

RACIAL AND ECONOMIC
EXCLUSIONARY ZONING:
THE BEGINNING OF THE END?

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INTRODUCTION

Having in 1968 written one of the first major comprehensive studies of exclusionary zoning,¹ little did we realize the speed by which our propositions would be tested in the courts.² Shortly after publication in January, 1969, one of the co-authors attended a legal strategy seminar at the New York offices of the National Committee Against Discrimination in Housing (NCDH) to assist in its legal assault on exclusionary suburban zoning. NCDH has led this attack.³ In addition,

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1. Aloï, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOLEDO L. REV. 65 (1969) [hereinafter cited as *Aloï, Goldberg & White*]. Other articles on the topic include Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter cited as *Michelman*]; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as *Sager*]; Shapo, *Thou Shalt Not Ration Justice: The Law and the Poor Man in the Sixties*, 55 CORNELL L.Q. 44 (1969) [hereinafter cited as *Shapo*]; Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827 [hereinafter cited as *Williams & Wacks*]. A new book containing a treatment of the topic is D. MANDELKER, *THE ZONING DILEMMA* (1970).

2. Most of the cases, discussed *infra*, have occurred during the past two years and include both state and federal court decisions.

3. NCDH Staff Attorney Richard F. Bellman has been instrumental in the prosecution of several of the leading lawsuits discussed *infra*. Messrs. Neil N. Gold

legal periodicals have published numerous articles which, in effect, expanded upon our tentative conclusions voiced during the formative stages of this struggle.⁴ This article will not dwell upon the existence of the problem nor its potential effect upon home rule.⁵ Those parts of our thesis have been generally recognized. Instead, we will concern ourselves with potential judicial and legislative remedies.

Although the Supreme Court approved comprehensive zoning in the landmark decision of *Village of Euclid v. Ambler Realty Co.*,⁶ (so long as the ordinance in question was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,"⁷) the district court decision prophetically identified the problem:

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.⁸

and Paul Davidoff of "Suburban Action" of White Plains, New York, also have been in the forefront.

4. See, e.g., Ratner, *Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1968); Bartke & Gage, *Mobile Homes: Zoning and Taxation*, 55 CORNELL L. Q. 491 (1970) [hereinafter cited as *Bartke & Gage*]. See also note 1, *supra*.

5. For a discussion of the home rule implications of exclusionary zoning we refer the reader to *Aloi, Goldberg & White, supra*, note 1 at 69. As specific indications of the erosion of home rule by the persistence of local exclusionary zoning, the reader should consider two developments in New York. First, enactment of the Urban Development Corporation Law which gives the state government authority to overrule local zoning prohibitions as well as acquire desirable sites for housing construction by utilizing eminent domain. Second, the proposal of a state senator, Thomas Laverne, for a statewide zoning ordinance to replace all zoning at the local level. Clearly, if misuse of home rule powers continues to occur, there will be no home rule powers left.

6. 272 U.S. 365 (1926) [hereinafter referred to as *Euclid*].

7. *Id.* at 395.

8. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

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Although the potential for class stratification by zoning was recognized in 1926, it has taken 30 years and social revolution for our society to belatedly agree with the district court.⁹

Zoning to exclude minorities, whether racial or economic, can be done in various ways. The most common are ordinances designed to "maintain the character of a neighborhood." Typical devices used are minimum lot-size requirements,¹⁰ minimum building-size requirements,¹¹ frontage requirements,¹² exclusion of mobile homes,¹³ bedroom restrictions,¹⁴ land improvement requirements such as sewage plants,¹⁵ minimum floor space requirements,¹⁶ living density requirements,¹⁷ prohibition of multiple-family dwellings,¹⁸ and various provisions in building codes.¹⁹ Utilizing these tools, intransigent administrators have created an unresponsive body of remedial zoning law and have erected an impenetrable exclusionary wall based upon race

9. See, e.g., the discussion in Note, *Suburban Zoning Ordinances and Building Codes: Their Effect on Low and Moderate Income Housing*, 45 NOTRE DAME LAWYER 123 (1969) [hereinafter cited as *Suburban Zoning Ordinances*]; Note, *Zoning, A Comprehensive Study of Problems and Solutions*, 14 N.Y.L.F. 159 (1968); Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507 (1964).

10. For a general survey of the problem of minimum lot size zoning requirements see Note, *Minimum Lot Area Requirements in New York*, 21 N.Y.U. INTRA. L. REV. 24 (1965).

11. *Suburban Zoning Ordinances*, *supra* note 9.

12. See Annot., 95 A.L.R.2d 716 (1964).

13. See *Bartke & Gage*, *supra* note 4.

14. See Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317 (1955).

15. See Makielski, *Zoning: Legal Theory and Political Practice*, 45 J. URBAN L. 1 (1967).

16. See, e.g., *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed for want of a substantial federal question*, 344 U.S. 919 (1953). See also *R. B. Constr. Co. v. Jackson*, 152 Md. 671, 137 A. 278 (1927); *Bilbar Constr. Co. v. Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958); and *Senefky v. Lawler*, 307 Mich. 728, 12 N.W.2d 387 (1943).

17. *American Veterans Housing Coop. v. Zoning Bd.*, 69 Pa. D. & C. 449 (C.P. Montgomery County 1950).

18. For a complete discussion of exclusionary zoning and multiple dwellings see Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963).

19. See the cases selected in *Suburban Zoning Ordinances*, *supra* note 9. The following studies consider this problem in its overall perspective: American Society of Planning Officials, *Research Report No. 2, Zoning and Land Use Regulation* (1968); NCDH, *Jobs and Housing, A Study of Employment and Housing Opportunities for Racial Minorities in Suburban Areas of the New York Metropolitan Region* (1970) [hereinafter cited as *Jobs and Housing*].

and economic class. These conditions might have gone unheeded but for the problems of the inner cities²⁰—the population explosion, the housing shortage, the increasing economic mobility of minority groups and today's "tight money" condition whereby housing starts are at their lowest levels since 1966.²¹

The magnitude in distance and numbers of the separation of Mexican-Americans, Indians, Negroes and Puerto Ricans from suburban economic growth emerges clearly in a study conducted by NCDH.²² A significant by-product of this exclusionary wall, said this study, is the creation of severe labor shortages in suburbs, on the one hand, and severe unemployment in ghettos, on the other.

The universal complaint of suburban employers about labor shortages reflects the abnormality of labor force distribution due to separation by income and race.²³ Most jobs are population-based, and in this regard the study found that service-oriented jobs constitute as much as 70% of employment, ranging from dentists to retail clerks.²⁴ Because employment in goods production constitutes a shrinking proportion of the labor force, in the absence of suburban housing, minority representation in population-based suburban employment must be minimal.²⁵ For example, while the resident minority population of both New York and Newark has increased dramatically over the past decade, the options left open to those who cannot avail themselves of nearby job opportunities because of education and skill factors have been either a longer journey to work or unemployment. Costs and inconveniences generally rule out reverse commuting. For example, NCDH points out that with 70% of all new jobs being created outside New York City and all growth in manufacturing jobs also outside, residence within New York City severely reduces the opportunities to take advantage of such jobs.²⁶ Unless massive numbers of the urban poor have opportunities opened to them to live in the suburban communities that are within convenient travel time to

20. See, e.g., *New York Post*, Dec. 12, 1969, at 44, col. 1; Shipler, *N.A.A.C.P. Presses Oyster Bay Fight*, *N.Y. Times*, Dec. 26, 1969, at 14, col. 1. See also Shipler, *Agnew, in Suburbs Speech, Borrowed from Memo*, *N.Y. Times*, March 10, 1970, at 26, col. 5; ERBER, *URBAN LAND AS A NATIONAL RESOURCE* (1967).

21. See, e.g., *Jobs and Housing*, *supra* note 19; Mesznik, *The Housing Market* (unpublished paper in finance seminar at Columbia University, May, 1970).

22. See *Jobs and Housing*, *supra* note 19 at 39.

23. *Id.* at 23-31.

24. *Id.* at 36-37.

25. *Id.* at 31.

26. *Id.* at 25.

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new employment concentration, they will have to forego jobs already there as well as vast numbers of new jobs projected for such locations.

Suburban communities that benefit financially from exclusionary controls do so at the expense of their neighbor suburbs and the region as a whole. For example, Franklin Lakes, New Jersey, a community which has refused to permit building of multi-family housing to accommodate employees of a new IBM facility, has three times the taxable resources of Garfield, a neighboring community, which has provided a significant amount of publicly assisted housing. Even those communities that do not benefit from exclusionary patterns are, so far, turning a deaf ear to this fact as evidenced by the increase in large-lot zoning.

The traditional notion of housing filtering down from upwardly mobile families to lower-income families and thus used as stepping stones for improved earnings "is meaningless to the black household if such housing is in a central city and the job sought by the household's breadwinner is in the suburbs."²⁷ The availability of "filtered-down" housing for minorities in suburbs convenient to employment locations will likely be the unusual coincidence rather than the usual case. The added cost of providing new housing in appropriate locations for lower-income groups is a social cost which society should assume as the price of undoing past years of neglect of, and discrimination against, the disadvantaged.

The process under which high costs of land and money create a housing market designed for multi-family structures collides with most suburban zoning ordinances. Similarly, present zoning patterns of one and two-acre lots most often result in a waste of land and exacerbation of sewage and solid waste disposal problems; higher densities permit economical treatment of sewage, solid waste incineration, and smoke control.

Concentration of publicly-subsidized housing in central cities, mainly in ghettos, is rationalized by many suburban dwellers as a solicitous regard for keeping intact the city neighborhoods of low-income ethnic groups. However, no group desires blight and lack of opportunity in preference to outlying employment and housing. This speculation of preferences by minorities for housing as between city and suburb, if they had a choice, is futile and essentially dishonest. It can easily be resolved by building housing in both city and suburb that is within the means of minorities and thus provide them with

27. *Id.*

the same freedom of choice the middle class takes for granted. The concentration of publicly-assisted housing in central cities is not in deference to the desires of minorities, but rather is in deference to the desires of suburbanites who exclude such housing from their communities.²⁸

Regardless of cause, it is clear that in a democracy the environmental benefits of land use control cannot be used to improve the quality of life of the well-to-do to the exclusion of economic (usually racial) minorities. Exclusionary zoning not only isolates the prosperous from certain segments of our population, but it even isolates them from their own families, for the typical young couple of middle-class parents cannot afford to live near their parents under our present zoning laws.

An unpublished study by New Jersey's Division of State and Regional Planning illustrates a typical "restrictive zoning" county in New Jersey.²⁹ Somerset County, New Jersey, contains 195,264 total acres, of which 83.5% or 163,220 acres are zoned residential. Within this residential use category, land zoned for less than one acre consists of 17.7% or 28,950 acres; however, only 9% or 1,431 acres remain available for development. Residential land zoned for an acre or more consists of 82.2% or 134,229 acres; of this amount 53.8% or 87,836 acres remain available for development. Thus, only 41 acres are zoned for multi-family uses; however, this land has been consumed. The statistics reflect a definite pattern in the growth of Somerset County. Development has flourished in the areas zoned for less than an acre, but those areas zoned for an acre or more remain sparsely developed.³⁰

Local governing bodies, through their manipulation of zoning regulations, have dictated this type of development. Land use regulatory devices have had the effect of establishing a minimum price for housing well above the means of the low and middle-income groups. As a result, development pressures have intensified in those areas where zoning regulations have been the least inhibiting.

The minimum cost of housing in the county, after attaching dollar figures to minimum floor space, lot and width requirements, varies

28. Kolben, *Enforcing Open Housing, An Evaluation of Recent Legislation and Decisions* (a study made for Operation Open City of the New York Urban League 1969).

29. Sullivan & Green, *Zoning Study*, N.J. Dep't of Community Affairs, April 7, 1970.

30. *Id.* at 2.

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between \$28,000 and \$33,000, but can run as high as \$68,000 and \$100,000 in certain areas.³¹ It is obvious that the low-income group and many in the middle-income group cannot meet the minimum F.H.A. requirements for housing at that price. Apartment dwellings and mobile homes will not offer an alternative solution since the former are prohibited in almost every municipality and the latter are universally prohibited.

Recognizing the debilitating effect of these conditions upon society, attorneys representing minorities have begun a nationwide attack on racially and economically exclusionary zoning. Rather than a single frontal assault on exclusionary zoning, it has been necessary to utilize a number of approaches which rest upon varying theories. Yet this apparent indirection must create stresses which by volume alone may topple what has become institutional exclusionary zoning. For example, the issue whether low and middle-income apartment housing should be permitted in a suburb has been raised in challenging the adequacy of the variance procedure.³² Another approach has been the development of a new substantive equal protection right under the Federal Constitution.³³ A third approach is to question whether public housing authorities with federal funding have an affirmative duty to locate housing projects in areas other than the urban ghettos. Some cases have developed a fourth approach, based on the ninth amendment. It recognizes a fundamental and inherent right to housing wherever one desires it, so long as the economic wherewithal to pay for it exists.³⁴ Still others look to the supremacy clause of the Constitution to strike down nonconforming local zoning ordinances or building codes by identifying an overriding federal interest in eliminating urban blight and creating equal housing opportunities in the suburbs.

This diversity of approach must not be confused with an inability to effectively deal with the problem. However, we must recognize that we are presently in a period of "muddling through." Indirection

31. *Id.*

32. See *Aloi, Goldberg & White, supra* note 1 at 87-94.

33. See *Karst & Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; *Michelman, supra* note 1; and *Sager, supra* note 1.

34. For a general discussion of the ninth amendment, see *Ratner, The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968). For a historical perspective on the ninth amendment, see *Abrams, What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A.J. 1033 (1967).

may be apparent, but the cacaphony of judicial response is exerting many pressures on the present fabric of zoning.

Another serious problem in potential exclusionary zoning cases is the lack of proper plaintiffs. Farsighted judicial and legislative response will be discussed—in particular, whether it is possible for central cities or law reform groups to have standing to bring suit against recalcitrant economically segregated suburbs.

The inevitable result of all of these actions—the only result—must be the elimination of exclusionary zoning. No other solution for a problem of this magnitude can be tolerated.

I. EQUAL PROTECTION

The concept of equal protection embodies action by a state or its instrumentalities which invidiously discriminates against a group or groups of persons. Historically, the equal protection clause of the fourteenth amendment has been utilized to strike down discriminatory state legislation³⁵ or state legislation discriminatorily enforced on the basis of race.³⁶ Hence a municipal ordinance which limits the right of Negroes to own property in a given area has long been held to be unconstitutional.³⁷

Faced with an ordinance which excludes on the basis of race, the Supreme Court will strike it down regardless of its alleged basis in the legitimate police power of the state. The Court in *Buchanan v. Warley*³⁸ would not accept the municipality's argument that such legislation

tends to promote the public peace by preventing racial conflicts; that it tends to maintain racial purity; that it prevents the deterioration of property owned and occupied by white people, which deterioration . . . is sure to follow the occupancy of adjacent premises by persons of color.³⁹

Where a town enacts exclusionary zoning ordinances, the effect is to shut out the poor, regardless of race. If it could be demonstrated that all black people are poor, a zoning ordinance aimed at excluding the poor (under the guise of a legitimate function of the police power) would be clearly racial and therefore unconstitutional. How-

35. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

36. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

37. *Buchanan v. Warley*, 245 U.S. 60 (1917).

38. *Id.*

39. *Id.* at 73-74.

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ever, where a statute is nondiscriminatory on its face, another case is presented. An examination of the racial composition of any municipality enacting restrictive zoning ordinances (such as minimum house-size requirements, overly large lot-area regulations and complete limitation of dwellings to single-family units) will disclose few Negroes living in the community. If Negroes were totally excluded from residence by virtue of the exclusionary zoning ordinance (*i.e.*, no Negroes could afford to own or rent property in a given community) then the zoning ordinance would violate the fourteenth amendment. Such a case, however, rarely exists. The municipality will deny that it excludes Negroes, maintaining that anyone who has the economic wherewithal has the right to live there; in fact, the municipality is likely to cite several Negroes living in the community. This argument, by demonstrating that the ordinance is not racially exclusionary on its face or in fact, contains its own answer, namely, that exclusionary zoning is a denial of equal protection to the poor.

Land has no inherent monetary value. Land in the most exclusive community can have no value aside from the uses to which it is dedicated. But for the protected exclusivity in a given area, those land values could not reach their present high value. When an exclusionary ordinance is enacted, the community has, in effect, placed a "snob value" on the property.

State action, be it benign or affirmative, is present in permitting the enactment of such zoning ordinances and must falsely inflate land values unrelated to true market conditions. The state has thus denied its disadvantaged citizens the right to own or rent property when they otherwise might have been able to afford it. Equal protection has been denied. By tolerating exclusionary zoning the state has created an area where the wealthy purchase property at an inflated price.

Having set forth the essence of the fourteenth amendment argument, we now proceed to a review of the cases useful to this attack. Most significant in this area is *Brown v. Board of Education*.⁴⁰ Although a school desegregation case, it signaled the addition of a new dimension to constitutional litigation—an awareness of the entire social and economic milieu as it affects the particular litigants. To paraphrase *Brown*, "we cannot turn the clock back to 1868 when the Amendment was adopted . . . [but] must consider [housing and exclusionary zoning] . . . in light of its full development and its present

40. 347 U.S. 483 (1954).

place in American life throughout the Nation."⁴¹ The effect of zoning is to classify citizens by reason of race and economic position. To ask whether this is a proper classification entitled to the protection of law presupposes the answer.

Cases in other areas of law have determined that classifications based upon economic status are improper.⁴² We see the beginning of this new substantive equal protection doctrine being applied in cases involving the procedural rights of the criminally accused, cases which easily could have been decided on due process grounds.⁴³ Thus *Griffin v. Illinois*⁴⁴ premised its holding that an accused indigent was entitled to a transcript at the state's expense to prosecute his appeal on the theory that the fourteenth amendment requires "equal justice for poor and rich, weak and powerful alike."⁴⁵ More than 10 years later, in holding that the indigent accused was entitled to counsel at the state's expense, the Court commented in *Anders v. California*,⁴⁶ that the state must "assure penniless defendants the same rights and opportunities on appeal—as nearly as practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."⁴⁷ And a year earlier, in *Harper v. Virginia Board of Elections*,⁴⁸ a poll tax case, the Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."⁴⁹

It is significant to note that the state enactments struck down in the foregoing cases were not specifically aimed at the economically disadvantaged; there was no intent to discriminate against the indigent. If the ultimate implication of cases such as these is that the poor and the economically disadvantaged must be protected against what has been termed "the effects of an adverse de facto classification,"⁵⁰ can

41. *Id.* at 492-93.

42. See generally Sager, *supra* note 1.

43. *Id.* at 775-77.

44. 351 U.S. 12 (1956).

45. *Id.* at 16.

46. 386 U.S. 738 (1967).

47. *Id.* at 745.

48. 383 U.S. 663 (1966).

49. *Id.* at 666. In this regard reference should also be made to *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub. nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). See also *McInnis v. Ogilvie*, 394 U.S. 322 (1969), *aff'g mem.* *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

50. This is a term used by both Professors Sager and Michelman, *supra* note 1. The related problem of the constitutional rights of the underprivileged in public

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we argue that exclusionary zoning, even in the benign sense where its adverse effects are institutional rather than intentional, must be struck down when it prevents housing mobility and perpetuates economic classification in housing in suburbia?

Two recent circuit court decisions dictate an affirmative answer to this question. Under these cases, minority groups may no longer be placed in disadvantageous positions in either acquiring or replacing their existing shelter. The economic rights of the poor are entitled to equal protection of the law. Displacees of an urban renewal project in *Norwalk CORE v. Norwalk Redevelopment Agency*⁵¹ based their action upon an alleged violation of the equal protection clause in that the Agency's plans did not attempt to assure relocation for Negro and Puerto Rican displacees to the same extent as for whites. Accepting for purposes of the motion that there was no specific intent to treat the races differently with regard to relocation, the court held that lack of intent to discriminate was insufficient to require dismissal of the complaint on the equal protection argument.⁵² The Agency had an affirmative duty to alleviate de facto segregation consequences of relocation for minority group citizens. Stating that, "[i]t is no secret that in the present state of our society discrimination in the housing market means that a change for the worse is generally more likely for members of minority races than for other displacees,"⁵³ the court squarely faced the underlying social issue. The court said:

[I]n many cases the relocation standard will be easier to meet for white than for non-white displacees. . . . We wish to stress that the specific problem is not that non-white displacees are, on the average, poorer than white displacees. That may be so, but it is a more general problem. What we are concerned with is that discrimination which forecloses much of the housing market to some racial groups, thereby driving up the price they must pay for housing. The situation is made worse by the fact that most people displaced by urban renewal are non-whites.⁵⁴

housing is discussed in Smith, *Due Process and the Poor in Public Housing*, 15 How. L.J. 422 (1969). The reader should be aware that the problem of housing the poor has not been one entirely within the purview of the judiciary. See, e.g., Berger, *Homeownership for Lower Income Families: The 1968 Housing Acts "Cruel Hoax,"* 2 CONN. L. REV. 30 (1969); Quirk & Wein, *Homeownership for the Poor: Tenant Condominiums, The Housing and Urban Development Act of 1968, and the Rockefeller Program*, 54 CORNELL L.Q. 811 (1969).

51. 395 F.2d 920 (2d Cir. 1968); noted, 82 HARV. L. REV. 691 (1969).

52. 395 F.2d at 931.

53. *Id.*

54. *Id.* at 931 & n. 18.

The non-intentional discriminatory classification was therefore specifically proscribed:

But the fact that the discrimination is not inherent in the administration of the program but is, in the words of the District Court, "accidental to the plan," surely does not excuse the planners from making sure that there is available relocation housing for all displacees. "Equal protection of the laws" means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."⁵⁵

It is noteworthy that the court defined the limitations of the equal protection guarantee in terms of economic means. Primary consideration was the cost to minority groups for replacement housing since it is relatively certain that non-whites pay a greater price for replacement housing than white citizens. This equal protection view of *Norwalk* was extended in *Southern Alameda Spanish Speaking Organization v. City of Union City*.⁵⁶ The appeal involved a referendum which annulled a city council rezoning of land from agricultural use to multi-family use. The city ordinance permitted construction of a federally financed housing project for low and moderate-income families. Although the circuit court affirmed a denial of plaintiffs' application for a preliminary injunction to compel the zoning change and for a three-judge court to entertain their constitutional claims,⁵⁷ it did recognize the socio-economic consequences of the claim of discrimination in housing made by the plaintiffs:

They assert that the effect of the referendum is to deny decent housing and an integrated environment to low-income residents of Union City. If, apart from voter motive, the result of this zoning by referendum is discriminatory in this fashion, in our view a substantial constitutional question is presented.⁵⁸

Continuing, the court placed the claims by plaintiffs in a purely economic context:

55. *Id.* at 931.

56. 424 F.2d 291 (9th Cir. 1970) [hereinafter cited as *SASSO*].

57. *Id.* at 296.

58. *Id.* at 295. On the question of the use of referendums to overturn open-housing ordinances favorable to minority groups, see *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Otey v. Common Council*, 231 F. Supp. 264 (E.D. Wis. 1968). The problem of anticipatory injunctive relief to enjoin the holding of the referendum where its result will be the enactment or repeal of a clearly unconstitutional ordinance is discussed in Comment, 82 HARV. L. REV. 1550 (1969).

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Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.⁵⁹

The thrust of these cases is clear: objective economic factors must be considered in defining the protection afforded by the equal protection clause; the issue is what *effect* does the governmental action have. Motive is irrelevant. Thus, if a community has a minority population residing in deteriorated housing, the town's zoning laws or urban renewal plan are unconstitutional if they work to prevent resolution of the housing problem.

II. THE RIGHT TO TRAVEL, ENTER, AND ABIDE

The *Norwalk* and *SASSO* cases deal only with the situation where municipalities have existing minority communities. The next logical issue occurs when a municipality does not have a minority community. This is the classic exclusionary zoning town that adopts zoning laws to perpetuate its middle-class orientation. Does this scheme constitute a violation of equal protection to the inner city resident? Based on the recognition in *Shapiro v. Thompson*⁶⁰ of the right to travel, enter, and abide, the answer must be in the affirmative.

The absence of a right to travel clause from our Constitution has been frequently noted, but it may be a retained right of the people under the ninth amendment. The right has been stated to be so fundamental that its insertion in the Constitution was unnecessary. The right to travel

. . . finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.⁶¹

Some jurists believe the right to travel has its origin in the commerce clause;⁶² others cite the privileges and immunities clause of

59. 424 F.2d 291, 295-96 (9th Cir. 1970) (footnotes omitted).

60. 394 U.S. 618 (1969).

61. *United States v. Guest*, 383 U.S. 745, 758 (1966).

62. *See, e.g., Edwards v. California*, 314 U.S. 160, 172-73 (1941).

the fourteenth amendment.⁶³ Another school of thought finds the right to travel to be inherently within the due process clause of the fourteenth amendment.⁶⁴ Regardless of its source, the right to travel is an established constitutional right.⁶⁵

Exclusionary zoning ordinances infringe upon and inhibit citizens from enjoying the full benefits of the right to travel. The right to travel cannot simply mean that a citizen is free to travel in interstate commerce. It also must be the right not to be excluded from a given state,⁶⁶ encompassing the converse right to establish residence within any desired state.⁶⁷

If the right to travel encompasses the right not to be excluded from a given state, may a municipality, an agent of the state, be permitted to exclude citizens and thereby determine the economic level of its inhabitants?⁶⁸ Wealthy communities, of course, defend their actions with the argument that their zoning ordinances, enacted under the police power of the state, protect them from the onslaught of low-income people who bring with them certain "evils" and force extra municipal expenditures.

Keeping the economically disadvantaged from residing in a given area is no longer recognized as a legitimate function of the police power. Rather, local governing units must learn to cope with housing mobility regardless of economic class. Exclusion of poverty-stricken individuals is unconstitutional. *Edwards v. California*⁶⁹ specifically dealt with the state's police power to exclude indigents:

The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . .

[Even if this be true, no state may] isolate itself from difficulties common to all of them by restraining transportation of persons

63. *Id.* at 178 (concurring opinion); *See also* *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) and *United States v. Wheeler*, 254 U.S. 281, 295 (1920).

64. *Williams v. Fears*, 179 U.S. 270, 274 (1900).

65. *See generally* Note, *Right to Travel versus Power to Conduct Foreign Affairs: Area Restrictions on Passports*, 50 CORNELL L.Q. 262 (1965).

66. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) and *Edwards v. California*, 314 U.S. 160, 173 (1941).

67. *Corfield v. Coryell*, 4 Wash. D.C. (Fed. Cas. No. 3, 230) 371, 381 (3rd Cir. 1823).

68. For a discussion of *Shapiro v. Thompson*, 394 U.S. 618 (1969), in this regard, see *Michelman*, *supra* note 1. For a general survey of the new equal protection, see Note, *Equal Protection*, 82 HARV. L. REV. 1065 (1969).

69. 314 U.S. 160 (1941).

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and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world.⁷⁰

Similarly, a municipality bounding a central city may not bar indigents on the grounds that indigents contribute to the evils that the police power is intended to curb. If it can be shown that indigents bring hardship upon a community as a whole, the remedy would be for that town to correct those evils rather than exclude all indigents as a class by means of the police power.

In *Shapiro v. Thompson*⁷¹ the Supreme Court struck down a state welfare residency law which "sought to fence out those indigents who seek higher welfare benefits."⁷² The statute was held unconstitutional because (among other reasons) it inhibited indigents' right to travel. The Court's analysis broadened the substantive basis for the equal protection guarantee in language applicable to exclusionary zoning.⁷³

The concurring opinion of Justice Stewart considered whether the fundamental right to travel includes a right to remain in any particular place and, if so, what is comprehended in this right to remain. Justice Stewart commented:

This constitutional right, which, of course, includes the right of "entering *and abiding* in any State in the Union," . . . is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards . . . it is a *virtually unconditional personal right*, guaranteed by the Constitution to us all.⁷⁴ (Emphasis added)

If there is a constitutionally protected right to enter and abide, the real question then becomes what quality of life must be made available to the new resident in the location he selects? A fundamental premise of this article is that no state or instrumentality of any state through zoning or otherwise, can prevent a citizen with the economic means from purchasing or renting a home in the location of his choosing. Moreover, and more important, there is an abiding national interest in a parity of housing opportunity in unrestricted locations which must be promoted across the economic spectrum in terms of both low and middle-income housing. Any parochial considerations

70. *Id.* at 173.

71. 394 U.S. 618 (1969).

72. *Id.* at 631.

73. *Id.* at 629-33.

74. *Id.* at 642-43.

justifying local exclusionary zoning necessarily must be subordinated to this national interest.⁷⁵

The definition of what we have termed the constitutionally protected right to enter and abide is buttressed by dicta in *Shapiro*. Insofar as individual liberty is concerned, individuals are free to move from one state to another in order to better their lives. For example, citizens are free to move from one state to another to take advantage of both better educational facilities and higher welfare benefits.⁷⁶

But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among other factors, the level of a State's Public Assistance. Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.⁷⁷

In the same vein, the philosophy of the *Shapiro* decision is thwarted by denying migrating indigents access to a community which provides a better life than that available in the squalor of the inner city.

It is evident that exclusionary zoning ordinances deny a specific class of citizens the right to enter a community with the hope of bettering their lives in terms of housing and education, among other things. If the right to enter and abide is a constitutionally permissible goal, then certainly exclusion of any citizen by a community violates his constitutional rights. As in the *Shapiro* case, the additional burden of expense placed on local governing units to implement this right will not justify its denial.

III. JONES V. ALFRED H. MAYER CO. AND ITS PROGENY

Prior to the assault on exclusionary zoning, proponents of equal housing focused their efforts on "fair housing"—admission of a selected few minority members to existing decent suburban housing. Although those cases dealt with a less sophisticated problem, the

75. The principle enunciated in *Shapiro* has been specifically applied to exclusionary zoning in a challenge recently instituted in the District Court for the Western District of New York. A class action alleges that a one year residency requirement used as a precondition for eligibility for public housing under the authority of the Rochester Housing Authority is unconstitutional. See *Hayes v. Rochester Housing Authority*, — F. Supp. — (W.D.N.Y. 1970).

76. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

77. *Id.* at 632; cf. *Watson v. Memphis*, 373 U.S. 526, 537 (1963) where the Court stated: ". . . it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them than to afford them."

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leading recent cases in that area show an increasing awareness of protection for the economically disadvantaged.

Although *Jones v. Alfred H. Mayer Co.*⁷⁸ and several decisions following it were primarily statutory holdings based upon the 1866 Civil Rights Act, nevertheless, the language of the opinions and the factual background clearly indicate the Court's concern with the economic consequences of discriminatory housing, a concern expressed in *Shapiro v. Thompson*⁷⁹ in the context of traveling, entering and abiding.

In a discussion within the context of the thirteenth amendment and the derivative remedial statute, 42 U.S.C. § 1982,⁸⁰ the Court in *Jones* commented:

Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to “go and come at pleasure” and to “buy and sell when they please”—would be left with “a mere paper guarantee” if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, *the right to live wherever a white man can live.*⁸¹ (Emphasis added)

Despite the breadth of this language, reliance on the thirteenth amendment necessarily limits its application to nonwhites. It does not focus on the broader questions with which we are concerned relating to the economically disadvantaged without regard to race. Under *Jones*, if an exclusionary zoning ordinance could be shown to exclude all black people, whether for economic or racial reasons, then the ordinance would fall. However, clearly segregationist type ordinances are rarely found today.⁸² Unfortunately, the Court found it “unneces-

78. 392 U.S. 409 (1968). The *Jones* case is analyzed in Note, *The “New” Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294 (1969).

79. 394 U.S. 618 (1969).

80. Section 1982 provides “all citizens of the United States the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

81. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) (footnotes omitted).

82. Cf. LA. REV. STATS. 33:4771 which permits a municipality to withhold a building permit for construction in either a Negro or Caucasian community if the desired construction is for a member of the opposite race. Attacked as unconstitutional in *Tyler v. Harmon*, 160 La. 943, 107 So. 704 (1926). Although sustained by the state court, the Supreme Court reversed in 273 U.S. 668 (1927) on the authority of *Buchanan v. Warley*, 245 U.S. 60 (1917).

sary to decide whether that discrimination also violated the Equal Protection Clause of the Fourteenth Amendment."⁸³

Sullivan v. Little Hunting Park, Inc.,⁸⁴ decided a year and one-half after *Jones*, significantly expanded the remedy for housing discrimination first enunciated in *Jones*. The *Sullivan* issue was whether a membership corporation chartered to operate a community swimming pool could refuse to approve the assignment of a membership share to a Negro upon his leasing a home in the community. The Court held that 42 U.S.C. § 1982 protected plaintiff's right to lease.⁸⁵ In answer to the argument that the Court, in assessing damages, was fashioning a remedy upon which the statute was silent, the Court held that

. . . where *federally protected rights* have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief.⁸⁶ (Emphasis added)

The significance of *Sullivan* and *Jones* for exclusionary zoning is twofold. First, the Court recognized the principle of parity of purchasing power by phrasing the holdings in terms of a freedom to "go and come," and "buy and sell" when and as a person desires, regardless of his race. Unmistakably the touchstone of both decisions is the theory that "a dollar in the hands of a Negro [should] . . . purchase the same thing as a dollar in the hands of a white man."⁸⁷ Second, *Sullivan* and *Jones* indicate a determination to fashion a remedy where none previously existed when a right is deemed to be federally protected, although the source of that right is not clearly delineated.⁸⁸

Unfortunately, our segregated suburbs in not recognizing these rights erect social barriers masked as economic ones. *Hunter v. Erickson*⁸⁹ illustrates the right-remedy dichotomy of *Jones* and *Sullivan*. Although ostensibly involving equal protection, the importance of this case is that a state, even under the guise of popular sovereignty, may no longer suffer a local attempt to disadvantage a particular group. It focuses on the power of municipalities to regulate housing

83. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 & n. 5 (1968).

84. 396 U.S. 229 (1969).

85. *Id.* at 237.

86. *Id.* at 239, quoting from *Bell v. Hood*, 327 U.S. 678, 684 (1946).

87. *Id.* at 236 and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

88. See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 & n. 13 (1968).

89. 393 U.S. 385 (1969).

for the economically disadvantaged. *Hunter* struck down a municipal charter amendment preventing the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters of Akron, Ohio. The amendment had passed by a majority at a general election after a petition of 10% of the voters had suspended ordinances requiring voter approval. The court held:

The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed. . . . [T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.⁹⁰

Each of the decisions herein discussed has added to the evolving theory of economic equal protection. With indirection and without a uniform plan to focus on exclusionary zoning, the cases nevertheless are applicable. We have reviewed the criminal procedure cases, *Griffin* and *Anders*, and *Harper*, which tell us that the intent of the state or its instrumentalities in enacting discriminatory legislation is irrelevant. It is not the plan, however well intentioned, but the result which must be considered. *Norwalk* and *SASSO* applied this theory to urban renewal plans and exclusionary zoning. This is of great importance in challenging exclusionary zoning, since obviously any zoning ordinance can be justified by the state's interest in rational land use, although the ordinance also effectively excludes the economically disadvantaged from suburbia. The *Hunter* holding, by clear implication, tells us that even the exercise of local sovereignty will be rejected if its result can, or will, be discrimination in housing. Finally, the clear thrust of the Court's theory in *Shapiro*, *Jones*, and *Sullivan*, despite conceptual differences, is the determination to protect minority economic rights—a dollar in the hands of any citizen entitles him to buy the same house as the most prosperous citizen. Whether exclusionary zoning can withstand the implementation of these newly formulated economic rights cannot be seriously questioned. It cannot. However, some procedural problems in terms of the fourteenth amendment remain.

90. *Id.* at 392-93.

IV. A POSTSCRIPT ON STATE ACTION

If the right to relief from the results of exclusionary zoning is found in the equal protection clause of the fourteenth amendment, any litigant must, of course, demonstrate "state action" as a condition precedent to invoking the clause.⁹¹ Does the discriminatory enforcement of a zoning ordinance at the local level, without more, constitute state action? State enabling legislation for zoning may not be a sufficient nexus between local discrimination and state action to invoke the protection of the fourteenth amendment. On the other hand, if a local zoning board of appeals makes an exclusionary decision, later judicial enforcement of that decision may constitute state action under the rationale of *Shelley v. Kraemer*.⁹²

Never again applied or expanded by the Court since its decision some twenty years ago, *Shelley* remains one of the most advanced pronouncements on the state action question. Its theory, should the Court ever again elect to apply it, is specifically applicable to our situation.⁹³ Holding that a private restrictive covenant based upon race was not itself constitutionally prohibited, the Court nevertheless found state action in the enforcement of that covenant by injunction in the local courts.⁹⁴ Similarly, this reasoning should apply to any judicial participation in a decision by a zoning board resulting in the exclusion of economically disadvantaged minorities.

Given the Court's reluctance to apply *Shelley*, we must inquire whether other inroads have been made into the state action concept which may be of assistance in any suit challenging exclusionary zoning. The concurring opinion of Justice Douglas in the Court's 1967 disposition of *Reitman v. Mulkey*⁹⁵ must be considered.

91. The commentary on the necessity, or lack of it, for "state action" before invoking the fourteenth amendment is prolific. The following are illustrative: Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Robinson, *The Possibility of a Frontal Assault on the State Action Concept, With Special Reference to the Right to Purchase Real Property Guaranteed in 42 U.S.C. § 1982*, 41 NOTRE DAME LAWYER 455 (1966).

92. 334 U.S. 1 (1948).

93. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

94. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

95. 387 U.S. 369 (1967). With regard to this case see the general discussion in Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 73-74. See also Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in Private Housing*, 52 CALIF. L. REV. 1 (1964).

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In *Reitman*, a Negro couple sued for alleged discriminatory failure to rent certain property. The suit was based upon provisions of the California Civil Code prohibiting any discrimination by reason of race in such situations. The state court dismissed the suit on the ground that Proposition 14 (Article 1, Section 26 of the California Constitution) repealed the code provisions relied upon.⁹⁸ Section 26 provided that:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.⁹⁷

The appeal to the Supreme Court was based upon an alleged violation of equal protection; the Court held that the constitutional provision involved the state in private discrimination to a degree sufficient to invoke the prohibitions of the fourteenth amendment.⁹⁸ However, the majority did not answer the question as to the propriety of the underlying private discrimination.

Justice Douglas' concurring opinion formulated the public function theory while stating the basis upon which he would find the state involvement necessary to use the fourteenth amendment.⁹⁹ Identifying the problem in *Reitman* as "in the realm of zoning, similar to the one we had in *Shelley v. Kraemer* . . .,"¹⁰⁰ Justice Douglas asserted:

Zoning is a state and municipal function. . . . When the State leaves that function to private agencies or institutions which are licensees and which practice racial discrimination and zone our cities into white and black belts or white and black ghettos, it suffers a governmental function to be performed under a private auspices in a way the State itself may not act.¹⁰¹

Given the close connection between the private sale of housing and the zoning function, the existence and extent of state licensing and regulation in the area, and the large amount of public financing in-

96. The cases in the state court were *Mulkey v. Reitman*, 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 (1966) and *Prendergast v. Snyder*, 64 Cal. 2d 877, 50 Cal. Rptr. 903, 413 P.2d 847 (1966).

97. CAL. CONST. art. I, § 26.

98. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

99. *Id.* at 386 (concurring opinion).

100. *Id.* at 381 (concurring opinion).

101. *Id.* at 384 (concurring opinion).

involved, Justice Douglas concluded that housing was itself part of the public domain, involving a public function, and therefore subject to the prohibitions of the fourteenth amendment.¹⁰²

Providing housing for the citizenry of the state is unquestionably a constitutionally valid public purpose.¹⁰³ Thus, it should be evident that any instrument limiting the implementation of housing (*e.g.*, zoning) is sufficiently vested with a public purpose and a public function to permit direct application of the fourteenth amendment.

The fifth and fourteenth amendments to the United States Constitution prohibit deprivation of life, liberty, and property without due process of law. Substantive due process traditionally has been viewed as protecting the property element of the triumvirate of rights and procedural due process, the liberty. The due process right to life—the third element—combined with the ninth amendment right of all citizens to an economic subsistence, may be said to guarantee citizens the right to equal housing opportunities for

. . . housing is not simply a question of shelter. It is much more and its social and human implications are far greater. A myriad of statutes and social surveys have documented the relationship between inadequate housing and inability to learn, between poor housing and poor health; between unsuitable housing and unsuitable emotional development; between low quality housing and high instance of crime.¹⁰⁴

The involvement of federal or state government in housing finance is additional evidence that housing is a public function subject to the equal protection clause of the fourteenth amendment.

Most federal housing programs attempt to assure a minimal flow of mortgage money. Thus the principal aim of the Veterans Administration (VA) and the mortgage insuring function of the Department of Housing and Urban Development (HUD) is to provide credit for home purchases by insuring the lenders against loss. The objective of the Federal National Mortgage Association and the Government

102. *Aloi, Goldberg & White, supra* note 1.

103. *New Jersey Mortgage Finance Agy. v. McCrane*, 56 N.J. 414, 267 A.2d 24 (1970); *Redfern v. Board of Comm'rs*, 137 N.J.L. 356, 59 A.2d 641 (E. & A. 1948); *West Virginia Housing Development Fund v. Coperhaven*, 171 S.E.2d 545 (W. Va. 1969); *Cremer v. Peoria Housing Authority*, 399 Ill. 579, 78 N.E.2d 276 (1948); *Massachusetts Housing Finance Agy. v. New England Merchants Nat'l Bank*, 249 N.E.2d 599 (Mass. 1969); *Hogue v. North Little Rock Housing Authority*, 144 S.W.2d 49 (Ark. 1940).

104. *Ryan, Decent Housing as a Constitutional Right*, 14 *How. L.J.* 338, 340 (1968).

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National Mortgage Association is to increase the liquidity of government insured mortgages by providing a secondary market facility to widen the market for government insured mortgages. The Federal Home Loan Bank Board, a part of the Home Loan Banking System, represents another tool to provide credit to home financing institutions.

The federal government also has established new institutions apart from traditional lending sources. The Department of Housing and Urban Development, for example, directly develops low-rent housing facilities for lower-income families through local housing authorities. In practice, municipalities are given federal assistance for renewal of their housing supply by use of subsidies to "write down" the cost of land acquisitions through local urban renewal agencies.

The states have done likewise. New Jersey, for example, has a varied complex of techniques to meet the housing needs of its citizens. It provides housing assistance tools like the Limited-Dividend Law,¹⁰⁵ the forerunner of modern middle-income housing. This law is designed to attract private industry into providing housing for persons of moderate means by making limited state assistance available principally by real estate, franchise, and other tax exemptions. Another vehicle is the Urban Renewal Corporation and Association Law,¹⁰⁶ which authorizes certain qualified urban renewal corporations and associations to undertake projects for the redevelopment of blighted areas. Such projects may include the development of the land as well as the construction and operation of housing, commercial, industrial, cultural, and recreational projects. By authorizing municipalities to take property by condemnation for an urban renewal corporation, the law was designed to attract private participation in this field. Assistance to the urban renewal corporation is provided in the form of partial tax exemptions. The Senior Citizens Nonprofit Rental Housing Tax Law,¹⁰⁷ provides special tax exemptions for the construction of housing for elderly people under federal law by nonprofit corporations. The Demonstration Grant Law,¹⁰⁸ creates within the State Department of Community Affairs a revolving fund for the purpose of financing grants for the demonstration of new techniques and materials of housing construction and rehabilitation. The law

105. N.J. STAT. ANN. § 55:16-1 *et seq.* (1964).

106. N.J. STAT. ANN. § 40:55C-40 (1967).

107. N.J. STAT. ANN. § 55:14I-1 *et seq.* (1969).

108. N.J. STAT. ANN. § 52:270-59 *et seq.* (1969).

also authorizes demonstration programs and the granting of money from the fund for other activities which will prevent and eliminate slums and blight. It further provides for interest-free advances to nonprofit and mutual housing sponsors to defray cost of housing projects. Another technique to meet the need for housing has been the creation of the Housing Finance Agency¹⁰⁹ for the purpose of providing direct mortgage financing to certain qualified housing sponsors. This is accomplished by the issuance of tax exempt revenue bonds and use of the proceeds to make long term commitments for construction and rehabilitation of middle-income housing. Finally, the state has sought to directly supplement the flow of funds from traditional lenders in the Mortgage Finance Agency Act.¹¹⁰

If the federal or state government financing the project acquiesced in a municipality's exclusionary zoning decision, this might constitute additional evidence of the affirmative state participation ordinarily required to utilize the fourteenth amendment. Thus, when a state housing finance agency supplies 90% or 100% mortgage financing in a typical 80-20 zoned town,¹¹¹ even though the housing sponsor determines a market exists for three-bedroom apartments, the state acquiescence in local zoning may constitute state action.

It is not our intention to exhaustively treat the state action question, but the cited opinions do provide a sufficient theoretical underpinning for a finding of state action by any court persuaded on the merits that exclusionary zoning has resulted in a denial of substantive equal protection. Having concluded our discussion of the fourteenth amendment arguments, we shall now consider whether other substantive bases are available for a constitutional attack on exclusionary zoning.

V. THE NINTH AMENDMENT

The ninth amendment to the United States Constitution declares that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The basic question to be resolved prior to applying this amendment to exclusionary zoning is whether it is a residuary clause protecting from infringement any number of fundamental non-enumerated personal rights or whether it is simply an assurance that the Constitution limits

109. N.J. STAT. ANN. § 55:14J-1 *et seq.* (1969).

110. N.J. STAT. ANN. § 17:1B-4 *et seq.* (1970).

111. *See, e.g.,* EAST BRUNSWICK TWP., N.J., REV. ORD. ch. 24-6(1) (1968) at 272:

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the federal government to the powers expressly granted or necessarily implied.¹¹² We believe that the former is the correct interpretation based upon the constitutional debates of this amendment.

James Madison, the draftsman of the amendment, explained the scope of the amendment as he understood it:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.¹¹³

As originally drafted, this fourth resolution—which was after revision to become the ninth amendment—read as follows:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹¹⁴

Although edited down to the language of the ninth amendment as we know it, this constitutional history makes clear the intention of

The size and occupancy of the individual dwelling unit in any project shall be limited as follows:

1. No dwelling shall have more than four rooms or more than two bedrooms.

2. Alcoves, pantries, dining areas, oversized closets, partial rooms or other open areas capable of being screened or partitioned and used as additional bedrooms are specifically prohibited. . . .

4. The occupancy of two-bedroom apartments shall be limited to four persons and the occupancy of one-bedroom apartments shall be limited to three persons.

112. The former view was articulated by Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965). The latter view was stated by Justice Black, dissenting in *Griswold*, at 520. The "pre-*Griswold*" commentary includes B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 *IND. L.J.* 309 (1936); and Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 *N.Y.U.L. REV.* 787, 802-06 (1962).

113. 1 *ANNALS OF CONG.* 456 (1834) [1789-1791].

114. *Id.* at 452. On the role of James Madison in drafting the ninth amendment see Dunbar, *James Madison and the Ninth Amendment*, 42 *VA. L. REV.* 627, 643 (1956).

the framers to leave the Bill of Rights open-ended to protect any number of other non-enumerated fundamental rights retained by the people. The language of one of the concurring opinions in the Supreme Court's 1965 decision in *Griswold v. Connecticut*¹¹⁵ reaffirms this interpretation in a modern context.

Griswold, on its facts, was unlike the exclusionary zoning question with which we are primarily concerned. There the Court struck down, on due process grounds, a Connecticut statute prohibiting the use of contraceptives "for the purpose of preventing conception" but not of preventing disease.¹¹⁶ The fundamental due process value being protected was, the majority said, the privacy of the marital relationship.¹¹⁷ It was in the debate over the source of this value or right that Justice Goldberg restated the framers' original conception of the ninth amendment.¹¹⁸

Commenting that "the [due process] concept of liberty . . . is not confined to the specific terms of the Bill of Rights,"¹¹⁹ Justice Goldberg asserted that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment . . . protected by the Fourteenth Amendment from infringement by the States."¹²⁰ Justice Goldberg stated earlier in his opinion:

The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.¹²¹

115. 381 U.S. 479 (1965).

116. The rationale for the majority opinion is set forth by Justice Douglas. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965). The statute was held unconstitutional by the majority because it violated a constitutionally protected right to privacy, the basis of which was held to be the "penumbras, formed by emanations" from the first, third, fourth, fifth, and ninth amendments which combined to form a "zone of privacy." *Id.*

117. *Id.*

118. *Id.* at 488.

119. *Id.* at 486.

120. *Id.* at 499.

121. *Id.* at 488. The commentary prompted by the varying constitutional views stated in *Griswold* generally supported both the approach of the majority in stating the penumbra theory and the reliance of Justice Goldberg in the concurring opinion on the ninth amendment. *See, e.g.*, Dixon, *The Griswold Penumbra*, 64 MICH. L. REV. 197 (1965).

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The benefits of a theory based on the ninth amendment are not exclusively substantive; procedurally, it would appear that fundamental personal rights can be protected against individual infringement without the state action prerequisite of the fourteenth amendment.¹²² The real issue thus becomes whether decent shelter is a fundamental non-enumerated personal right protected by the ninth amendment. In a modern context this issue becomes whether one is entitled to a home in the suburbs, a home located wherever one's buying power will permit it to be built. Despite Justice Holmes' comment in *Block v. Hirsch*,¹²³ decided in 1921, that housing was a "necessary of life,"¹²⁴ it was not until 1962 in *Colorado Anti-Discrimination Commission v. Case*,¹²⁵ that a court spoke of housing in terms of the ninth amendment.

In upholding the authority of the Commission to enter an order enjoining a refusal to sell real property by reason of race, the Supreme Court of Colorado stated:

We have no hesitancy in stating that there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions. . . . Natural rights—inherent rights and liberties, are not the creatures of constitutional provisions either at the national or state level. . . . The Ninth Amendment to the Constitution of the United States . . . makes clear that "The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people." A proper construction of this single sentence entitles that provision to far greater consideration in the definition of and the protection afforded to "inherent rights" than has heretofore been recognized.¹²⁶

122. See, e.g., the discussion in Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1068-71 (1968). The application of the ninth amendment to situations not involving governmental restraint has not, to our knowledge, been judicially vested as yet. Parenthetically, we would also mention that some of the reported cases have subjected the ninth amendment to what amounts to a federal "color of right" limitation insofar as these cases have declined to invoke the ninth amendment where the complained of governmental action is found to be based upon a granted or enumerated power. See, e.g., *United Public Workers of America v. Mitchell*, 330 U.S. 75, 95-96 (1947). This view has been criticized, we think correctly, in Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A.J. 1033, 1036 (1967).

123. 256 U.S. 135 (1921). See also the comment of Chief Justice Phillips for the Supreme Court of Texas in *Spann v. City of Dallas*, 111 Tex. 350, 357, 235 S.W. 513, 516 (1921).

124. *Block v. Hirsch*, 256 U.S. 135, 156 (1921).

125. 151 Colo. 235, 380 P.2d 34 (1962).

126. *Id.* at 243-44, 380 P.2d at 39-40.

The court analyzed the ninth amendment protections in terms of the individual right to housing:

We constantly speak of "equality of opportunity" as a foundation stone of the American way of life. We solemnly proclaim that "All men are created equal"; that "all men" have the inalienable right of acquiring, possessing and protecting property. We hold that as an unenumerated inalienable right a man has the right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination against him on account of his race, creed or color. The act of the legislature here in question is fully justified by . . . the Ninth Amendment of the Constitution of the United States.¹²⁷

Certainly, the ninth amendment theory should apply to discriminatory housing, whether the perpetrators are individual sellers or municipal officials enacting or administering local zoning ordinances. It remains to be seen whether any other court will adopt and apply this theory.

VI. THE SUPREMACY CLAUSE

Considering the federal housing and civil rights acts,¹²⁸ together with the federal constitutional provisions—the ninth, the thirteenth, and the fourteenth amendments—we might well ask whether there is an overriding federal interest in equal housing opportunity. If so, does Article VI, clause 2 of the United States Constitution, providing that the Federal Constitution and all laws enacted pursuant thereto shall be the supreme law of the land, have any application to exclusionary zoning? Before proceeding to the answer, a threshold question must be considered. Even if an overriding federal interest

127. *Id.* at 247, 380 P.2d at 41. The definition of the "other rights" retained by the people has apparently not proceeded in other areas. One of the problems may be the reluctance of courts to rely upon the substantive protection of the ninth amendment in any particular case where a constitutional argument can be based on another amendment specifically enumerating the right in question. *See, e.g.,* United States v. Kahn, 251 F. Supp. 702 (S.D.N.Y. 1966), *aff'd* 366 F.2d 259 (2d Cir. 1966), *cert. denied*, 385 U.S. 948 (1966); Roth v. United States, 354 U.S. 476, 492 (1957). In addition, a generally restrictive view of the scope of the ninth amendment has been taken in some of the commentary. *See, e.g.,* Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 790-92 (1959).

128. 42 U.S.C. §§ 1982, 1983 (1964); United States Housing Act of 1937 § 1 *et seq.* as amended, 42 U.S.C. § 1401 (1964); Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1964); Fair Housing Act of 1968 § 801 *et seq.*, 42 U.S.C. § 3601 *et seq.* (1968); Demonstration Cities and Metropolitan Development Act of 1966 § 101 *et seq.*, 42 U.S.C. § 3301 *et seq.* (1966); UNITED STATES CONST. art. VI, cl. 2; DEP'T OF HOUSING AND URBAN DEVELOPMENT, LOW RENT HOUSING MANUAL § 205.1(g) (1965).

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is identified, there is a rule of judicial restraint prohibiting the invocation of the supremacy clause unless or until alternative constitutional remedies have been exhausted or found inapplicable. We submit that this limitation is self-imposed by the federal judiciary without bases in the Constitution and therefore is unnecessary.¹²⁹

*Ranjel v. City of Lansing*¹³⁰ illustrates an appropriate application of this clause to housing. *Ranjel* was a class action by Negroes and Mexican-Americans to enjoin a proposed referendum on an ordinance enacted by the city council amending the zoning ordinance to authorize federally approved low-cost housing in a white neighborhood. The district court commented:

Zoning ordinances have long been used to contain particular racial groups inside the ghetto. This has been true in school zoning as well as property zoning. Improvement in national housing patterns is also inhibited by old zoning requirements which are often used as tools to resist change.

It is critically important to classify these zoning practices for what they are: sophisticated means of invidious racial discrimination; invidious because racial discrimination is difficult to prove in this otherwise acceptable means of city planning.¹³¹

Reviewing the facts, the court concluded that "the motivation behind circulation of the referendum petitions and the attempts to hold the referendum for denying the zoning variance is in major part based on economic and racial discrimination in housing."¹³²

In analyzing the legal theory for relief, the court first cataloged the federal housing acts and HUD directives and regulations and concluded: "It is obvious that the proposed referendum in this case, if passed, would seriously impede this federal policy."¹³³ Specifically, on the basis of the federal supremacy clause, the court held:

Article VI, clause 2, of the United States Constitution provides that the Constitution and all laws enacted pursuant thereto shall be the supreme law of the land. An action approved by the entire electorate of the State of Michigan could not serve to nullify rights

129. The view has been expressed that the weight of the supremacy clause only comes to bear when a conflict arises "between federal law and application of an otherwise valid state enactment." *Hamm v. City of Rock Hill*, 379 U.S. 306, 312 (1964).

130. 293 F. Supp. 301 (W.D. Mich. 1969), *rev'd* 417 F.2d 321 (6th Cir. 1969).

131. *Id.* at 306 (footnotes omitted).

132. *Id.* at 307.

133. *Id.* at 309.

created by or arising out of the United States Constitution. There is little doubt that the action by the City of Lansing in this case of conducting this racial referendum would deprive plaintiffs of fundamental constitutionally secured rights and would serve only those forces of discrimination which seek to frustrate the aforementioned constitutionally declared policy. Because of the supremacy clause of the Constitution, that action is impermissible.¹³⁴

Although the *Ranjel* case has now been reversed on appeal to the Court of Appeals for the Sixth Circuit,¹³⁵ the analysis of the district court remains irrefutable on proper facts. Like substantive equal protection and the ninth amendment, the supremacy clause is but another example of the multi-faceted assault on exclusionary zoning. Although a direct hit has yet to be scored, the cumulative pressure from the varied challenges to exclusionary zoning continues to mount, with the promise of total revision in the not too distant future.

All of the remedies thus far discussed are imposed from outside the system of local zoning ordinances. By and large, they proceeded upon two basic assumptions. First, that internal revision of zoning ordinances by the amendatory or variance procedures is impossible. Second, that since *Euclid*, no challenge to zoning in terms of the police power would succeed. Recent developments have now raised the question whether these assumptions necessarily will remain correct.

VII. REMEDIES WITHIN THE ZONING SYSTEM

Since *Euclid*, few zoning ordinances have been struck down for having no substantial relation to the public health, safety, morals, or general welfare. Courts have taken a parochial view of which "public" and whose "general welfare," and have held that exclusionary controls designed to preserve the character of a given community were a legal exercise by a municipality of the state's police power. However, as in the equal protection cases where recognition has been given to the larger "public" and the entire citizenry's "general welfare," recent cases working within the zoning system are producing the first important results.

Recognizing that "zoning serves the public at large and the community as well as individual property owners,"¹³⁶ New Jersey recently provided the first clear legal ruling that a minimum construction

134. *Id.* at 310.

135. 417 F.2d 321 (6th Cir. 1969).

136. *Baskerville v. Town of Montclair*, Docket No. L-35387-68 P.W. (N.J. Super. Ct., Mar. 30, 1970) at 4.

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cost requirement for residential zoning by a local community is illegal because it is unrelated to the health, safety, or general welfare of the community. *Baskerville v. Town of Montclair*¹³⁷ determined that a planning board could not rezone property on the condition that dwellings in the construction zone would be valued (in terms of construction costs) at a minimum of \$35,000 each. Although legislative authority permitted a planning board to impose conditions in the public interest on the approval of a subdivision,¹³⁸ the court noted the inability of counsel to substantiate the need for minimum construction cost conditions. The court stated that "such a requirement appears to be so clearly unrelated to the health, safety or general welfare of the community that governing bodies [in the past] have shunned it as part of their zone plans,"¹³⁹ and concluded that it was "plain that the minimum cost requirement is unrelated to the health, safety or general welfare of the community."¹⁴⁰ The ordinance was thereby rendered invalid by inclusion of such conditions. The court, by way of dictum, noted that, "[p]ossibly a condition fixing floor area of the dwellings would have been more appropriate, but basically, floor area when translated into dollars of construction cost, results in a dollar limitation."¹⁴¹ The *Montclair* decision thus proscribes both minimum cost conditions and floor area conditions. Although a marked departure from the traditional view of our state courts,¹⁴² it is significant that this trial court decision is emphatic and precise in holding to the contrary. The decision does not simply shift the burden of proving the reasonableness of the minimum construction cost or floor space condition to the municipality. Rather, it eliminates that question entirely in holding that as a matter of law these conditions cannot be made a part of an amendment to a zoning ordinance.

137. *Id.*

138. *Id.* at 5.

139. *Id.* at 7.

140. *Id.*

141. *Id.*

142. *See, e.g.,* *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed for want of a substantial federal question*, 344 U.S. 919 (1953). Two articles by Professor Haar criticized the *Wayne* case: Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954). The second article was a response to Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954), which was written in answer to Professor Haar's first article.

During 1970, the Pennsylvania Supreme Court struck down two exclusionary municipal zoning ordinances. In *Kit-Mar Builders, Inc. v. Zoning Board of Adjustment*¹⁴³ a contract vendee agreed to purchase certain property contingent upon rezoning to permit construction of single-family residences on lots of one acre; existing zoning required lots of no less than two acres along existing roads and not less than three acres in the interior. After being denied a zoning change and building permit, Kit-Mar appealed to the zoning board on the ground that the zoning was not reasonably related to the health, safety, and general welfare; no attempt was made by Kit-Mar to seek a variance on the ground of undue hardship.¹⁴⁴ The zoning board denied Kit-Mar's request for rezoning on the ground that smaller lot sizes would create a sewage problem. Kit-Mar then appealed to common pleas where the board was reversed. On appeal, the Pennsylvania Supreme Court affirmed.¹⁴⁵

Relying heavily on its previous opinion in *National Land & Investment Co. v. Kohn*¹⁴⁶ the court in *Kit-Mar* held that "[a]bsent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable."¹⁴⁷ Clearly recognizing the real issues, the court concluded that "[t]hinly veiled justification for exclusionary zoning will not be countenanced by this Court."¹⁴⁸ Thus, "whether a potential sewerage problem exists or not is irrelevant, however, since we *explicitly rejected* the argument that sewerage problems could excuse exclusionary zoning in *National Land*."¹⁴⁹

The court recognized that although the inhabitants of the predominantly white middle class enclave of Concord Township might attempt to prevent in their town the destruction and decay common to our urban communities, it concluded that the manner in which they acted to do so was repugnant to our democratic system:

We once again reaffirm our past authority and refuse to allow the township to do precisely what we have never permitted—keep out people, rather than make community improvements,

143. — Pa. —, 268 A.2d 765 (1970).

144. *Id.* at —, 268 A.2d at 766.

145. *Id.* at —, 268 A.2d at 770.

146. 419 Pa. 504, 215 A.2d 597 (1965).

147. *Kit-Mar Builders, Inc. v. Zoning Bd. of Adjustment*, — Pa. —, 268 A.2d at 767.

148. *Id.* at —, 268 A.2d at 770.

149. *Id.* at —, 268 A.2d at 767 (emphasis by the court).

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The implication of our decision in *National Land* is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.¹⁵⁰

This regional view is essentially correct. Municipalities derive their power from the state.¹⁵¹ Unlike the United States, which was formed by a number of independent entities, a state's subdivisions are created by the state and therefore have no power independent of state enabling law.¹⁵² If administratively appropriate, there is no legal bar to a state abolishing all subdivisions.¹⁵³ Thus, the Pennsylvania Supreme Court is correct when it states that the residents of a given township should not have the power to make a decision which fails to look at the needs of the area in which it is located. It has an affirmative duty to consider the regional reach of population growth and relocation problems.¹⁵⁴

An important aspect of *Kit-Mar* is the reversal of the burden of proof. Ordinarily, the party challenging a municipal ordinance must

150. *Id.* at —, 268 A.2d at 769.

151. The rule is generally stated that in the absence of constitutional prohibitions, the legislature may create or destroy, combine or divide, and enlarge or restrict municipal corporations. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960); *Williams v. Eggleston*, 170 U.S. 304, 310 (1898); *LaGuardia v. Smith*, 288 N.Y. 1, 41 N.E.2d 153 (1942); *New York v. Lawrence*, 250 N.Y. 429, 165 N.E. 836 (1929); *Adriaansen v. Board of Education*, 222 App. Div. 320 (4th Dep't 1927), *aff'd* 248 N.Y. 542 (1928).

152. *See* cases cited *supra* note 151.

153. *New York v. Lawrence*, 250 N.Y. 429, 165 N.E. 836 (1929).

154. *See, e.g.*, Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); *Bowe, Regional Planning versus Decentralized Land-Use Controls—Zoning for the Megalopolis*, 18 DE PAUL L. REV. 144 (1968); *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954).

It is shocking to think that it has taken our society nearly 45 years to realize the interdependence of our political subdivisions. Thus, the very case in which the Supreme Court first sanctioned zoning involved its refusal to help the impoverished inhabitant of a tenement during the 1920's. The Court approved the exclusion of apartment houses from a Cleveland, Ohio suburb, referring to the "apartment house [as] a mere parasite . . ." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

show that the ordinance is either confiscatory as to him or arbitrary and unreasonable and thus unrelated to the local police power.¹⁵⁵ In *Kit-Mar*, however, the court plainly indicated that large lot zoning, without more, was suspect and that under the circumstances it was incumbent upon the township to show extraordinary circumstances justifying the provision.

The second Pennsylvania decision attacked the omission of a classification for apartment use. After denial of a building permit, plaintiff in *Appeal of Girsh*¹⁵⁶ eschewed the ordinance procedure for variances and directly attacked the ordinance. The zoning board sustained the denial and the trial court affirmed the board action. On appeal, the township argued in justification of the decision that plaintiff should have perfected the administrative variance procedure before proceeding with any direct attack on the ordinance. The supreme court made short work of that argument, for as in *Kit-Mar* it clearly recognized the real issue:

By emphasizing the possibility that a given land owner *could* obtain a variance, the Township overlooks the broader question that is presented by this case. In refusing to allow apartment development as part of its zoning scheme, appellee has in effect decided to zone *out* the people who would be able to live in the Township if apartments were available.¹⁵⁷

Earlier, Justice Roberts, speaking for the majority, disposed of the township's argument:

In light of this standard, appellee's land-use restriction in the case before us cannot be upheld against constitutional attack because of the *possibility* that an *occasional* property owner may carry the heavy burden of proving sufficient hardship to receive a variance. To be constitutionally sustained, appellee's land-use restriction must be reasonable. If the failure to make allowance in the Township's zoning plan for apartment uses is unreason-

155. See, e.g., *Scarsdale Supply Co. v. Village of Scarsdale*, 8 N.Y.2d 325, 329, 206 N.Y.S.2d 773, 775, 170 N.E.2d 198, 200 (1960). This case is discussed in Schwartz, *1961 New York Law Survey: Administrative Law*, 36 N.Y.U.L. Rev. 1429, 1433-44 (1961). A second ground for unconstitutionality ordinarily argued is that the ordinance as applied to the particular piece of property is confiscatory insofar as it restricts that property to a use for which it is not adapted. See *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931).

156. 437 Pa. 237, 263 A.2d 395 (1970).

157. *Id.* at —, 263 A.2d at 397. On the question of apartment construction in the suburbs, see Comment, *The Battle for Apartments in Benign Suburbia: A Case of Judicial Lethargy*, 59 Nw. U.L. Rev. 345 (1964), and Comment, *The Legal Significance of Cost Considerations in the Regulation of Apartments by Suburbs*, 59 Nw. U.L. Rev. 413 (1964).

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able, that restriction does not become any the more reasonable because once in a while, a developer may be able to show the hardship necessary to sustain a petition for a variance. At least for the purposes of this case, the failure to provide for apartments anywhere within the Township must be viewed as the legal equivalent of an explicit total prohibition of apartment houses in the zoning ordinance.¹⁵⁸ (Emphasis by the court)

Having failed with its variance argument, the township also argued that "apartment uses would cause a significant population increase with a resulting strain on available municipal services and roads, and would clash with the existing residential neighborhood."¹⁵⁹ Although cases throughout the United States have accepted this argument,¹⁶⁰ the Pennsylvania court had broken with precedent and rejected it: "[z]oning provisions may not be used . . . to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."¹⁶¹ Citing population and business movement to the suburbs and improved regional transit facilities from the inner cities as an increasing fact of life for many formerly outlying communities, the court concluded:

Apartment living is a fact of life that communities like Nether Providence must learn to accept. If Nether Providence is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth; it cannot be allowed to close its doors to others seeking a "comfortable place to live."¹⁶²

158. 437 Pa. at —, 263 A.2d at 397. The difficulty of proof for a variance is illustrated by the leading case in New York, *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939), where the New York Court of Appeals indicated that for a variance to be granted the record must show: "(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) the use to be authorized by the variance will not alter the essential character of the locality." *Id.* at 76, 24 N.E.2d at 853. Although previously the standard in New York as applied to "area" variances was less stringent than the criteria applied by the *Otto* case to "use" variances, *Hoffman v. Harris*, 17 N.Y.2d 138, 259 N.Y.S.2d 119, 216 N.E.2d 326 (1966), the court has apparently tightened even the requirements for the area variance by reading a hardship requirement into the test for such variances for the first time. *Fulling v. Palumbo*, 21 N.Y.2d 30, 286 N.Y.S.2d 249, 233 N.E.2d 272 (1967).

159. 437 Pa. at —, 263 A.2d at 398.

160. Callahan, *Exclusionary Zoning: Public Power or Constitutional Protection?* (unpublished paper at Syracuse University, 1968).

161. *National Land & Invest. Co. v. Kohn*, 419 Pa. 504, 527-28, 215 A.2d 597, 610 (1965).

162. *Appeal of Girsh*, 437 Pa. 237, —, 263 A.2d 395, 399 (1970).

The significance of this decision cannot be underestimated. First, the court clearly recognized the inadequacy of the variance procedure to resolve the problem of population growth and mobility by failure to zone for apartment use.¹⁶³ The property value and hardship basis for the variance procedure and the incidental difficulty of proof combine to make this procedure useless in the context of exclusionary zoning. Second, and perhaps more important, the court plainly couched its analysis of apartment zoning in terms of the modern phenomena of urban blight and population and employment movement into the suburbs. In this context, the court's conclusion that a failure to zone for apartments is unreasonable per se plainly shifts the burden of persuasion to the municipalities in any suit raising the constitutional issue.

The federal courts likewise appear to be rejecting traditional zoning platitudes. When a municipality attempted to justify its denial of a zoning change and negate the charge of discriminating intent, it cited the following reasons for denial of a building permit and zoning change to low-income housing project sponsors: overcrowded neighborhoods, overcrowded schools, overcrowded recreational facilities, and overburdened fire fighting capabilities. In rejecting these arguments in *Columbia Square, Inc. v. City of Lawton*,¹⁶⁴ the court said that the proof was not conclusive. No longer may municipalities mouth traditional reasons for denying lower-income developments. Under *Lawton*, in depth factual evidence is necessary to support exclusion. This shifts the burden of proof, and a presumption of discriminatory intent becomes conclusive upon failure to carry the burden of proof. This is significant because of the lack of evidence on the issue of racial prejudice.

One other decision merits discussion. A 1969 New Jersey decision dealt with exclusion of a low-income elderly project within a high-rise construction district. Although the case did not deal with the usual attempt to keep "outsiders" from entering a municipality, it is significant because of its discussion of the necessity of zoning ordinances being responsive to the needs of the entire population within its boundaries rather than the more diminutive standard of responsiveness to the neighborhood.

When the City of Plainfield amended its zoning ordinances to per-

163. This view was extensively discussed in *Aloi, Goldberg & White, supra* note 1, at 87-96.

164. — F.2d — (10th Cir. 1970).

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mit its housing authority to build a twelve-story high-rise public housing project for senior citizens, the neighboring property owners objected. Plaintiffs in *Christiansen v. Common Council*¹⁶⁵ cataloged their objections to the rezoning through two expert witnesses who cited the depreciation of property values by reason of the "massive size" of the project, inconsistency with the pattern of residential use in the neighborhood, inadequate parking, traffic congestion, inordinately high density of use in terms of the number of units planned, and the "ghettoizing effect" of such projects. Plaintiffs argued that the amendment constituted spot zoning and was contrary to the comprehensive plan.¹⁶⁶

In rejecting plaintiffs' contentions, the court based its opinion on an expanded concept of the general or community welfare, stating:

When Ordinance Z-42 is assayed in the light of the local planning and zoning history and the determined need for senior citizen housing in Plainfield, the purpose to further the welfare of the community as a whole as part of an already existing comprehensive plan is apparent

While it is regrettable that there may be some slight disadvantage to neighboring landowners . . . , "the standard" to be employed in making a determination of whether zoning regulations are formulated "with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout" the municipality . . . has been declared to be "*not the advantage or detriment to particular neighboring landowners but rather the effect on the entire community as a social, economic and political unit.*"¹⁶⁷ (Emphasis added)

165. Docket No. L-44103-67 P.W. (N.J. Super., July 30, 1969).

166. *Id.* at —. Parenthetically, we might note at this point that the Court of Appeals of New York gave special consideration in a different context to the comprehensive plan argument in the case of *Udell v. Haas*, 21 N.Y.2d 463, 469, 288 N.Y.S.2d 888, 893, 235 N.E.2d 897, 900 (1968). Although the comprehensive plan theory can be used by a housing sponsor and in that context is unquestionably a step in the right direction, the reader should be aware of certain conceptual problems which might make proof under this theory difficult—namely, the fact that zoning as a legal instrumentality preceded the concept of a master plan and that many communities thereafter enacted zoning ordinances without a master plan. See generally Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955); Dunham, *City Planning: An Analysis of the Content of the Master Plan*, 1 J. LAW & ECON. 170 (1958).

167. *Christiansen v. Common Council*, Docket No. L-44103-67 P.W. (N.J. Super., July 30, 1969).

This opinion may indicate a change in philosophy regarding the basis upon which zoning ordinances are enacted and administered. Rational land use in terms of the conservation of property values in a narrowly defined neighborhood has ordinarily been the general welfare definition underlying zoning enactments.¹⁶⁸ This consistently has proved to be an accurate definition especially where there are vestiges of the anti-nuisance conception of zoning.

A definition of general welfare for the community, first in terms of a regional conception of community interests¹⁶⁹ and second, in terms of the entire population of a municipality,¹⁷⁰ is a departure from the established pattern. This departure must result in greater attention being given to the problem of zoning for the economically disadvantaged in terms of overall housing requirements for the region.

We may be in the midst of a metamorphosis in the traditional parochial and property value orientation of local zoning ordinances and procedures. It apparently is becoming increasingly possible for plaintiffs to make out a prima facie case against local agencies refusing to rezone by alleging discriminatory practice or intent. The burden of proof in all of the cited cases, although not strictly labeled as such, shifts to the municipality to justify the action taken. A new regional conception of general welfare, an increasing awareness of the inadequacy of the variance procedures to meet the contemporary

168. For the importance of something more than a town-to-town fragmented approach to solving the problems see Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Adams, *Minimum Lot Area Requirement in New York*, 21 N.Y.U. INTRA L. REV. 24 (1965); Comment, *The General Welfare, Welfare Economics and Zoning Variances*, 38 S. CAL. L. REV. 548 (1965).

169. See articles cited *supra* note 168.

170. We might also discuss at this point the use of other techniques commonly applied in private zoning law. The "special use" or the "floating zone" might be devices which, through proper administration, could provide the safety valve to adapt zoning ordinances in their present form to the solution of the suburban housing problem. Similarly, the planned unit development, including single-family dwellings, luxury apartments, low and moderate-income apartments, and shopping and service areas, might be utilized within the framework of the existing ordinances. See, e.g., Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary*, 74 HARV. L. REV. 1552 (1961); Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963); Dallstream & Hunt, *Variations, Exceptions and Special Uses*, 1954 U. ILL. L.F. 213; Symposium—*Planned Unit Development*, 114 U. PA. L. REV. 3-170 (1965); Aloï, Goldberg & White, *supra* note 1, at 103-04. An example of the planned unit development approach is contained in the New Jersey enabling statute. Municipal Planned Unit Development Act, N.J. STAT. ANN. tit. 40 §§ 55-54 to -67 (1967).

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problem of housing the economically disadvantaged, and general suspicion of the traditional parochial justifications for zoning ordinances are all symptomatic of this change in judicial attitude.

VIII. THE SEARCH FOR RESPONSIBLE PLAINTIFFS: A NOTE ON STANDING

To challenge the validity of zoning ordinances most jurisdictions grant standing only to property owners within the zoned area.¹⁷¹ Under these procedures, a housing reform group like NCDH does not have standing. If a group achieves the status of property owner in the exclusionarily-zoned area, the municipality may determine that it is in the group's best interest to grant a variance in a single instance, thus mitigating the grounds for a broadside judicial attack on its entire zoning policies.¹⁷² This device will, of course, deny NCDH standing, since no cause of action will exist.

Thus, after we identify theories for relief from exclusionary zoning, a practical problem of the greatest importance remains: what individual or group of individuals or other instrumentality will bring the suit? An aggrieved individual faces substantial expenditures for expert witnesses and attorney fees, which cannot be recouped even if the suit is successful.¹⁷³ Since we are concerned with low-income individuals, it should be apparent that they do not have the resources. To the extent that other individuals similarly situated will join in the suit, perhaps making it a class action, expenses will be less. But, even under the best conditions, a protracted zoning litigation might well present a prohibitive financial risk to the aggrieved individual or individuals. The question is whether there are any "institutional" plaintiffs capable of withstanding the financial burdens of such litigation, yet so situated as to be able to represent the interests of the potentially large class of plaintiffs.

An important opening wedge in this regard is the case of *Township of River Vale v. Orangetown*,¹⁷⁴ which involved a suit by one municipality (River Vale) for an injunction and damages because a second municipality (Orangetown) rezoned a large tract adjacent to it from

171. See the discussion in Comment, 83 HARV. L. REV. 679, 682-83 (1970); Note, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967); Note, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070 (1966).

172. On the burdens of prosecuting the action, see *Aloi, Goldberg & White*, *supra* note 1, at 84-96.

173. *Id.*

174. 403 F.2d 684 (2d Cir. 1968); case discussed in Comment, 83 HARV. L. REV. 679 (1970).

a "one-acre residential" to an "office park" district. Specifically, River Vale alleged that the Orangetown amendment would deprive it of property in violation of the due process clause of the fourteenth amendment insofar as the proposed office-research project would increase its expenditures by generating higher density highway traffic and would depreciate property values within its borders with a resultant diminution of revenues. The district court dismissed the action for lack of jurisdiction on the ground that the Orangetown amendment did not directly affect River Vale and further that River Vale was not a "person" within the meaning of the fourteenth amendment and thus entitled to its protection. On appeal to the Second Circuit Court of Appeals the dismissal of the complaint was reversed.¹⁷⁵

The appellate court made two significant holdings: first, that standing to invoke the due process clause in a zoning controversy should not be limited to persons whose property is located within the municipality which enacted the ordinance in question;¹⁷⁶ second, that a municipal corporation is a "person" within the meaning of the fourteenth amendment and, as such, is a proper party to challenge the zoning scheme.¹⁷⁷ This determination is a significant departure from the prior cases which had declined to recognize municipalities as "persons" within the meaning of the fourteenth amendment,¹⁷⁸ the theory being that municipalities, as subdivisions of state government, cannot assert federal constitutional rights against their creator.¹⁷⁹

The first holding repudiated the generally applied rule that a party is not aggrieved under a zoning ordinance unless he owns or holds some other legal or equitable interest in property within the zone. Under this view, zoning ordinances protected only the general welfare of property owners within the zoned district and afforded no protection to nonresidents. Freedom to legislate without outside interference, for the benefit of inhabitants of the zone (in terms of the preservation of property values) is the underlying policy justification for this theory. In permitting a nonresident to challenge a zoning ordinance, the Second Circuit held that under the due process clause

175. 403 F.2d 684 (2d Cir. 1968).

176. *Id.* at 687.

177. *Id.*

178. The court rejected a line of cases holding to the contrary. *See, e.g.,* Williams v. Mayor & City Council, 289 U.S. 36 (1933); Risty v. Chicago R.I. & P. Ry., 270 U.S. 378 (1926); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Eggleston, 170 U.S. 304 (1898).

179. *See, e.g.,* Williams v. Eggleston, 170 U.S. 304, 310 (1898).

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a claim of economic damage is "a sufficiently direct injury to give the township standing to sue."¹⁸⁰ Similar reasoning could be applied to fair housing groups, state and federal financing agencies, and non-residents desirous of moving into a community.

The second holding is a significant departure from prior cases which did not recognize municipalities as "persons" within the meaning of the fourteenth amendment.¹⁸¹ The theory was that municipalities, as subdivisions of state government, could not assert federal constitutional guarantees against their creator. The rationale is still valid in this context since the suit is brought not against the creator but another creation.

The implications of this decision can be far-reaching. Because the exclusionary zoning out of the economically disadvantaged now may be subject to regional factors of population and employment mobility, local interests within the particular zoning jurisdiction are no longer the sole consideration in appraising the legality of any particular enactment. Zoning municipalities must be concerned not to cause unreasonable economic loss to neighboring communities. Thus, the central cities, upon a proper showing of economic loss, may now be able to bring suit against neighboring communities that have aggravated the population and employment problems of the inner cities.¹⁸² No longer will suburban residents be able to earn their livelihood from the central city and then neglect the problems they create. The central city now may have standing to bring about a proper regional consideration of both economic benefit and burden. Procedurally, the central city advocate, by reason of its expertise in zoning and land use problems, may be able to more effectively advance the rights of the economically disadvantaged within its boundaries. The financial burden of suit can be shifted to a plaintiff better able to bear it.¹⁸³

180. *Township of River Vale v. Orangetown*, 403 F.2d 684, 687 (2nd Cir. 1968).

181. See, e.g., the statute in New York, applicable to towns, N.Y. TOWN LAW, § 267(7) (McKinney 1965). See also the authorities collected in note 173 *supra*.

182. See Comment, 83 HARV. L. REV. 679, 682-83 (1970).

183. There are two recent examples of movement in this direction. In an article published in the March 1, 1970, Sunday Edition, the *New York Times* reported that the New York City Planning Department had joined as amicus curiae in a suit commenced by the NCDH against Union City, California. The *Times* reported that:

The suit against Union City, a community of about 10,000 near Oakland, came about after a group of Mexican-Americans was turned down in its attempt to erect a federally subsidized apartment complex in the community. Although the City Council there approved the necessary zoning change for

Also, through the city-plaintiff many smaller claims by individual citizens, which perhaps might not be pressed may be joined in a single lawsuit for disposition. Whether central cities will avail themselves of this opportunity, of course, remains to be seen; the procedure is, however, available.

Recent case law dealing with the obligation and responsibilities of public housing authorities brings into focus other alternative responsible plaintiffs—the housing authorities. Although these cases are primarily challenging the location of new public housing when placed within existing ghetto areas, their holdings may place an affirmative obligation upon the agencies to look beyond their boundaries for acceptable sites. A class action against the Chicago Housing Authority alleging that the Authority had designed its site selection and tenant assignment procedures for the purpose of continuing the existing pattern of residential racial segregation in the city was commenced by Negro public housing tenants and applicants in *Gautreaux v. Chicago Housing Authority*.¹⁸⁴ Plaintiffs claimed violations of Section 1 of the Civil Rights Act of 1871,¹⁸⁵ Section 601 of the Civil Rights Act of 1964¹⁸⁶ and the fourteenth amendment. Factually, plaintiffs showed *de minimis* percentages of Negro tenants in projects located in white neighborhoods and the converse in projects located

the project, white residents who lived nearby circulated petitions and brought the matter to a referendum in which the voters approved a return to the original zoning. Attributing this action to "invidious racial discrimination" the Planning Department here contended in its brief that the practice, if sanctioned, would inhibit efforts toward planning on a regional, rather than municipal basis. Apart from the legal issues, the department maintained "this Court must also weigh the impact of its decision on the National urban crisis, and its prospects for amelioration through comprehensive planning." N.Y. Times, March 1, 1970, at 60, cols. 3-4.

Plans for similar intervention by two city planners with the financial backing of grants from two foundations were discussed in the June 29, 1969 edition of the *Times*. N.Y. Times, June 29, 1969, at 39, cols. 1-6.

184. 304 F. Supp. 736 (N.D. Ill. 1969), *enforcing* 296 F. Supp. 907 (N.D. Ill. 1969), noted, 83 HARV. L. REV. 1441 (1970).

185. 42 U.S.C. § 1983 (1964):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

186. 42 U.S.C. § 2000d (1964):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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in Negro neighborhoods. Site segregation was alleged as the result of a pre-clearance procedure in which the Authority submitted proposed sites to the alderman in whose district the project was to be located; in the event the alderman objected to the location of the project, the Authority would relocate it. A historic pattern over an approximately 11-year period in regard to these site clearances demonstrated that over 90% of the projects proposed in the white neighborhoods were rejected whereas only 10% of the sites proposed for black neighborhoods were rejected. Cross motions for summary judgment were made. The court granted plaintiffs' motion ordering appropriate injunctive relief under Section 1983.¹⁸⁷ Holding that no criterion, other than race, can plausibly explain the pattern of site location and tenant assignment in the city,¹⁸⁸ the court emphatically stated that the tenants assignment and site selection procedures used by the Authority were designed to maintain patterns of residential racial segregation and, as such, were prohibited by the fourteenth amendment. The court's decree, in the form of a mandatory injunction, ordered the Authority to construct most of its future projects in white neighborhoods and further ordered the institution of a freedom of choice tenant assignment plan which included a 50% occupancy preference quota for neighborhood residents in each project.¹⁸⁹ The court's judgment naturally raises the question whether the Authority has an affirmative duty to end de facto housing segregation.¹⁹⁰

The Court of Appeals of Arizona in *El Cortez Heights Residents and Property Owners Association v. Tucson Housing Authority*,¹⁹¹ read the *Gautreaux* case as imposing this affirmative duty. A black neighborhood association brought the action in *El Cortez* to enjoin construction of a low-cost housing project in the only middle-income

187. *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907, 914 (N.D. Ill. 1969).

188. *Id.* at 912.

189. 304 F. Supp. 736 (N.D. Ill. 1969). Reference should also be made to the earlier decisions in *Detroit Housing Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955), where the court held that a housing authority could not use racial quotas for separating Negro and white housing projects. The writer in 83 HARV. L. REV. 1441, 1442 (1970), commenting on *Gautreaux* in relation to the *Lewis* case, stated, "[t]he underlying constitutional principle can be extended without difficulty to site selection with discriminatory intent, although *Gautreaux* is the first court so to hold."

190. The note writer in 83 HARV. L. REV. 1441, 1444 (1970) takes the position that *Gautreaux* does not go so far as to impose an affirmative duty on a housing authority to end de facto housing segregation.

191. 10 Ariz. App. 132, 457 P.2d 294 (1969).

Negro residential community in the county. The project in question was federally assisted. Relying on the Civil Rights Act of 1964 and the regulations thereunder,¹⁹² the court found an overriding federal presence in the field of minority housing.¹⁹³ It concluded that "the duty imposed under the statute and regulations is not simply the negative duty to not discriminate," but "is a mandate that prohibits housing authorities from acting in a manner that results in discrimination."¹⁹⁴ Specifically referring to the *Gautreaux* opinion, the court stated: "We concur with the most recent view expressed in *Gautreaux* . . . that these mandates also derive from the Fourteenth Amendment of the United States Constitution."¹⁹⁵

However, a third case, *Hicks v. Weaver*,¹⁹⁶ indicates that public housing may, given the proper circumstances, be placed in Negro neighborhoods. As in *El Cortez*, a class action was brought by Negroes to enjoin the construction of a public housing project in an all Negro neighborhood in the absence of any showing that no other acceptable sites were available. Although agreeing with plaintiffs, the court stated:

This does not mean that the location of public housing in all-Negro neighborhoods is *per se* a violation of 42 U.S.C. § 2000d. But it does create a strong inference which, if unexplained, may be sufficient to support that conclusion. Such an inference might be rebutted by showing, for example, that no other acceptable sites are available. Ultimately, we must consider all of the circumstances surrounding the location of the sites, and the fact that the sites are located in Negro areas is certainly a prime factor to consider in determining whether discrimination exists.¹⁹⁷

192. Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1964); 24 C.F.R. § 1.4(b)(2)(i) (1969).

193. *El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Authority*, 10 Ariz. App. 132, —, 457 P.2d 294, 296 (1969). This aspect of *El Cortez* should be compared with our previous discussion of the use of the supremacy clause in exclusionary zoning cases. See *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969), *rev'd* 417 F.2d 321 (6th Cir. 1969).

194. *El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Authority*, 10 Ariz. App. 132, —, 457 P.2d 294, 296 (1969).

195. *Id.* at —, 457 P.2d at 296. Citing *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969), the *El Cortez* court stated, "[w]e do not hold that the selection *per se* was illegal, but only that the racial character of the neighborhood cannot be ignored in choosing a low-income housing site."

196. 302 F. Supp. 619 (E.D. La. 1969).

197. *Id.* at 623.

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The court concluded:

This, then, is a case where the dominant factor in selecting sites for the location of public housing was the racial concentration of the neighborhoods. Its purpose was to perpetuate segregation of the races in public housing, and the present location of the sites will most likely perpetuate segregation. This is rank discrimination forbidden by both the equal protection clause of the Fourteenth Amendment and 42 U.S.C. § 2000d.¹⁹⁸

If these cases are read as imposing an affirmative duty on housing authorities or development agencies to locate minority group housing projects in areas other than ghetto areas, the housing authorities must ultimately search for acceptable alternative sites in the contiguous and nearby villages and towns. It is not inconceivable that a particular authority will very quickly determine that there are no acceptable sites in the city and that, if the mandate of these cases is to be carried out, a site must be selected in the surrounding suburban areas. If the authority then acquires land in a suburban area for the purpose of constructing the project, and zoning for the project is denied, must the authority then under the affirmative duty imposed by *Gautreaux*, go so far as to bring suit against the municipality to declare unconstitutional the zoning ordinance which conflicts with the overriding federal interest in the housing project? If so, there is the possibility that the housing authorities and redevelopment agencies will join the central cities, the neighborhood associations, and individual parties in the assault on exclusionary zoning. Obviously, the housing authorities or redevelopment agencies will have the financial backing to carry on even protracted litigation and can effectively represent the interests of each and every economically disadvantaged citizen involved.¹⁹⁹ Whether we will see housing authority litigation develop along these lines remains to be seen.

In reviewing the above, a reader may think that such possibilities are, at best, utopian speculation. Lest one think that such possibility is improbable, we refer to a recent article in the *New York Times* which indicates that the Nixon administration plans policy changes to help desegregate public and federally supported housing.²⁰⁰ Spe-

198. *Id.*

199. Our statement as to the financial stability of housing authorities is true only to the extent that the federal government supplies the financing. Most housing authorities today have difficulty meeting their budgets because of large maintenance and operation factors as well as outmoded facilities.

200. *N.Y. Times*, April 28, 1970, at 17, col. 1.

cifically, Assistant Attorney General Jerris Leonard stated that the government would soon propose that new public housing be built in the suburbs rather than in the slums as a condition to obtaining federal funding.

In the area of standing, a recent New Jersey legislative enactment should be mentioned. The act, like the *River Vale* case alleviates the property ownership requirement for standing in zoning cases. As enacted, the new "standing" statute reads:

[A]ny person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or be effected [sic] by any action taken under the act to which this act is a supplement, or whose rights to use, acquire, or enjoy property under the act to which this act is a supplement, or under any other law of this State of the United States have been denied, violated or infringed by an action or a failure to act under the act to which this act is a supplement.²⁰¹

Although the ultimate impact of the legislation will depend upon court interpretation, the following ramifications are clear. First, it gives any person the right to go to court to challenge large and expensive acreage requirements, and secondly, it permits individuals and groups such as NCDH to challenge local ordinances that implicitly exclude construction of low-cost housing.²⁰² Unfortunately, and contrary to the developing case law, the statute places the burden of proof with the individual or group making the challenge rather than on the community defending against a claim of discrimination.²⁰³

IX. LEGISLATIVE REMEDIES

Because the tortuous case-by-case approach herein discussed will evolve through the courts only after many years of persistent effort, it may be easier to accomplish reform through legislation. For example, in our last section, we analyzed cases to establish standing for certain housing reform groups. These cases, confused and uncoordinated, may or may not be read by the courts in the manner we have

201. N.J. STAT. ANN. § 40:55-47 (1967), as amended (Supp. 6, 1969).

202. The first case under this statute was filed on June 22, 1970 in the Superior Court of New Jersey, Law Division, Middlesex County. *Lake Nelson Estates, Inc. v. Township of Piscataway*. The suit was initiated by eleven individual Negroes who are potential customers of a subdivision which a New Jersey corporation, *Lake Nelson Estates, Inc.*, desires to build. The complaint challenges the right of Piscataway Township to proscribe multi-family housing from its residential zones. See N.Y. Times, June 23, 1970, at 33, cols. 5-8.

203. N.J. STAT. ANN. § 40:55-47 (1967), as amended (Supp. 6, 1969).

discussed. On the other hand, by passing a bill the New Jersey legislature easily settled the standing question.²⁰⁴ It is thus useful to review current legislation and legislative proposals which should alleviate the problems of exclusionary zoning.

Since the municipal power to zone is normally based upon state enabling legislation, the best solution is to change the underlying purposes of such enabling laws. In 1969, New Jersey's Governor Richard J. Hughes proposed S-803, a bill designed to alter the premises upon which the power to zone is based. This proposed Land Use Law, which one of the authors assisted in drafting, substantially broadened the objectives of municipal zoning to include provisions for equal housing opportunities. Although pigeonholed in the New Jersey legislature, some provisions of the bill ought to be highlighted. The last sentence of the section setting forth the permissible objectives of zoning provides that "in no event shall any zoning ordinance be deemed to have a valid objective if the effect of such ordinance is to exclude racial, religious or ethnic minorities."²⁰⁵ The importance of this provision is evident when it is compared to the standing statute. This provision switches the burden of proof whereas the standing one does not. Section 40 of S-803 contains the basic power to zone, stating:

The zoning ordinances shall take into consideration, among other factors: 1. the need for various types of housing for all economic, and social groups residing in the municipality, and where appropriate in the surrounding region, including, but not limited to, families of persons employed within the municipality and persons whose displacement is caused by public projects within the region or adjoining regions.²⁰⁶

This provision allows a challenge when the existing plan is exclusionary in any way. Thus, after reciting the other factors, the bill concludes, "any zoning ordinance which has the effect of excluding racial, religious or ethnic minorities is void and unenforceable."²⁰⁷

If a state legislature will not accept such a far-reaching approach, and New Jersey's did not, other alternatives exist. A more moderate approach may be the creation of state housing zones which cut across municipal boundaries. Under this proposal, the state agency primarily responsible for either planning or housing would, after public

204. *Id.*

205. S-803 (N.J. 1969).

206. *Id.*

207. *Id.*

hearing, determine that a given area could be developed only as a planned unit development.

Interestingly, since 1935 Alabama has had on its books one of the most encompassing pieces of legislation designed to assure housing for all economic groups within a community. The statute provides:

For the promotion of the public peace, order, safety or general welfare, such municipal corporations may, within residence districts, established pursuant to this article, further regulate as to the housing or residence therein of the different classes of inhabitants, *but such regulations are not hereby authorized as will discriminate in favor of or against any class of inhabitants.*²⁰⁸ (Emphasis added)

Although this law permits the establishment of different residence districts by economic class, it requires that every class must have some residence district. Total exclusion is not permissible. This legislation could accomplish much of what we seek.

Two states have tried to attack the issue on racial grounds. Thus, Kansas and Colorado have almost identical statutory language prohibiting racial restrictions in zoning ordinances.²⁰⁹ However, these statutes do little more than codify the principle of the fourteenth amendment in zoning ordinances. Since most discrimination is more subtle than outright racial classification,²¹⁰ the statutes are not that helpful.

A recent and far-sighted proposal is that passed by the Massachusetts legislature in 1969. Referred to as the "anti-snob zoning" bill, the statute is designed to facilitate the building of low and moderate-income housing in suburban communities and to allow challenges to restrictive zoning laws.²¹¹ It establishes a five-member state housing

208. ALA. CODE tit. 37, § 775 (1958).

209. KAN. STAT. ANN. tit. 12, § 713 (1964), provides: "Nothing herein contained shall be construed as authorizing the governing body to discriminate against any person by reason of race or color."

COL. REV. STAT. ch. 139, art. 60, § 10 (1963), provides: "This article shall not be construed, in the case of any municipality, to confer or enlarge any authority or power to establish any restriction based upon race or color."

210. "The apparent reason for much of the dissatisfaction of minority groups in the cities was, and is, rooted in local government structure and fiscal arrangements—including the 'white noose' of the suburbs, under-financing of central city schools, inadequate housing, unbalanced patterns of state aid, and repressive restrictions upon the administration of public welfare." THE ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, 9TH ANNUAL REPORT (1968).

211. MASS. LAWS ANN. ch. 40B, § 20 *et seq.* (1969). See also *id.* ch. 23B, § 5A.

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appeals committee, including one selectman and one city councilman, in the Department of Community Affairs to oversee the proposed construction of housing in the suburbs. Nonprofit and limited profit housing developers may appeal to the state board when they are turned down by local zoning boards. The state board has the power to override local rulings if they exclude the low and moderate-income housing. Certain exceptions were written into the law to protect home rule powers. The most important limits to no more than 10% the amount of low and moderate-income housing which a municipality must provide.

Looking at the issue from a different vantage point, the California legislature attacked the problem quite differently. It passed a prefabricated housing bill²¹² which established a state Commission on Housing and Community Development to formulate uniform health and safety standards for factory-built housing. The law set up inspection procedures at factory sites that will permit units which meet the prescribed standards to be certified for installation in any California locality. Since low-income housing must, of necessity, involve either cheaper construction, lower interest rates, or other factors of building cost, this legislation is significant in that it allows a technologically sound structure to be placed in municipalities, regardless of local building code requirements. To appease the "home rule" proponents, the law permits localities to retain their jurisdiction over land use, setbacks, architecture and esthetics.

Another proposal gaining some acceptance is the creation of a state urban development corporation whose primary function would be the racial distribution of low and moderate-income housing units throughout suburbs.²¹³ To be effective such corporations necessarily need the power to overrule local zoning ordinances when local administration might impair or interrupt the implementation of state functions. This amounts to the establishment of a veto power over local zoning boards and might have the effect of destroying them. Unresponsive local zoning boards would thus be informed by higher authority as to what is legally and ethically correct in terms of the national and local interest.²¹⁴ What might be more desirable is the creation of a state urban development corporation whose functions include the development of local corporations, keyed to the various

212 CAL. HEALTH & SAFETY CODE § 19961 (West Supp. 1970).

213. N.Y. UNCONSOL. LAWS § 6254 (McKinney Supp. 1969).

214. See *Aloi, Goldberg & White*, *supra* note 1.

metropolitan areas, to implement state or federal programs.²¹⁵ These local development corporations, working with the state and federal funding authorities, might be given both the power to overrule local zoning ordinances and the power of condemnation. Thus, where a particular town might have open space adaptable to low or moderate-income housing, the corporation, after public hearings, would be empowered to exercise the power of condemnation and forcibly rezone the parcel and dedicate it to public use. This solution would be no less onerous upon local zoning boards than the mere creation of a state corporation and might even have the advantage of additional responsiveness to the needs of localities by placing authorities closer to them.

The problem with the vertical imposition of solutions is that the unintended result may be the elimination of a number of functions of local zoning which are both necessary and useful to the processes of local government. Thus, all the problems and their latter-day complications, in response to which comprehensive plans and zoning ordinances were first developed, continue and remain necessary of solution. With the creation of an urban development corporation for a particular metropolitan area with power to overrule zoning ordinances and to implement policy through the power of condemnation, the question naturally arises as to why such a metropolitan corporation should not also be vested with all of the functions normally exercised by a town zoning board. Is there any reason why the many town zoning ordinances should not be replaced by a single metropolitan zoning code, enacted pursuant to a metropolitan comprehensive plan, with the power to vary the code vested solely in the urban development corporation? New York State Senator Thomas Laverne has offered a proposal to accomplish this objective, viz., a statewide zoning authority to replace all existing local zoning administrations.²¹⁶ Whether such a proposal can be passed in a state legislature presumably responsive to local interests is questionable; however, the impli-

215. *Id.*

216. Senator Laverne actually introduced three bills accompanied by an annotation of the Planning Law Revision. Laverne is chairman of the Joint Legislative Committee on Metropolitan & Regional Areas Study which has had intensive studies for the last three years.

Two key features of his bill are (1) the creation of a framework for statewide review of land redevelopment projects which affect areas broader than the effective jurisdiction of existing planning agencies and (2) the provision of guidance for local planners from the state in areas of critical state concern, that is, areas in which major public investments have been made.

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cations of the proposal itself remain of interest. We offer no final answer to this query, but recognition of the problem is necessary for a full consideration of this area.

Another approach is to utilize the civil rights statutes. An interesting extension of state civil rights statutes has been attempted in New Jersey. A project of Rutgers Law School under the direction of Professor Alfred Blumrosen has concluded that the New Jersey Division on Civil Rights²¹⁷ has jurisdiction over municipalities, including their zoning functions. The effect of restrictive zoning is to virtually exclude black people from these suburbs and thus deny them "the opportunity to obtain . . . publicly assisted housing accommodation, and other real property without discrimination."²¹⁸ The project concluded, therefore, that the objectives of the state's civil rights legislation cannot be achieved unless local zoning policies conform to these objectives.

"Corporations" in New Jersey's Law Against Discrimination includes municipal corporations and makes them subject to the jurisdiction of the Division on Civil Rights. The Attorney General in a formal opinion dated September 11, 1945, concluded that the Law Against Discrimination is applicable to the state and its political subdivisions. The relevant language reads:

[The State's] Counties, municipalities and school districts and all other subdivisions of government as well as all heads of departments, all Boards and Commissions of the State government and its subdivisions are bound by this law.²¹⁹

The legislative objective of both the zoning enabling law and the Law Against Discrimination is the promotion of the health, morals, and general welfare.²²⁰ When suburban municipalities, by restrictive zoning, fail to consider the crisis in housing—a crisis which falls disproportionately on one class of citizens, they are not legislating for the general welfare in accordance with their legislative mandate. Indeed, they are legislating for the special welfare of their own citizens at the expense of those whose housing needs are greatest. Such legislation, under state auspices, in effect helps to assure continued "ghettoization" of black people and perpetuates the systematic residential segregation in our society. Until the substantial racial-economic in-

217. N.J. STAT. ANN. § 10:5-1 *et seq.* (Supp. 1969-70).

218. N.J. STAT. ANN. § 10:5-4 (Supp. 1969-70).

219. OP. ATT'Y GEN. (N.J., Sept. 11, 1945).

220. N.J. STAT. ANN. § 10:5-2 (Supp. 1969-70); *id.* § 40:55-32 (1967).

equalities in American life disappear, it cannot be legislation for the "general" welfare.

In carrying out zoning functions, local officials have the responsibility to promote the objectives of the state's policies against racial discrimination as set forth in New Jersey's civil rights laws.²²¹ The state's zoning enabling law and its civil rights law are statutes *in para materia*. Such laws must be interpreted together to insure fulfillment of the legislative objectives of both statutes. The zoning and civil rights measures are related in that both involve the exercise of the police power with respect to housing; the legislative purposes of both measures are defined in virtually identical terms. The zoning and civil rights laws deal with the exercise of the police power to secure proper shelter and to insure against improper land uses. Because zoning laws are designed to further orderly land development, communities cannot prevent land uses detrimental to suitable living environments. Thus, a major purpose of zoning laws is to secure and protect decent housing. The civil rights law has the same objective: securing decent housing for its citizens. However, in this case the citizens protected by the legislation have been denied equal opportunities to obtain decent housing because of racial prejudice. Because of this, it is essential that the problems of the black ghetto resident be deemed critical factors with respect to all legislative decisions in the area of zoning. To permit officials to exclude such information from consideration in the zoning decision-making process is to invite a continuing pattern of systematic discrimination against those residing in segregated neighborhoods and in the racial ghettos.

The Rutgers project concludes that the Law Against Discrimination, intended to implement the obligations of the thirteenth amendment, must be adhered to in zoning cases. The failure to consider the needs of nearby black ghetto communities in zoning matters tends to perpetuate those ghettos and therefore violates the thirteenth amendment. The project concludes that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."²²²

Since state reform involves fifty states, a more encompassing approach is to attack the problem on the federal level. S-3025, introduced by Senators Javits, Hart, and Scott, would give financial aid to those communities that open their lands to development for fam-

221. N.J. STAT. ANN. § 10:5-1 *et seq.* (Supp. 1969-70).

222. *Jones v. Alfred H. Mayer Co.*, 329 U.S. 409, 442-43 (1968).

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ilies of modest means. Conversely, the bill denies certain forms of federal aid to those localities that do not have a program of publicly assisted housing for families of low and moderate income. A number of incentive grants are available. The most significant incentive grants are for (1) 50% of the administrative costs of a state agency which finances low-income housing without regard to local jurisdictional boundaries; (2) 50% of the amounts by which real estate taxes received by municipalities were reduced as a result of tax abatements granted which increased the supply of low and moderate-income housing; (3) 66 $\frac{2}{3}$ % of the cost to the locality which acquires unimproved or abandoned property for nominal consideration and disposes of same to a housing sponsor which is receiving assistance under any federal, state or local program to provide low and moderate-income housing; and (4) 50% of the local contributions required by other grant-in-aid programs which are carried out in connection with a program to alter zoning ordinances so that they effectively afford an opportunity for persons of all income levels to have decent, safe, and sanitary housing.

Another approach may be to utilize the federal "701 Program" to promote adequate housing components. State community affairs agencies administer the local planning assistance programs for which Section 701 grants federal money. The 1968 Housing Bill changed Section 701 to a "comprehensive" planning grant.²²³ It broadened the program to include human and natural resources planning as well as land use and physical facilities planning. However, it is the state planning agency which has the enforcement power over the provision. If properly utilized, it could begin the process of true metropolitan solutions.

The Nixon administration recently proposed enactment of a federal law to bar local governments from using zoning, building codes, and other powers to prevent construction of low-income housing in areas undergoing development in which federal housing programs are available. As proposed by Secretary Romney, the bill reads as follows:

(a) No general or special-purpose unit of local government (or other agency having official jurisdiction over regions or sub-areas within a State or States) shall, in the exercise of powers with respect to planning, zoning, subdivision controls, building codes or permits, or other matters affecting land use for areas that are undeveloped or predominantly undeveloped but that are in the

223. 40 U.S.C. § 461 (Supp. V, 1970), amending 40 U.S.C. § 461 (1964).

path of development, prevent the reasonable provision in such areas of low- and moderate-income housing eligible for Federal assistance in a manner inconsistent with any State or local comprehensive or master plans for such areas.

(b) No such unit or agency shall, in the exercise of such powers for any area, discriminate against low- and moderate-income housing on the basis of its eligibility for Federal assistance.²²⁴

Enforcement of the legislation is given to the Attorney General and, more importantly, to any person entitled to a direct or indirect benefit from the federal housing program. Jurisdiction is placed in the federal courts:

(c) If the Attorney General of the United States, after consultation with the Secretary of Housing and Urban Development, believes that either the provisions of subsections (a) or (b) of this section have been violated, he may bring a civil action in any appropriate United States District Court to enforce compliance with this section. Any person who would be entitled to financial assistance or any other benefit, direct or indirect, under a federally assisted housing program may bring a civil action in any appropriate United States District Court without regard to the amount in controversy or in any appropriate State or local court of general jurisdiction to enforce compliance with, or to obtain equitable or preventive relief under, this section, and may request such relief in any court whenever relevant in connection with a defense to any suit or action brought against such person in that court.²²⁵

The problems of which we speak not only must, but will, be solved. Tortuous development of court precedent may be the avenue of revision, but it is more likely that state or federal legislation will be utilized. Unless local zoning ordinances are now adapted to solve new problems for the purpose of reaching accommodations between existing residential suburban development and construction of necessary low and moderate-income housing in suburbs, they will simply be steam-rolled out of existence by solutions imposed in the public interest by superior governments. A word to the wise is sufficient—or is it?

224. Offered as an Amendment to H.R. 16643 and S. 3639, Housing and Urban Development Act of 1970. Text of Amendment reprinted in Council of State Governments' Newsletter, June 1, 1970.

225. *Id.* See also "Romney Asks Ban on Rules Curbing Housing for Poor," N.Y. Times, June 3, 1970, at 1, col. 5.