723. Under the ordinance, 29.2% of the township land was zoned for industry. The balance of the land area was divided into four residential districts. All permitted only single-family detached housing—one house per lot. Attached townhouses, apartments and mobile homes were not allowed anywhere in the township under the general ordinance. *Id.* at 162-63, 336 A.2d at 719. The general effect of the ordinance requirements was to raise the price of access beyond the financial reach of potential low-income residents.

139. *Id.* at 170, 336 A.2d at 723.

140. *Id.* at 159, 336 A.2d at 717.

141. *Id.* at 188-91, 336 A.2d at 732-34.

142. *Id.* at 191-92, 336 A.2d at 734.

143. In *Mt. Laurel,* as in *Warth,* plaintiffs were potential residents who sought the economic, cultural and social advantages of suburban living. *Compare* notes 47-48, 57 and accompanying text *supra, with* text following note 136 *supra.* But in *Mt. Laurel* unlike *Warth,* the court did find their allegations sufficient to show injury. 67 N.J. at 159 & n.3, 336 A.2d at 717 & n.3.

reluctance to engage in judicial activism to surmount federal/state and judicial/legislative prerogatives.[144] Contrary to the *Mt. Laurel* court, the *Warth* court refused to enter the "remedial thicket" and may have denied plaintiffs standing primarily on the basis of the type of relief sought. In *Warth* the Court sought to limit federal court intervention to situations in which an order directing a locality to permit a specific project to go forward is the appropriate relief.[145] Such relief is more manageable, the Court felt, and restricts federal intrusion into what ought to be a state or local prerogative.[146]

At the same time, *Mt. Laurel* may be proof of the soundness of the *Warth* Court's rationale. It illustrates both the state court's superior perception of the local situation and its understanding of how planning jargon is used to cover prejudice. In addition, *Mt. Laurel* also indicates that the state courts, more than the federal courts, have the ability to supervise a major restructuring of land use policy.

Nevertheless, a critical distinction between *Warth* and *Mt. Laurel* remains the basis of each court's decisionmaking process. *Warth* involved a claim for relief on federal constitutional grounds. *Mt. Laurel*, on the other hand, involved interpretation of broad state statutory and constitutional provisions.[147] The independent development of both standing and zoning law at the state and federal levels becomes clearest at this point. At the state level the potential for reform of zoning and standing law rests initially with the state legislature. The *Mt. Laurel* court confined itself to analysis of specific New Jersey statutory and constitutional mandates. Standing for nonresidents was afforded on the basis of a New Jersey statute granting standing to all persons "within and without" the municipality whose right "to use, acquire, or enjoy property *is* or *may* be affected."[148] The ordinance was invalidated for contravening a constitutional provision that required a zoning regulation to promote the "general welfare."[149] General welfare was

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144. *See* The Potomac Institute, Inc., Memorandum 75-5, June 30, 1975, at 3.

145. 422 U.S. at 516.

146. *Id.* at 508 n.18.

147. Standing was granted to nonresidents by N.J. STAT. ANN. §40:55-47.1 (Supp. 1975); *see* note 135 *supra*. The regional welfare rationale was an interpretation of the constitutional provision providing that zoning regulations in New Jersey were to promote the general welfare. 67 N.J. at 174-75, 336 A.2d at 725.

148. *See* note 135 *supra*. It has been suggested that the statute may have been unwittingly passed without consideration of its potential effect. N.Y. Times, Jan. 25, 1970, §8, at 9, col. 1.

149. *See* note 147 *supra*.

found to extend the zone of protected interest to all of the state's citizens, including those beyond the borders of *Mt. Laurel*.[150] After *Mt. Laurel* one realizes that despite the broad substantive rights recognized by state courts in zoning matters, any real change in judicial treatment of the standing and exclusionary zoning problems at the state level must be undertaken in the state legislatures. Thus, in the last analysis, liberalized standing requirements in state zoning litigation will result not from judicial activism but from legislative initiative.[151]

CONCLUSION

In light of recent federal and state cases, a potential resident may indeed be afforded standing to challenge an exclusionary scheme. His likelihood of success will principally depend on the forum he chooses and how carefully he drafts his pleadings. The initial decision is whether to proceed in state or federal court. Should the federal forum be chosen, the potential resident must take great care in deciding whether to allege constitutional or statutory violations. If the potential resident can allege a discriminatory racial purpose or effect he will likely be granted standing to challenge the ordinance under the fourteenth amendment. Absent such a clear racial impact, the potential resident should plead a violation of his right to equal housing opportunity under one of the civil rights acts or the HCDA. In some instances, though, it may be wise to bring the action in state rather than federal court. Some states have statutory and constitutional provisions that have laid a framework for broad regional land use regulation.[152] A potential resident residing in one of those states may be granted standing to challenge regulations which he feels are unlawfully exclusionary. This is especially true if the particular state court is willing to order affirmative action housing/land use programs. Thus, with intelligent forum selection and proper pleadings the potential resident may be able to circumvent the traditional requirement which limits standing to those with a specific property interest in the land affected.

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150. 67 N.J. at 158, 177, 336 A.2d at 716, 726.

151. *Warth* reiterated this view when it said: "[C]itizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process." 422 U.S. at 508 n.18.

152. *See generally Hearings on H.R. 3510 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., ser. 7 (1975).

ADDENDUM

As this volume was being printed, the United States Court of Appeals for the Second Circuit, sitting en banc, reversed Evans v. Lynn, *sub nom.* Evans v. Hills, ____F.2d____(2d Cir. June 4, 1976) (6-4) (see text at notes 101-09 *supra*). Relying extensively on Warth v. Seldin, 422 U.S. 490 (1975), the court held that potential resident challengers failed to meet the standing requirement of injury in fact.

The decision reflects the reluctance of federal courts to extend standing to the potential resident challenging exclusionary zoning schemes under Title VI of the Civil Rights Act of 1964 or Title VIII of the Civil Rights Act of 1968 and indicates that if the potential resident challenger is unable to demonstrate a clear racially discriminatory purpose or effect, his challenge must be based upon federal statutes which explicitly grant standing. The decision should not, however, effect challenges in state court based on state statutes or state constitutional provisions.