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## Challenging Exclusionary Zoning Practices

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# CHALLENGING EXCLUSIONARY ZONING PRACTICES

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## I. INTRODUCTION\*

Municipal zoning ordinances are often used to exclude from a community persons of a lower socio-economic status than the existing residents. Such practices, known collectively as exclusionary zoning, have come under increasing attack as the shortage of decent housing<sup>1</sup> in the United States becomes more severe.<sup>2</sup>

The overcrowding of urban core areas has accelerated the "white flight" from major cities. Most persons who have abandoned the center city and

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1. See NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 34, 91st Cong., 1st Sess. (1968) [hereinafter cited as DOUGLAS COMM'N]; PRESIDENT'S COMM'N ON URBAN HOUSING, A DECENT HOME (1968) [hereinafter cited as KAISER COMM'N]; NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT (1968) [hereinafter cited as KERNER REPORT].

2. It has been estimated that in 1960 some nine million persons occupied substandard housing units in the United States. It was further found that 30% of all non-white households and 10% of all white households were overcrowded and that 58% of these overcrowded households were located in metropolitan areas. KAISER COMM'N, *supra* note 1, at 44. The Douglas Commission recommended that between 2.0 and 2.25 million new housing units be constructed to cope with the need for adequate housing and that a large portion of these new housing starts be reserved for persons of lower income. DOUGLAS COMM'N, *supra* note 1, at 11.

established residence in suburban areas have been white and more affluent than the urban dwellers. The result has been creation of two economically and racially disparate societies.<sup>3</sup> In addition, it has been estimated that within a recent seven-year period, over half of all industrial and commercial buildings were constructed outside the core cities of metropolitan areas.<sup>4</sup> With more job sources and vacant land being found in the suburbs,<sup>5</sup> it was inevitable that a subsequent movement of the less affluent urban dwellers would also occur. However, a major obstacle to the relocation of these lower- and moderate-income families in suburban areas has been the prevalence of exclusionary zoning techniques. The fundamental exclusionary devices are restrictions upon lot size, building size, multifamily dwelling construction, and "single family" residency requirements.

Zoning ordinances which restrict the minimum size of a building lot<sup>6</sup> are the most common means<sup>7</sup> by which municipalities attempt to control population density.<sup>8</sup> Generally, since single family home owners control a suburb's zoning decisions,<sup>9</sup> the resulting zoning scheme encourages low population density. By so restricting the amount of land available for develop-

3. In 1966, the population of metropolitan areas outside the center city was 96% white. KERNER REPORT, *supra* note 1, at 118-21. It is predicted that by 1984, thirteen major United States cities will have total populations of which blacks comprise more than 50%. *Id.* at 216.

4. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REP. No. 303, CHANGES IN URBAN AMERICA 5 (1969). With this amount of construction in the suburbs it is logical that, from 1960-67, 50% of all new jobs were created in suburban areas. *Id.* at 1-5.

5. One article reports a study which found that 99% of the vacant land in the twenty most populous urban areas is located outside the center cities. Snob Zoning, THE NEW REPUBLIC, Dec. 20, 1969, at 7.

6. One commentator refers to minimum lot size requirements as "snob zoning" due to their exclusionary effect on low- and moderate-income housing. Note, *Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339, 340 (1970) [hereinafter cited as *Snob Zoning*].

7. 2 N. WILLIAMS, JR., AMERICAN LAND PLANNING LAW § 38.01 (1974) [hereinafter cited as 2 N. WILLIAMS].

8. See generally 2 N. WILLIAMS, *supra* note 7, §§ 38.04-.10, 65.01. An objective of minimum lot size requirements, in addition to density control, is the preservation of a rural or semi-rural atmosphere with its attendant peace and quiet, open space, light and air, and reduced traffic congestion. See *Gignoux v. Village of Kings Point*, 199 Misc. 485, 99 N.Y.S.2d 280, 284 (Sup. Ct. 1950); cf. *Bogert v. Township of Washington*, 25 N.J. 57, 135 A.2d 1, 5, *aff'g* 45 N.J. Super. 13, 131 A.2d 535 (App. Div. 1957); *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516, 518 (1942).

Other objectives are to reduce the demand on public facilities and maintain property values, while lowering the tax rate. See 2 R. ANDERSON, AMERICAN LAW OF ZONING § 8.47 (1968) [hereinafter cited as 2 R. ANDERSON]; 2 N. WILLIAMS, *supra* note 7, § 38.16; Note, *Large Lot Zoning*, 78 YALE L.J. 1418, 1421-24 (1969) [hereinafter cited as *Large Lot Zoning*]. The level of property tax rates is a proper concern of the community. *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353, 357 (App. Div. 1971); VA. CODE ANN. § 15.1-489(7) (Repl. Vol. 1973), as amended (Cum. Supp. 1975).

9. See *Large Lot Zoning*, *supra* note 8, at 1420-21.

ment within the zoning district,<sup>10</sup> the effect is to increase the price of that land. As a consequence, low- and moderate-income persons are excluded because of this higher price<sup>11</sup> and because of the lack of land available for smaller lots and multifamily units.<sup>12</sup>

Zoning ordinances which establish minimum cost requirements for dwellings have generally been held unconstitutional.<sup>13</sup> However, in order to circumvent this result, many municipalities have resorted to minimum building size restrictions.<sup>14</sup> A number of courts, in upholding such regulations, have reasoned that some minimum restrictions are necessary to avoid the detrimental effects of overcrowding upon the physical and mental well-being of the dwelling's occupants.<sup>15</sup> It has not been shown, however, that minimum lot size restrictions do, in fact, control population density.<sup>16</sup>

One of the most controversial methods of maintaining low population density has been the use of restrictions on multifamily dwellings.<sup>17</sup> Some municipalities attempt to prohibit construction of all such housing within their borders;<sup>18</sup> others impose severe restrictions upon such units.<sup>19</sup> The

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10. See 2 N. WILLIAMS, *supra* note 7, § 38.21 at 40.

11. See *Snob Zoning*, *supra* note 6, at 341.

12. *Id.*

13. See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1055 (1953) [hereinafter cited as *Zoning for Minimum Standards*].

14. See, e.g., VA. CODE ANN. § 15.1-486(b) (Repl. Vol. 1973), as amended (Cum. Supp. 1975). The primary purposes of these regulations are the protection of public health, maintenance of the community's tax base, and protection of property values. 2 N. WILLIAMS, *supra* note 7, § 63.01.

15. See, e.g., *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693, 697 (1952), appeal dismissed, 344 U.S. 919 (1953). See also Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

16. Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); *Zoning for Minimum Standards*, *supra* note 13, at 1061; 2 N. WILLIAMS, *supra* note 7, § 63.06.

17. See generally Williams & Norman, *Exclusionary Land-Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); Note, *Low Income Housing in the Suburbs: The Problem of Exclusionary Zoning*, 24 U. FLA. L. REV. 58 (1971); Comment, *Suburban Apartment Zoning: Legality and Technique*, 12 B.C. IND. & COM. L. REV. 955 (1971); 23 ALA. L. REV. 157 (1970); Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634 (1970); *Symposium: Apartments in Suburbia: Local Responsibility and Judicial Restraint*, 59 NW. U.L. REV. 344 (1964); Babcock & Bosselman, *Snob Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963).

18. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970).

19. One of the most common practices is to restrict the number of bedrooms permitted in a multifamily dwelling. See, e.g., *Molino v. Borough of Glassboro*, 116 N.J. Super. 195, 281 A.2d 401, 405-06 (L. Div. 1971). Such ordinances discourage the influx of lower-income fami-

result, however, is the same: construction of certain types of housing, which could be afforded by lower-income families, is either prohibited or inhibited.<sup>20</sup>

An equally exclusionary result is reached by ordinances controlling the number of unrelated occupants within a dwelling. This practice is referred to as "single family" zoning.<sup>21</sup> These ordinances ordinarily limit a "family" to those persons related by blood, marriage, or adoption.<sup>22</sup> In *Village of Belle Terre v. Boraas*,<sup>23</sup> the Supreme Court upheld the validity of a local ordinance which defined "family" in a similarly restrictive manner.<sup>24</sup> The Court deferred to the locality's judgment in this area of social legislation,<sup>25</sup> and left municipalities in a strong position to defend not only "single family" restrictions but also most other exclusionary zoning ordinances mentioned herein. This note will explore possible substantive and procedural challenges to such ordinances.

## II. CONSTITUTIONAL CHALLENGES TO EXCLUSIONARY ZONING

### A. TRADITIONAL SUBSTANTIVE DUE PROCESS

The power of a government to restrict the use and enjoyment of real property through zoning measures has long been considered a valid exercise of the police power.<sup>26</sup> Zoning of land involves the exercise of judgment

lies with children. 2 N. WILLIAMS, *supra* note 7, § 56.01 at 441.

The New Jersey Supreme Court seems to recognize "a right to be [free from] . . . a limitation on the number of members in [a] family in order to reside any place." *Molino v. Borough of Glassboro*, *supra* at 405-06; *accord*, *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971). *But see* *Malmar Associates v. Board of County Comm'rs*, 260 Md. 292, 272 A.2d 6, 16 (1971).

20. *See generally* *Watson, Where Will the Low-Income Families Live?*, 3 REAL ESTATE L.J. 37 (1974); Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774 (1971); Note, *The Use of Zoning Laws to Prevent Poor People from Moving Into Suburbia*, 16 HOW. L.J. 351 (1971); Cutler, *Legality of Zoning to Exclude the Poor: A Preliminary Analysis of Evolving Law*, 37 BROOK. L. REV. 483 (1971); Aloï, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 TOL. L. REV. 65 (1969).

21. 2 N. WILLIAMS, *supra* note 7, § 52.02 at 350-51.

22. *See* *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); *Marino v. Mayor & Council*, 77 N.J. Super. 587, 187 A.2d 217 (L. Div. 1963); *City of Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (L. Div. 1961).

23. 416 U.S. 1 (1974).

24. *Id.* at 2.

25. *Id.* at 8.

26. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In *Euclid*, the Court upheld the validity of a comprehensive zoning ordinance on the grounds that it was a valid exercise of the state's police power, asserted for the public welfare. The Court applied the traditional

which has been held to be legislative in character<sup>27</sup> subject to judicial invalidation only if arbitrary and capricious and having no substantial relation to the public health, safety, or welfare.<sup>28</sup> The source of this restraint on the zoning power is the due process clause of the fourteenth amendment of the Constitution.<sup>29</sup> Challenges to zoning ordinances based on the due process clause have met with only limited success since the locality's exercise of the police power will be upheld if it is shown to be reasonably necessary for the accomplishment of a public purpose.<sup>30</sup> Usually, where there is room for difference of opinion or if the reasonableness of a zoning ordinance is fairly debatable, the courts will not disturb it.<sup>31</sup> Where a zoning ordinance is held to be a proper exercise of the police power, the right of the property owner to the unrestricted use of his land is subordinated to the exercise of such power. Therefore, if the traditional due process test is applied in cases challenging the exclusionary effects of zoning ordinances, most ordinances will remain intact.

### B. EQUAL PROTECTION

The central legal argument against exclusionary zoning is that such zoning violates the equal protection clause of the fourteenth amendment.<sup>32</sup> Under the traditional two-tier approach<sup>33</sup> in equal protection analysis, liti-

due process test in declaring the ordinance valid: zoning ordinances will be upheld unless they bear no substantial relation to the public health, safety, or welfare.

27. See, e.g., *Higginbotham v. Barrett*, 473 F.2d 745, 747 (5th Cir. 1973); *Barton v. Atkinson*, 228 Ga. 733, 187 S.E.2d 835, 843-44 (1972); *O'Rourke v. City of Tulsa*, 457 P.2d 782, 783-85 (Okla. 1969). *But see Wasicki v. Zoning Bd.*, 163 Conn. 166, 302 A.2d 276, 278-79 (1972); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327, 330-31 (1972); *Donovan v. Clarke*, 22 F. Supp. 632, 634 (D.D.C. 1963).

28. *Washington ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 120-21 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927).

29. U.S. CONST. amend. XIV, § 1 reads in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

30. *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *People v. Hawley*, 207 Cal. 395, 279 P. 136, 143-44 (1929).

31. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Zahn v. Board of Pub. Works*, 274 U.S. 325, 328 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-96 (1926); *Radice v. New York*, 264 U.S. 292, 294, 296 (1924).

32. See generally Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971) [hereinafter cited as *Exclusionary Zoning*]; Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as *Tight Little Islands*].

33. For a discussion of the two-tier approach, see Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181, 187-91 (1975).

gants attempt to trigger "strict judicial scrutiny" of challenged ordinances rather than the more permissive "minimum rationality" standard.<sup>34</sup> Where the ordinance peculiarly affects a suspect class<sup>35</sup> or a fundamental right,<sup>36</sup> the equal protection clause casts a heavy burden upon the local government to show (1) that the law is necessary to promote a compelling governmental interest and (2) that there is no less drastic way to achieve the governmental objective.<sup>37</sup> Plaintiffs are likely to prevail when challenging exclusionary zoning if they convince the court to adopt this strict standard of review. A zoning regulation which excludes a person from a particular area solely upon the basis of race denies him rights guaranteed by the equal protection clause.<sup>38</sup> Also invalid are zoning ordinances which more subtly establish racial classifications.<sup>39</sup> The effect of either form of

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34. With respect to legislative classifications reviewed under the "minimum rationality" test, the Court has stated that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). In another case, Chief Justice Warren stated an even more permissive standard to govern minimum rationality analysis:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . [A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

35. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (racial minority).

36. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote).

37. This concept is "strict judicial scrutiny". A number of cases have established suspect classifications. *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Brown v. Board of Education*, 347 U.S. 483 (1954) (race); *Oyama v. California*, 332 U.S. 633 (1948) (nationality). The Supreme Court has recognized fundamental rights in certain cases: *Doe v. Bolton*, 410 U.S. 179 (1973) (right to privacy); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right to adequate appellate review of a criminal conviction); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to marry and procreate).

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

39. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, the Court declared that a municipal ordinance regulating lawful business activities within a municipality's boundaries violated the equal protection clause of the fourteenth amendment if, in the administration of that ordinance, the municipality made arbitrary and unjust discriminations founded upon differences in race. *Id.* at 374. *Accord*, *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir.), cert. granted, 96 S. Ct. 560 (1975). In this recent case, plaintiffs alleged that Arlington Heights' refusal to rezone a parcel of land in a manner which would permit the construction of a low- and moderate-income housing development violated their constitutional rights under the equal protection clause. Plaintiffs argued that refusal to rezone the land had a racially discriminatory effect and perpetuated Arlington Heights' segregated community character. The court of appeals stated that "[r]egardless of the Village Board's motivation, if this alleged discriminatory effect exists, the decision violates the Equal Protection Clause unless the Village can justify it by showing a compelling interest." *Id.* at 413. The court pointed out that in 1970 Arlington Heights'

zoning ordinance is to exclude an insular minority from a particular area, thus triggering strict scrutiny.

Exclusionary ordinances have been unsuccessfully attacked on the ground that they operate more harshly upon the low-income classes thus establishing a wealth-related classification.<sup>40</sup> The Supreme Court disagreed, holding that legislative classifications affecting only the poor are not constitutionally suspect in and of themselves.<sup>41</sup>

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population was 64,884 persons but that only 27 persons were black. Between 1960 and 1970, in the northwestern portion of Cook County, where Arlington Heights is located, there was an influx of 219,000 people, only 170 of whom were black. *Id.* at 413-14 nn.1 & 2. Based upon these statistics and other findings of fact, the court found that "rejection of the . . . proposal has racially discriminatory effects." *Id.* at 414.

On April 20, 1976, the Supreme Court held that a federal district court has the power to order the U.S. Department of Housing and Urban Development to implement a remedial housing plan in the suburbs surrounding the City of Chicago. *Hills v. Gautreaux*, 96 S. Ct. 1538 (1976). It is doubtful that the decision is indicative of a change in the Court's attitude in federal intrusion into zoning matters. *Gautreaux* can be seen as the Court's belief that "[o]nce a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'" *Id.* at 4483, quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). While in *Gautreaux* the Court found a constitutional violation in HUD's violation of the fifth amendment and the Civil Rights Act of 1964, it is unclear what, if any, violation it will find in *Arlington Heights*. Accordingly, the *Gautreaux* holding, while important as a possible insight into the Court's viewing of the problems of metropolitan growth, including education, should not influence the outcome of *Arlington Heights*.

Following the inclusion of *Arlington Heights* in a footnote in *Washington v. Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976), commentators have written that the Court has in fact either decided or indicated its predisposition in *Arlington Heights*. In fact, Mr. Justice Stevens wrote a separate concurring opinion because the Court "expresses an opinion on the merits of the cases cited in n.12." *Id.* at 4801.

See also *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970); *Southern Alameda Spanish Speaking Organization v. City of Union City*, 424 F.2d 291 (9th Cir. 1970); *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972).

40. See generally *Tight Little Islands*, supra note 32; *Exclusionary Zoning*, supra note 32; Note, *Low Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971); Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge*, 81 YALE L.J. 61 (1971); Comment, *Zoning: Closing the Economic Gap*, 43 TEMP. L.Q. 347 (1970).

41. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973), in which the Court stated: "However, there is dicta in some Supreme Court cases suggesting that wealth-related classifications require strict judicial scrutiny; however, these cases involve the abridgment of fundamental rights and therefore strict judicial scrutiny is applied regardless of the wealth-related classification." See also *Tate v. Short*, 401 U.S. 395, 400-01 (1971) (restraint upon personal liberty); *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (access to the judicial system); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) (right to vote); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666, 668 (1966) (right to vote).

Also unlikely to trigger a strict standard of review are enactments which classify according to family size. In *Dandridge v. Williams*,<sup>42</sup> a Maryland welfare program was challenged in that it imposed a ceiling upon the amount of assistance a family could receive under the federal Aid to Families with Dependent Children (AFDC) program.<sup>43</sup> The plaintiffs argued that this regulation violated the equal protection clause because it discriminated against large families. In reversing a lower court decision,<sup>44</sup> the Supreme Court did not subject the legislation to strict scrutiny and upheld the statute.<sup>45</sup> The Court's affirmance of a state's right to place ceilings on the public's access to a limited source of funds supports analogous arguments favoring exclusionary zoning to insure that public services are provided for all residents. Municipal services are not limitless, and just as most scarce resources they must be allocated to members of society in a manner similar to welfare payments. It is arguable that exclusionary zoning devices act as a "ceiling" upon the distribution of municipal services and attempt to allocate these limited services in a way that serves the members of a community most beneficially.

A theory often seen in zoning cases is that exclusionary zoning devices require strict scrutiny because they affect a fundamental right to have housing. The Supreme Court has recognized that equal access to housing is a problem of constitutional stature.<sup>46</sup> However, in *Lindsay v. Normet*,<sup>47</sup> the Supreme Court rejected the argument that decent housing is itself a fundamental right. A majority of the Court refused to apply strict scrutiny to an Oregon unlawful detainer law and thereby foreclosed another means of attacking exclusionary ordinances under the equal protection clause.<sup>48</sup>

### C. THE RIGHT TO TRAVEL

Preceding portions of this note have stressed the extensive local regulation of privately owned lands in the United States.<sup>49</sup> Since land

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42. 397 U.S. 471 (1970).

43. 42 U.S.C. §§ 601-10 (1970), *as amended*. 42 U.S.C.A. §§ 601-10 (Cum. Supp. 1976).

44. *Williams v. Dandridge*, 297 F. Supp. 450 (D. Md. 1968).

45. The Court apparently accepted the defendants' argument that the law was rationally supported and warranted by legitimate state interests, particularly because the law encouraged one to seek gainful employment. *Dandridge v. Williams*, 397 U.S. 471, 483-84 (1970).

46. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948). It must be recalled that each of these cases involved racial issues as well as housing issues and thus differ from factual settings involving housing issues only. But these decisions do indicate that the Court is aware of the significance of adequate housing.

47. 405 U.S. 56 (1972).

48. *Id.* at 70.

49. In a survey of 18,000 local government units, approximately 14,000 local governments

regulations so often result in the exclusion of citizens from a particular locality,<sup>50</sup> a substantial restriction is imposed on population mobility. It is this effect of exclusionary zoning which today furnishes the most significant basis for constitutional challenge. It is argued that the right to travel is a special right, engrained within the structure of American society such that an abridgment of this right, under certain circumstances, will be reviewed under an exacting judicial test. Although no specific constitutional base has been agreed upon, a significant body of case law<sup>51</sup> and commentators suggest that the constitutional right to travel does exist.<sup>52</sup> The first acknowledgement of the right appeared in Chief Justice Taney's dissenting opinion in the *Passenger Cases*,<sup>53</sup> but not until *Edwards v. California*<sup>54</sup> did the right to travel achieve great judicial importance.<sup>55</sup> The Supreme Court in *Edwards* reviewed a statute prohibiting non-resident indigents from travelling into California and found it to be an unconstitutional burden on interstate commerce.<sup>56</sup> The holding in *Edwards* certainly protects the right to travel, but the scope of that protection seems to encompass *interstate* travel only. Because Congress possesses plenary power over interstate commerce, one could argue that an individual's right to travel interstate could be effectively controlled by federal regulations.<sup>57</sup>

In 1966, the right to travel received additional constitutional recognition. In *United States v. Guest*,<sup>58</sup> six private individuals were indicted under the

employed some form of land use regulation. DOUGLAS COMM'N, *supra* note 1, at 208-10.

50. See Section I *supra*.

51. *Oregon v. Mitchell*, 400 U.S. 112, 285-87 (1970) (opinion of Stewart, J.) (one of the privileges and immunities of national citizenship); *Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 488-91 (1965) (concurring opinion) (ninth amendment right); *Zemel v. Rusk*, 381 U.S. 1, 13-16 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 505-07, 517 (1964), *citing* *Kent v. Dulles*, 357 U.S. 116, 127 (1958) (one of the liberties protected by the due process clause of the fifth amendment); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1868) (one of the privileges and immunities of state citizenship).

52. The "general unwritten premise" of the constitutional scheme is an additional basis for the right to travel. See Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6, 41-48 (1955); Comment, *The Right to Travel and its Application to Restrictive Housing Laws*, 66 Nw. U.L. REV. 635, 639 n.10 (1971) [hereinafter cited as *Right to Travel*].

53. 48 U.S. (7 How.) 283, 464 (1849) (dissenting opinion). A portion of his opinion reads: For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. . . . *Id.* at 492.

54. 314 U.S. 160 (1941).

55. *But see* *Crandell v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), *quoting* *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (dissenting opinion).

56. *Edwards v. California*, 314 U.S. 160, 177 (1941).

57. *Right to Travel*, *supra* note 52, at 638-39 n.16.

58. 383 U.S. 745 (1966).

Civil Rights Act of 1964,<sup>59</sup> for conspiring to deprive blacks of their constitutional rights, one of which was the right to travel. In its opinion, the Court did not base the right to travel upon any specific provision of the Constitution, but concluded that the right was secured by the Constitution in general and protected from abridgment by private individuals as well as by state and federal governments.<sup>60</sup>

Perhaps the most important Supreme Court decision recognizing the right to travel is *Shapiro v. Thompson*,<sup>61</sup> where the Court declared violative of the equal protection clause Connecticut's one-year residency requirement for welfare aid. The Court began its analysis of the case by affirming its holding in *Guest* that the right to travel was secured by the Constitution in general, and reasoned that a statute "detering the in-migration of indigents" was constitutionally impermissible because it had a chilling effect on travel.<sup>62</sup> On the basis that the right to travel was involved, the Court invoked the strict scrutiny test<sup>63</sup> and invalidated the statute.<sup>64</sup> It should be noted, however, that before invoking this test the Court reviewed the nature of the penalty imposed by the statute, emphasizing the indigency of those whose mobility was restrained.<sup>65</sup> One may therefore argue that it was the denial of welfare payments to indigents which burdened travel so seriously as to require strict scrutiny.<sup>66</sup> Perhaps a less significant penalty on the right to travel, which affects all classes of society, will invoke a less stringent standard of review.<sup>67</sup>

59. 18 U.S.C. § 241 (1964), as amended (1968).

60. 383 U.S. at 757-60 & n.17.

61. 394 U.S. 618 (1969).

62. *Id.* at 631.

63. It is submitted that the compelling state interest test is equivalent to and yields the same results as the concept of "strict judicial scrutiny." See text accompanying note 34 *supra*.

64. The Court, in requiring a compelling state interest, suggested that "[e]ven under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State one year would seem to be irrational and unconstitutional." 394 U.S. at 638.

65. *Id.* at 629. The state statute denied poor immigrants welfare assistance for a year.

66. In support of this argument, it is important to note that the compelling interest analysis advanced in *Shapiro* asks: (1) whether a regulation of travel places a *penalty* on the right to travel and, if it does, (2) whether the regulation promotes a compelling government interest. *Id.* at 638 n.21 (1969).

67. See *Sosna v. Iowa*, 419 U.S. 393 (1975), where the Supreme Court upheld the validity of an Iowa durational residency requirement for a divorce. The Court rejected appellant's claim that the Iowa statute was unconstitutional because it established two classes of persons and discriminated against those who had recently exercised their right to travel to Iowa. The Court did not review this equal protection challenge using a stringent standard of review. The *Sosna* holding supports the contention that if the penalty on the right to travel is not so severe as to outweigh any benefits gained by the state because of the penalty, the right to travel will not be afforded protection by strict scrutiny. Thus, the penalty analysis created in

In the 1970's, the trend in the Supreme Court has been to limit the situations in which strict scrutiny is applied.<sup>68</sup> This position was recently followed in a decision upholding a zoning ordinance which allegedly restricted the right to travel. In *Village of Belle Terre v. Boraas*,<sup>69</sup> the Supreme Court declared valid a zoning regulation limiting occupancy of single family dwellings to no more than two unrelated persons.<sup>70</sup> The plaintiffs in *Belle Terre* alleged that this local ordinance violated their rights of privacy, association, and travel and should be declared unconstitutional.<sup>71</sup> Rejecting this claim the Supreme Court applied the deferential review of minimum rationality even though travel was involved.<sup>72</sup> The Court found

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*Shapiro* becomes a balancing test, or sliding scale level of review when dealing with the right to travel.

68. The trend has also been one avoiding the rigidities of the traditional "two-tier" approach in favor of a more flexible model of equal protection analysis. In 1965 one commentator offered four components of such a model:

- 1) What is the character and importance of the interests which the state is attempting to protect or promote by the rule in question?
- 2) What is the character and importance of the interests adversely affected by this rule?
- 3) How substantial is the connection between the particular basis of classification represented by the rule in question and the legitimate purpose[s] it is designed to serve?
- 4) Are there available to the state alternative means of serving those purposes adequately, without so adversely affecting the significant interests of those who are placed at a disadvantage? Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 28, 29 (1965).

This "balancing" process has been applied in some form in many recent Supreme Court cases. See, e.g., *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533-38 (1973) (food stamp distribution); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (distributor of contraceptives); *Reed v. Reed*, 404 U.S. 71 (1971) (sex discrimination). See also Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975).

69. 416 U.S. 1 (1974).

70. This restriction did not apply to persons related by blood, marriage, or adoption. *Id.* at 2.

71. The district court judge concluded that the exclusionary classification failed to promote traditional zoning objectives (safety, preservation of land from excessive use, reduction of traffic congestion, etc.) but that it did represent a lawful effort to maintain the traditional family character of the community. Relief was therefore denied. *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 146 (E.D.N.Y. 1972).

The court of appeals applied a more exacting test and held that the classification created by the ordinance did not rationally promote valid zoning objectives. The court agreed with the trial court that the ordinance did not promote traditional objectives but refused to hypothesize legitimate goals to save the legislation. *Boraas v. Village of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973).

72. The Court stated: "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal

that the community's objective of protecting its traditional family character was a rational exercise of the state's police power.<sup>73</sup>

Although the Supreme Court has refused to recognize a fundamental right to decent housing,<sup>74</sup> several recent cases suggest that zoning ordinances which infringe upon both the complainant's interest in mobility and housing will receive more intense judicial scrutiny. In *King v. New Rochelle Municipal Housing Authority*,<sup>75</sup> a district court held that the right to travel was not necessarily based upon the commerce clause, that the right to travel was not dependent on the crossing of state lines, and that the right included intrastate movement. In *Cole v. Housing Authority*,<sup>76</sup> the plaintiff, after changing residence, applied to a federally funded housing complex for admission. The plaintiff's application was rejected because it failed to comply with a two-year residency requirement. The court held that this two year requirement was invalid on two grounds: (1) it violated the Federal Public Housing Act,<sup>77</sup> and (2) it was unconstitutional under the *Shapiro* holding.<sup>78</sup>

The results in *King* and *Cole* suggest that the compelling interest stan-

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Protection Clause if the law be 'reasonable, not arbitrary' . . . and bears a 'rational relationship to a [permissible] state objective.' " 416 U.S. at 8, quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) and *Reed v. Reed*, 404 U.S. 71, 76 (1971).

73. Although the Supreme Court decided *Belle Terre* using the minimum rationality standard of review, the result in *Belle Terre* is not inconsistent with arguments in favor of the "sliding scale" level of review when important rights such as travel are involved. First, the interests of the residents of a community must be ascertained and compared to the interests of potential migrants. We must recall that *Belle Terre* was an extremely small community comprised of only 220 homes. The relative impact the legislative regulation had upon the right to travel was miniscule, and the deference to the legislature in this area of social welfare was plausible. Because the Supreme Court declared that *Belle Terre*'s objective of protecting the family character of the community was within the police power of the state, the decision shows that in this particular factual setting the rights of the current community members outweighed the interests of potential migrants.

74. *Lindsay v. Normet*, 405 U.S. 56 (1972).

75. 314 F. Supp. 427 (S.D.N.Y. 1970). The plaintiff challenged a statute which allowed local agencies to adopt their own admissions standards to public units. The law required that a family have at least one member who had been a resident of the city for five years before application could be made for public housing. Relying on *Shapiro*, the district court held that the five year requirement was unconstitutional.

76. 312 F. Supp. 692 (D.R.I.), *aff'd*, 435 F.2d 807 (1st Cir. 1970).

77. 42 U.S.C. §§ 1401-14 (1964).

78. The defendants in *Cole* asserted that the local requirement did not fall within the ambit of the *Shapiro* ruling; they argued that the requirement did not abridge plaintiff's right to travel because most people in the city would satisfy their housing needs on the private market. The court declared that "the private market is inadequate as a matter of law." 312 F. Supp. at 697.

dard applies in cases dealing with public housing residency requirements.<sup>79</sup> In fact, the appellate court's decision in *Cole*<sup>80</sup> dealt specifically with the standard of review to be applied in cases involving residency requirements and the burden they place on the right to travel. The court recognized that *Shapiro* did not state precisely what impact a residency requirement must have upon the right to travel before strict scrutiny is applied. But the court believed that the holding in *Shapiro* stood for "the proposition that a rule penalizing travel requires a justification of a compelling state interest."<sup>81</sup> The two-year requirement affecting public housing applicants imposed such a penalty and thus triggered strict scrutiny.

It has been suggested that, if public housing exists within a community, an attempt to limit the access of blacks or the poor to such housing through the use of residency requirements is violative of the equal protection clause. There is a contrast, however, between decisions wherein existing public housing, rather than new public housing, is denied. In *Valtierra v. Housing Authority*,<sup>82</sup> plaintiffs challenged article 34 of the California Constitution, which required voter approval of low-cost housing starts. The federal district court held that this provision violated the equal protection clause as it impeded minority groups and the poor in their attempt to obtain federal housing assistance.<sup>83</sup> The Supreme Court reversed, holding that the democratic right of referendum significantly outweighed the burden imposed upon the challengers to obtain housing assistance.<sup>84</sup> The Court refused to apply strict scrutiny after finding that article 34 made no "distinctions based on race."<sup>85</sup> Although the Supreme Court made no direct reference to the right to travel, the holding operates as a deterrent to the population mobility argument.<sup>86</sup> Of equal significance is that appar-

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79. *But see* Lane v. McGarry, 320 F. Supp. 562, 563-64 (N.D.N.Y. 1970) (applying the traditional equal protection analysis in this area).

80. 435 F.2d 807 (1st Cir. 1970).

81. *Id.* at 810 (emphasis added). The court went on to find that travel included migration with the intent to settle and abide. *Id.* at 811.

82. 313 F. Supp. 1 (N.D. Cal. 1970), *rev'd sub nom.* James v. Valtierra, 402 U.S. 137 (1971).

83. 313 F. Supp. at 4-6.

84. 402 U.S. at 141-43.

85. *Id.* at 141. Referendum laws containing explicit racial classifications are unlawful. Hunter v. Erikson, 393 U.S. 385 (1969). The referendum in *Valtierra* made no mention of race, but it did refer to low-income groups. The lower court had equated classes based upon wealth with those based upon race. 313 F. Supp. at 4.

86. The result in *Valtierra* would probably have been the same had the challengers argued that their right to travel had been abridged by virtue of article 34 of the California Constitution. The holding in *Valtierra* is consistent with the "sliding scale" level of review in equal protection analysis. Such analysis would enable the court to weigh the interests of the democratic right to call a referendum against the penalty on the right to travel. Based upon the

ently the referendum is a technique that may be used to effectively exclude those who need new housing, particularly new public housing.

#### D. THE EXPANSION OF SUBSTANTIVE DUE PROCESS IN STATE COURTS

One technique that has been used successfully to attack the problem of exclusionary zoning is a "broadened application" of due process requirements applied by the Supreme Court of Pennsylvania. It is argued that the broadened application doctrine allows the court to review every zoning regulation very carefully to determine in each factual setting whether the regulation promotes the health, safety or general welfare of the public. While the United States Supreme Court has recently subordinated the right to travel in the equal protection area, the Court could, under the broadened application test, give the right to travel new constitutional significance.

In *National Land and Investment Co. v. Kohn*,<sup>87</sup> the Supreme Court of Pennsylvania reviewed the constitutionality of a zoning ordinance (four-acre minimum residential lot-size requirements) which had the direct effect of restricting population growth and mobility. The township relied on four general welfare arguments to support its zoning regulation,<sup>88</sup> each of which was rejected by the court. The core of the *National Land* holding was that a township could not use zoning to evade responsibilities imposed by population growth.<sup>89</sup> It is submitted that under the test used in *National Land*, zoning is invalid if its major purpose is to impede the entrance of newcomers, especially if it appears that the municipality is avoiding its duties to the general public.

In perhaps the most important case applying a broadened application, the Pennsylvania Supreme Court held that local governments had an af-

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holding in *Valtierra*, it is suggested that unless the democratic right to call a referendum is blemished with some constitutionally impermissible taint (e.g., referendum laws explicitly based on race, alienage, nationality), the right to call a referendum will override challenges to restrictive referendum and zoning laws, even if those challenges are predicated upon the fundamental right to travel.

In *City of Eastlake v. Forest City Enterprises, Inc.*, 44 U.S.L.W. 4919 (U.S. June 21, 1976), the Supreme Court held that Ohio's Constitution specifically reserved to the people the right of referendum and held that it does not violate the due process clause of the fourteenth amendment of the United States Constitution.

87. 419 Pa. 504, 215 A.2d 597 (1965).

88. The township argued that these minimum lot size restrictions were needed to assure proper sewage disposal, to protect the local water supply from pollution, to prevent traffic congestion on inadequate roadways, and to preserve the character of the community. 419 Pa. 504, 215 A.2d 597, 608-10 (1965).

89. The right to travel played an important role in the development of this principle. First, the court stated its concern for the right of people to freely migrate. Restrictive zoning cannot "stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live." 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

firmative duty to zone for multifamily housing, and not merely a duty to review requests for variances in the single unit zoning laws.<sup>90</sup> The decision accepted the argument that no township may zone to avoid its share of the natural population expansion created by urban migration to the suburbs. By not including apartments within its zoning scheme, the township excluded people who would be able to move into the township if apartments were available.<sup>91</sup> The court rejected outright the township's argument that the prohibition of apartment buildings was reasonably necessary to prevent the overburdening of municipal services, facilities, and roadways.<sup>92</sup> It is submitted that the Pennsylvania court refused to sustain the local zoning ordinance because it did not comply with the due process requirements of a broadened application test.<sup>93</sup>

The broadened application of due process by the Pennsylvania court has not been followed by the federal courts. In two recent cases the Court of Appeals for the Ninth Circuit upheld the validity of local zoning ordinances using traditional due process and equal protection analyses. In *Ybarra v. City of the Town of Los Altos Hills*,<sup>94</sup> the zoning ordinance required that a housing lot contain not less than one acre and that no lot be occupied by more than one dwelling unit. This ordinance prohibited construction of multifamily dwellings and thereby prevented low income people from entering and living in Los Altos. As for the ordinance's restraint on population mobility, the court deferred to the determination that local concerns outweighed regional burdens.<sup>95</sup>

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90. *In re Girsh*, 437 Pa. 237, 240, 263 A.2d 395, 396 (1970). The court said the duty existed provided multifamily housing was in demand.

91. The court stated: "Statistics indicate that people are attempting to move away from the urban core areas, relieving the grossly over-crowded conditions that exist in most of our major cities. Figures show . . . most jobs . . . are in the suburbs." *Id.* at 244, 263 A.2d at 398.

92. *Id.* at 240-46, 263 A.2d at 396-99.

93. Under traditional due process analysis, the ordinances in *National Land* and *Girsh* would have probably been sustained because they do tend to promote the general welfare. However, in these cases the court was extremely concerned with population mobility and thus the right to travel. These opinions suggest that health, safety, and general welfare are not limited to one town or city but are regional concepts. Furthermore, the cases imply that the right to travel is a component of the health, safety, and general welfare of the public. As courts across the nation confront the problems of regional development, the broadened application of due process requirements may become increasingly popular in challenges to exclusionary zoning.

For additional holdings advancing sound judicial thoughts on the subject of regional planning and the rights of individuals to enter into municipalities, see *Township of Williston v. Chesterdales Farms, Inc.*, 7 Pa. Comm. 453, 300 A.2d 107 (1973); *Appeal of Kitmar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

94. 503 F.2d 250 (9th Cir. 1974).

95. In its analysis of the case, the court seems to reason that since there is neither a suspect

In *Construction Industry Association of Sonoma County v. City of Petaluma*,<sup>96</sup> plaintiffs challenged a city plan which fixed a housing development growth rate at 500 dwelling units per year and which directed that building permits be divided evenly between east and west sections of the city and between single-family dwellings and multiple residence units. Included in plaintiffs' challenge to the plan was a claim that the plan was arbitrary and unreasonable and, therefore, violated the due process clause of the fourteenth amendment.<sup>97</sup> The court rejected this claim, stating that "[t]he concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."<sup>98</sup>

The Pennsylvania Supreme Court's response to exclusionary zoning techniques provides the most plausible way to date to attack exclusionary zoning. The reasoning adopted by that court combines a broader application of due process requirements with the fundamental right of people to travel and settle in municipalities of their choosing. It is submitted that the traditional due process test is not strong enough to defeat exclusionary zoning ordinances,<sup>99</sup> and it has already been observed that the Burger Court will limit the instances in which strict scrutiny applies.<sup>100</sup> Whatever rights the poor and minorities may have may be balanced away against the rights of others.<sup>101</sup> It is therefore suggested that protection from exclusionary zoning exists with the reasoning of the Pennsylvania court. Concern for population growth, mobility and regional development automatically involves the right to travel and triggers the broadened application due process test.

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classification nor a violation of a fundamental right requiring strict judicial scrutiny, the locality needs to show only that the ordinance "bears a rational relationship to a legitimate governmental interest" in order to withstand challenges predicated upon the equal protection clause. 503 F.2d at 254. The court further stated: "The ordinance is not arbitrary and does not deny appellants due process." *Id.*

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

97. *Id.* at 906-07.

98. *Id.* at 909. One point that must be raised is that plaintiffs did rely heavily on the lower court's finding that the actual effect of the city plan was to exclude substantial numbers of people who would otherwise choose to live in Petaluma. *Id.* at 906. But the court rationalized: "Practically all zoning restrictions have as a purpose and effect exclusion of some activity . . . [a]nd in reviewing the reasonableness of the . . . ordinance . . . [w]e must determine . . . whether the exclusion bears any rational relationship to a legitimate state interest." *Id.*

99. See text accompanying notes 30-31 & 94-98 *supra*.

100. See note 68 *supra* and accompanying text.

101. *Id.*

### III. STANDING TO CHALLENGE EXCLUSIONARY ZONING

A discussion of the use of exclusionary zoning ordinances and the theories under which such ordinances are challenged is not complete without consideration of which persons have the qualifications to challenge those ordinances in court. One commentator considers the concept of standing to be "among the most amorphous in the entire domain of public law."<sup>102</sup> A review of federal and state case law supports this statement and demonstrates the difficulty in predicting the criteria courts will use in determining the question of standing in the future. Standing is a generic term which is often confused with the concepts of mootness, ripeness, and justiciability.<sup>103</sup> The primary thrust of the standing doctrine, however, is the preservation of the adversary system in the courts; this is usually achieved by requiring parties in litigation to allege that they personally have been injured.

The evolution of the issue in the federal courts has led to a requirement that the plaintiff demonstrate a connection between a personal injury and the alleged constitutional infringement.<sup>104</sup> This is to insure satisfaction of the "case or controversy" language of article III.<sup>105</sup> In the state courts, standing is usually attained if the petitioner can qualify as a "person aggrieved."<sup>106</sup> The major problem with this term is in its interpretation; state court systems, by virtue of their autonomy, have no uniform requirement and define the term differently. In most state jurisdictions, an individual must show damage to a particular personal and legal interest, as opposed to a general community interest.<sup>107</sup>

Although it appears that the standing requirement is similar in the two forums, in reality it diverges. The federal courts comprise a unified system deriving guidance from the Supreme Court, while the state courts lack uniform guidance from a singular body.

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102. *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, at 498 (1966) (remarks of Professor Paul A. Freund).

103. See note 171 *infra*.

104. See notes 117-20 *infra* and accompanying text.

105. Article III specifies that the judicial power shall extend only to cases or controversies. U.S. CONST. art. III, § 2.

106. See Section III. B. *infra*.

107. See 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 21.06 (1968) [hereinafter cited as 3 R. ANDERSON]; 2 E. YOKLEY, *ZONING LAW AND PRACTICE* § 18-3 (3d Ed. 1965) [hereinafter cited as 2 E. YOKLEY]; Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes From a Dark Continent*, 55 Iowa L. Rev. 344 (1969) [hereinafter cited as Ayer].

## A. FEDERAL COURTS

1. *The Trend Toward Liberalization*

The evolution of the standing doctrine in the federal courts has been replete with misunderstanding at the lower court level. In 1939, the Supreme Court enunciated the legal interest test for standing.<sup>108</sup> According to this test, a person threatened with injury by government action does not have standing to contest such action in court "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."<sup>109</sup> The Supreme Court appears to have adhered to the legal interest test<sup>110</sup> until 1968 when the Court in *Flast v. Cohen*<sup>111</sup> modified the standing doctrine by enunciating the nexus test. The Court held that for the plaintiff to have standing, he must show "a logical link between [his] status and the type of legislative enactment attacked . . . [and he] must establish a nexus between [his] status and the precise nature of the constitutional infringement alleged."<sup>112</sup> The Court's abandonment on the legal interest test was completed two years later in *Association of Data Processing Service v. Camp*,<sup>113</sup> where the Court articulated a two-prong test for standing:

Under that test plaintiffs must show that the challenged action has caused them injury in fact, economic or otherwise, and that the interest sought to be protected is arguably within the zone of interests protected or regulated by the statute or constitutional guarantee in question.<sup>114</sup>

Most commentators are agreed that the Court's departure from the legal interest test in *Flast* and *Data Processing* marked the beginning of a trend to liberalize requirements for standing in the federal courts.<sup>115</sup> Whether these two cases are seen as part of the same trend of thought, or as repre-

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108. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939).

109. *Id.*

110. It is often difficult to tell what test the Court is applying because cases are frequently decided without any mention of standing. This has caused Professor Singer to agree with the criticism that in deciding if the plaintiffs have standing, "courts are determining the merits of the controversy, not whether there is an injury per se." Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229, 246 n.54 (1969).

111. 392 U.S. 83 (1968).

112. *Id.* at 102.

113. 397 U.S. 150 (1970).

114. *Id.* at 152-53.

115. See Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973); Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

senting two distinct standing doctrines, remains a subject of dispute although the latter view appears to be correct.<sup>116</sup> *Flast* dealt with a taxpayer's action challenging an alleged unconstitutional expenditure of federal funds under the Elementary and Secondary Education Act of 1965.<sup>117</sup> The plaintiff claimed that the congressional appropriation of funds used to finance instruction in religious schools and to purchase textbooks for those schools was an unconstitutional violation of the establishment clause's specific limitation on Congress' power to tax and spend.<sup>118</sup> On the other hand, *Data Processing* raised the question whether the ruling of the Comptroller of the Currency allowing national banks to sell data processing services to customers was permissible under the National Bank Act.<sup>119</sup> One case dealt with an alleged constitutional violation whereas the other involved an alleged violation of agency authority as defined by the Administrative Procedure Act.<sup>120</sup>

In the three years after *Data Processing* was decided, the Supreme Court considered the question of standing in numerous other administrative law cases.<sup>121</sup> Courts<sup>122</sup> and commentators<sup>123</sup> during this period often failed to distinguish between the administrative law cases and cases involving constitutional questions. This caused very serious results. While Congress may grant standing to individuals who could not qualify under the nexus test of *Flast*, federal courts are bound not only by the requirements of article III but also by prudential limitations on the exercise of their jurisdiction.<sup>124</sup> Due to these limitations, plaintiffs relying on constitutional law issues must meet more stringent requirements than those bringing suit under the Administrative Procedure Act. The failure of federal courts to distinguish the different requirements for standing resulted in confusion.

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116. Compare Monaghan, *supra* note 115, with Davis, *supra* note 115.

117. 20 U.S.C. § 241(a) *et seq.*, § 821 *et seq.* (1970).

118. 392 U.S. at 86-87.

119. 12 U.S.C. § 24 (1970).

120. 5 U.S.C. §§ 701-02 (1970).

121. See, e.g., *United States v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

122. See Sedler, *supra* note 115, at 489. For an example of a court which failed to distinguish the two, see *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833 (D.D.C. 1971).

123. See, e.g., Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970). Davis says that "[f]our Supreme Court cases . . . have drastically liberalized the federal law of standing. . . ." *Id.* Of the four cases Davis cites, two were brought under the Administrative Procedure Act, one under a specific statute and one involved an alleged constitutional violation.

124. See the discussion of statutory standing and prudential considerations, notes 174-75 *infra* and accompanying text.

Recently, the Supreme Court has made it clear in cases involving constitutional questions that the standing doctrine, while more liberal than it was prior to 1968, is still stricter than that applied in cases of administrative law.<sup>125</sup> While some members of the Court would advocate accepting injury in fact as the sole test for standing,<sup>126</sup> the majority still requires a sufficient nexus between the injury and the alleged constitutional violation. In *United States v. Richardson*,<sup>127</sup> the Court denied standing to a federal taxpayer who alleged that certain provisions of the Central Intelligence Act of 1949<sup>128</sup> violated article I, section 9 of the Constitution. The taxpayer did not claim that funds were being spent in violation of a specific constitutional limitation on the taxing and spending power, but rather that he could not obtain information on how the funds were being spent.<sup>129</sup> While this lack of information may have in some way injured the taxpayer, there was no nexus between that injury and his status as a taxpayer.<sup>130</sup> The Supreme Court distinguished *Data Processing* by saying that standing in that case resulted from a specific statute giving the aggrieved party the right to sue.<sup>131</sup> Standing was also denied in *Schlesinger v. Reservists Committee to Stop the War*<sup>132</sup> because the plaintiff's claim did not pass the nexus test. Chief Justice Burger stated that generalized citizen interest is not enough and the fact that no one might be able to sue if the plaintiffs could not was not determinative.<sup>133</sup>

This type of reasoning can have a drastic effect on standing in exclusionary zoning cases. Often the plaintiffs are potential residents who are alleging harm to themselves and others similarly situated and therefore are susceptible to having their claims labeled as "generalized citizen interest."<sup>134</sup> The claims of existing residents have been likely to fail because "[o]rdinarily, one may not claim standing . . . to vindicate the constitu-

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125. See *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Richardson*, 418 U.S. 166 (1974).

126. This is the position of Justices Brennan, White, Douglas, and Marshall. See *Warth v. Seldin*, 422 U.S. 490, 518-30 (1975) (dissenting opinions of Justices Douglas and Brennan, with whom Justice White joined); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (Marshall, J., dissenting). "Respondents' complaint therefore states . . . a claim of direct and concrete injury to a judicially cognizable interest." *Id.* at 239.

127. 418 U.S. 166 (1974).

128. 50 U.S.C.A. § 403 (1951).

129. 418 U.S. at 169.

130. *Id.* at 175.

131. *Id.* at 176 n.9.

132. 418 U.S. 208 (1974).

133. *Id.* at 227.

134. As Chief Justice Burger said in *Schlesinger*, "[o]ur system of government leaves many crucial decisions to the political processes." *Id.*

tional rights of some third party."<sup>135</sup> However, three considerations have prompted the Court to depart from this rule in the past: (1) the importance of the relationship between the claimant and the third parties, (2) the impossibility of rightholders asserting their own constitutional rights and (3) the need to avoid a dilution of third parties' constitutional rights.<sup>136</sup> At times the Court will be persuaded by these considerations and allow one to assert a claim of *jus tertii*.<sup>137</sup> Such a claim may enable a landowner in an exclusionary zoning case to allege that the zoning impairs his ability to sell or lease his property while also infringing upon the constitutional rights of outsiders to settle and abide. On the other hand, a claim of *jus tertii* will not enable a landowner who is not presently being injured, or about to be injured, to assert the constitutional rights of potential residents.<sup>138</sup>

In conclusion, while standing requirements in non-statutory constitutional cases have been liberalized, some showing of injury in fact and a sufficient nexus between the injury and the constitutional infringement alleged are still necessary. The injury is not confined to an economic harm nor is it required to be an injury to a legal right. But despite this broadening of the concept of standing, the door is still closed to many plaintiffs alleging a constitutional infringement of their rights. Nowhere is this more evident than in the area of exclusionary zoning.

## 2. Residents of the Municipality

There are very few federal exclusionary zoning cases which have discussed standing. In those that did, the main emphasis was on non-residents. Residents were found to have standing where they asserted a personal harm, usually of an economic nature. They were denied standing where they alleged injury to the constitutional rights of third parties. This can be illustrated by examining the treatment of standing for residents in *Warth v. Seldin*<sup>139</sup> and in *Construction Industry Association of Sonoma County v. City of Petaluma*.<sup>140</sup>

In *Petaluma* a plan of phased growth provided for construction of a maximum of 500 new housing units each year, holding the growth of the

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135. *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

136. Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 441 (1974).

137. A claim of *jus tertii* is defined as "a litigant's claim that a single application of a law both injures him and infringes upon the constitutional rights of third persons." *Id.* at 424.

138. "[T]he federal courts have consistently adhered to one major proposition without exception: one who has no interest of his own at stake lacks standing." Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 617 (1968) (emphasis in original).

139. 422 U.S. 490 (1975).

140. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

population to about six percent per year. Two landowners and a builders association filed suit alleging personal economic harm and denial of the constitutional rights of future residents. One of the landowners was a resident of Petaluma although most of the land he owned was outside the city. The court of appeals had no difficulty finding standing for the resident and nonresident contiguous landowners to assert that the plan operated to reduce the value and marketability of their land.<sup>141</sup> But it reversed the district court's ruling that the plaintiffs had standing to assert that the Petaluma plan infringes on third parties' alleged constitutional right to travel.<sup>142</sup> The court said that the economic interests of the landowners and the builders association were outside the zone of interest protected by the alleged constitutional right to travel.<sup>143</sup>

### 3. *Nonresidents of the Municipality*

Nonresidents in exclusionary zoning cases fall into three categories: developers of low-cost housing and their backers who are often civic or religious associations, future residents and contiguous property owners. In *Dailey v. City of Lawton*,<sup>144</sup> the Tenth Circuit did not question the standing of a nonprofit corporation which was requesting a change in zoning in order to build a low-income housing project. Columbia Square, the corporation, and Dailey, a prospective tenant, sued the city, alleging that the city's denial of rezoning was based on racial animus.<sup>145</sup> The court enjoined the city from denying Columbia Square the building permit without even discussing the issue of standing.<sup>146</sup> In the same year, the Second Circuit found that the Kennedy Park Homes Association had standing to challenge a city's rezoning of an area in which it planned to build a low-income housing project.<sup>147</sup> The Association was technically not a landowner, but it did have a commitment for a definite site and financial assistance from the FHA.<sup>148</sup> The court said that this was enough to show that it was capable of building the project in question, being prevented from doing so only by the zoning ordinance.<sup>149</sup>

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141. *Id.* at 905.

142. Plaintiffs could, however, challenge the reasonableness of the statute. For a discussion of the court's holding on the merits see notes 96-98 *supra* and accompanying text.

143. 522 F.2d at 904.

144. 425 F.2d 1037 (10th Cir. 1970).

145. *Id.* at 1038. The suit was brought under 28 U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970).

146. *Id.*

147. *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

148. *Id.* at 112.

149. *Id.* at 109. The Association alleged racial animus and sued under 42 U.S.C. § 1983

The Ninth Circuit has found that an organization with an option to buy a specific tract of land, with definite plans for a particular housing project, had standing to attack a referendum which nullified a zoning ordinance.<sup>150</sup> The Eighth Circuit has also allowed both prospective tenants and a non-profit developer to challenge the validity of a zoning ordinance which effectively prohibits the construction of multiracial, federally subsidized, low- and moderate-income housing.<sup>151</sup>

All of these cases have one important point in common: the nonresident plaintiffs alleged racial discrimination. The plaintiffs in some of the cases alleged discrimination in violation of a statute which specifically granted them standing. While Congress may not confer standing where there is no injury, where Congress has provided standing to individuals harmed by violation of a specific statute, the courts tend to accept this legislative judgment and proceed to the merits of the case. Whether there is a sufficient nexus between the harm incurred and the statutory violation alleged is determined upon the court's deciding the merits of the case and may not be used as a means of avoiding difficult substantive questions. Of course, this does not mean that a plaintiff can gain standing simply by alleging violation of any statute; he must sue under a statute that specifically confers the right to sue upon certain people considered to be aggrieved persons.<sup>152</sup>

Plaintiffs in cases where no statute was mentioned or where the statute did not confer any standing rights had standing by claiming personal injury caused by racial discrimination. Freedom from racial discrimination is a well-settled right, and if its denial is asserted by the proper parties,

(1970) as well as under the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970).

150. *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970). The organization alleged discrimination against Mexican-American residents of Union City.

151. *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 (8th Cir. 1972). Plaintiffs based their claim on various statutory and constitutional provisions, and the court held that the plaintiffs demonstrated "a personal stake in the outcome of the controversy" . . . [and that] the dispute will be presented in a form capable of judicial resolution." *Id.* at 1213, quoting in part *Baker v. Carr*, 369 U.S. 186, 204 (1962).

See also *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (per curiam). In that case future residents and developers were allowed to sue on the basis of racial discrimination. The court did not discuss the basis for granting standing except to rule that the individual plaintiffs had the right to sue for themselves and all others currently on the waiting list of the Atlanta Housing Authority for low-rent public housing.

152. The Administrative Procedure Act is such a statute. The APA provides that:

[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702 (1970).

federal courts will proceed to consider the case on its merits. The cases discussed indicate that proper parties include prospective tenants who are currently on a waiting list for a particular project or who can demonstrate their ability to reside in a particular project but for the exclusionary zoning ordinance.<sup>153</sup> The developers of these projects were also held to have standing both in their own right and to assert the constitutional rights of their prospective tenants.<sup>154</sup> Whether alleging racial animus alone (absent a showing of direct personal injury) would be enough to give plaintiffs standing had been left an open question by lower federal courts. The Supreme Court in *Warth v. Seldin* has stated that such an allegation does *not* satisfy the injury-in-fact requirement.<sup>155</sup>

Standing for nonresidents is less of a problem in exclusionary zoning cases which involve contiguous landowners because these cases are usually brought on a claim of direct economic injury rather than racial animus. In *Township of River Vale v. Town of Orangetown*,<sup>156</sup> the Second Circuit held that a New Jersey township had standing to challenge the validity of a zoning ordinance passed not in New Jersey but in New York.<sup>157</sup> The township of River Vale claimed that the challenged rezoning of Orangetown would result in a lowering of property values within the township and, therefore, constituted a taking without due process of law.<sup>158</sup> The court held that the claim of reduction in property values "with resulting reduction in township revenues alleges a sufficiently direct injury to give the township standing to sue."<sup>159</sup> Thus, a contiguous landowner might successfully challenge a zoning ordinance passed by the neighboring municipality by alleging that the ordinance lowers the value of his property. This contiguous landowner may also be able to assert the constitutional rights of those who desire to live in the zoning municipality, but who cannot due to the challenged ordinance, if these third parties are unable to bring their own action.<sup>160</sup>

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153. Compare *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (per curiam) with *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

154. See *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972), where the court said: "The interests of the corporate and individual plaintiffs coincide because both desire to be free from the discriminatory zoning." *Id.* at 1213.

155. See notes 161-86 *infra* and accompanying text.

156. 403 F.2d 684 (2d Cir. 1968).

157. *Id.* at 686.

158. *Id.*

159. *Id.* at 686-87.

160. See the discussion on claims of *jus tertii* at notes 135-38 *supra* and accompanying text.

#### 4. *The Supreme Court's Limitation on Standing: Warth v. Seldin*

In *Warth* the Supreme Court settled many questions regarding standing which had confused courts and commentators alike since the *Data Processing* decision in 1970. The Court may also have revealed a degree of antagonism toward challenges to exclusionary zoning ordinances.<sup>161</sup> *Warth* involved a suit by various organizations and individual residents in the Rochester, New York metropolitan area against the town of Penfield, an incorporated municipality adjacent to Rochester and against members of Penfield's zoning, planning, and town boards.<sup>162</sup>

Eight individual petitioners, none of whom were residents of Penfield, brought suit as a class action.<sup>163</sup> They were joined by Metro-Act of Rochester, Inc., a nonprofit corporation formed "to alert ordinary citizens of problems of social concern . . . and to urge action on the part of citizens to alleviate the general housing shortage for low- and moderate-income persons."<sup>164</sup> All of the petitioners wanted the court to declare Penfield's zoning ordinance unconstitutional and to order the defendants to enact a new ordinance which would alleviate their individual problems.<sup>165</sup>

It was alleged that Penfield's zoning ordinance, by effectively excluding persons of low or moderate income, violated petitioners' constitutional rights as well as their rights under the federal Civil Rights Acts.<sup>166</sup> Petitioners also alleged that the town had made it impossible for persons of low or moderate income to find housing in Penfield by various other acts such as arbitrary denial of variances, denial of proposals for low- and moderate-cost housing in an arbitrary manner and refusal to allow tax abatements.<sup>167</sup> After considering in detail each individual petitioner's claim, the Supreme Court rejected all of them for lack of standing.<sup>168</sup>

In addition to these petitioners, the Rochester Home Builders Associa-

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161. 422 U.S. at 518 (Justice Douglas dissenting).

162. *Id.* at 493.

163. Four of the petitioners were taxpayers and residents of Rochester who claimed that Penfield's exclusionary zoning practices forced Rochester to impose higher taxes on them. *Id.* at 493-94.

164. *Id.* at 494.

165. *Id.* at 496.

166. Petitioners pointed to the first, ninth, and fourteenth amendments to the United States Constitution and to 42 U.S.C. §§ 1981-83 (1970). They asserted that:

[O]nly 0.3% of the land available for residential construction [in Penfield] is allocated to multi-family structures . . . and even on this limited space, housing for low- and moderate-income persons is not economically feasible because of low density and other requirements. *Id.* at 495.

167. *Id.*

168. *Id.* at 518.

tion and the Housing Council of Monroe County requested leave to intervene as plaintiffs. The Home Builders Association was made up of firms engaged in residential construction in the Rochester area and the Housing Council was a nonprofit corporation comprised of private and public organizations interested in housing problems.<sup>169</sup> The Housing Council provided an affidavit that one of its members—Penfield Better Homes Corporation—“is and has been actively attempting to develop moderate income housing’ in Penfield, ‘but has been stymied by its inability to secure the necessary approvals. . . .’”<sup>170</sup>

In considering the standing of these various petitioners, the Supreme Court made clear at the outset exactly what standard it was using to determine standing: “This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”<sup>171</sup> The Court in *Warth* elucidated its standing doctrine by explaining that a plaintiff may have conventional article III standing by showing a real or threatened injury and still be denied standing by the Court’s own limitations. Standing was said to include judicially-fashioned limitations on access to the federal courts such as the requirement that the harm be of a particularized rather than a generalized nature<sup>172</sup> and the requirement that a plaintiff cannot base his claim on the legal rights of third parties.<sup>173</sup> Plaintiffs can escape the prudential limitations of the standing doctrine if Congress grants them an express right of action, but plaintiffs can never escape the article III requirements.<sup>174</sup> In *Warth*, none of the plaintiffs could gain standing by bringing suit under sections 1981, 1982, or 1983 because none of these statutes provided any special standing to sue.<sup>175</sup> Since none

169. *Id.* at 497.

170. *Id.*, quoting Appellant’s Brief at 174.

171. *Id.* at 498. This is very unlike many of the lower federal court analyses in which the courts often denied or allowed standing without any statement as to their criteria. In fact, one lower federal court has said that standing and justiciability are “doctrines between which no clear distinction is generally found.” *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 928 n.13 (2d Cir. 1968). Fortunately, the Supreme Court in *Warth* had no problem distinguishing the two:

[S]tanding imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case. . . . As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court’s remedial powers on his behalf. 422 U.S. at 498-99, quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962).

172. *Id.* at 499.

173. *Id.*

174. *Id.* at 501.

175. Lower federal courts have sometimes confused the alleging of a violation of a particu-

of the petitioners had a statutory right to bring suit, they would be subjected to both article III and prudential consideration standing analysis.

The Court first considered the claim of the individual petitioners who had asserted that they and the class of people they represented had been excluded from living in Penfield due to lack of housing for persons of low or moderate income. Although they had alleged that they searched for housing in Penfield, they failed to show that they would, in all probability, have been able to find housing were it not for Penfield's exclusionary zoning or that if the court provided the relief requested, such housing would then be made available.<sup>176</sup> The *Warth* Court distinguished lower court cases in which nonresidents had been granted standing by noting that, in those cases, the nonresidents were either on a waiting list for a particular housing project, or had demonstrated that they were qualified to reside in a project which was being stymied by exclusionary zoning and that a judicial remedy could provide them the relief they needed.<sup>177</sup>

The *Warth* Court then considered the claims of the four additional petitioners who had alleged they were being harmed as taxpayers of Rochester. The Court had little problem in disposing of this claim because it not only failed to show a causal relation between the harm suffered and the exclusionary zoning practiced in Penfield, but these petitioners were also depending upon the constitutional rights of third parties. As residents of

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lar statute with bringing an action under a statute that gives plaintiffs a specific right to sue. Compare *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (court failed to mention that 42 U.S.C. § 1983 (1970) does not provide any special standing rights) with *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) (court recognized special standing rights under the Fair Housing Act of 1968 but not under the Civil Rights Act of 1964).

176. It appeared that petitioners' inability to reside in Penfield may be due to the general economics of the housing market. Petitioners were not subject to the exclusionary zoning ordinance because they were not residents of Penfield; neither did they have any property interest in Penfield nor had they been denied a variance by Penfield's zoning officials. These petitioners did not even meet the minimum article III standing requirements for, while they had suffered a harm, they did not show a sufficient causal connection between the harm they suffered and the constitutional rights which they alleged were abridged. 422 U.S. at 505-07.

177. See cases cited notes 143-54 *supra* and accompanying text. However, *Warth* does not stand for the proposition that nonresidents *cannot* have standing to sue. The Court emphatically said:

[W]e hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention. 422 U.S. at 508 (emphasis in original).

The Court added in a footnote that "[t]his is not to say that the plaintiff . . . must have a present contractual interest in a particular project. . . . But usually the initial focus should be on a particular project." *Id.* at 508 n.18.

Rochester, they had no constitutional or statutory right "to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester."<sup>178</sup> Rules of prudential considerations were held to bar these petitioners from asserting the rights of third parties unless a statute specifically allowed them to do so or they could demonstrate that their suit was necessary because the third parties were unable to assert their own rights.<sup>179</sup>

Finally, the Court denied standing to the three associations: Metro-Act, Housing Council, and Rochester Home Builders Association. Metro-Act had alleged harm to the 9% of its membership that resided in Penfield who were deprived of living in an integrated community due to Penfield's exclusionary zoning.<sup>180</sup> The Court was able to deny standing to Metro-Act by distinguishing *Trafficante v. Metropolitan Life Insurance Co.*,<sup>181</sup> upon which petitioners had relied. In *Trafficante*, the plaintiffs had based their cause of action on a violation of the Civil Rights Act of 1968<sup>182</sup> which has a specific section granting standing to sue to persons alleging purposeful racial or ethnic discrimination.<sup>183</sup> Metro-Act did not and could not allege a cause of action under the Civil Rights Acts of 1968.

The Home Builders Association would probably have had standing if it could have alleged that any of its members were currently being deprived of business opportunities and profits as a result of Penfield's zoning practices. But the complaint did not refer to any current project or to any member who had applied for and been denied a variance or building permit for a current project.<sup>184</sup> Therefore, Home Builders failed to allege a harm of sufficient immediacy to support its intervention. Housing Council, however, did allege that one of its members had been denied a zoning variance for moderate-cost housing. But the denial had occurred in 1969, three years before filing of the instant suit, and there was no allegation that the project was still viable, "or that respondents' actions continued to block a then-current construction project."<sup>185</sup>

*Warth* teaches that plaintiffs in future zoning cases should take care to set forth their complaint with as much specificity as possible. Plaintiffs especially need to make clear to the court how its relief could help them.

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178. *Id.* at 509.

179. *Id.* at 510.

180. *Id.* at 512.

181. 409 U.S. 205 (1972).

182. 42 U.S.C. § 3601 *et seq.* (1970).

183. 42 U.S.C. § 3610 (1970).

184. 422 U.S. at 516.

185. *Id.* at 517.

Furthermore, plaintiffs who are suing as nonresidents must show a close connection between their legal interests and a particular housing project which the exclusionary zoning is blocking. Such a connection may be shown by their presence on a waiting list, paying an apartment deposit, having a contract to buy a specific house, or, in the case of a developer, a commitment to purchase a tract of land. Future residents must also allege that, were it not for the exclusionary zoning, they would be able to obtain housing in the area.<sup>186</sup>

### B. STATE COURTS

Access to the state courts to contest zoning restrictions may be sought in a variety of ways.<sup>187</sup> The more common actions brought are for judicial review of administrative decisions,<sup>188</sup> declaratory relief,<sup>189</sup> injunctive relief,<sup>190</sup> or mandamus.<sup>191</sup> The latter three actions are often founded on constitutional grounds while the former is usually based on administrative grounds; state courts frequently fail to distinguish the two grounds insofar as standing requirements are concerned.<sup>192</sup> Although these requirements may be incorrect, the courts have nevertheless applied them consistently.

The Standard State Zoning Enabling Act,<sup>193</sup> which provides for judicial review of decisions of the board of adjustments,<sup>194</sup> is the mold from which

186. Some of these suggestions are found in 9 SUFFOLK U.L. REV. 944 (1975).

187. For a comprehensive analysis of the ways in which zoning controversies reach the courts in Virginia, see Note, *Land Use Law in Virginia*, 9 U. RICH. L. REV. 513, 539-40 (1975).

188. This review ordinarily requires that the appellant be a "person or persons, jointly or severally, aggrieved." See 3 R. ANDERSON, *supra* note 107, §§ 21.01-.06 (1968).

189. Declaratory judgment actions ordinarily require that the plaintiff have a substantial interest, usually pecuniary, that will be seriously affected. See, e.g., *Brechner v. Incorporated Village of Lake Success*, 23 Misc. 2d 159, 201 N.Y.S.2d 254 (Sup. Ct. 1960). See also 3 R. ANDERSON, *supra* note 107, § 24.03.

190. Injunctive relief normally requires that the plaintiff allege and prove special damages peculiar to him. See, e.g., *Schubach v. Silver*, 9 Pa. 152, 305 A.2d 896 (1973), citing *Burne v. Kearney*, 424 Pa. 29, 225 A.2d 892 (1967). See also 3 R. ANDERSON, *supra* note 107, § 23.11.

191. Mandamus proceedings are generally available to an "aggrieved person" or to one having a "sufficient interest." See, e.g., *Lynch v. Gates*, 433 Pa. 531, 252 A.2d 633 (1969) (injury and damage not common to all other property owners). See also 3 R. ANDERSON, *supra* note 107, §§ 22.02-.03.

192. Ayer, *supra* note 107, at 346. See Comment, *Standing to Challenge Exclusionary Local Zoning Decisions: Restricted Access to State Courts and the Alternative Federal Forum*, 22 SYRACUSE L. REV. 598, 599 n.5, 600-01 (1971); Note, *Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation*, 24 VAND. L. REV. 341, 355, 359 (1971).

193. Standard State Zoning Enabling Act § 7 (1926) [hereinafter referred to as the Standard Act]. The Standard Act, published by the United States Department of Commerce, is reproduced at 3 R. ANDERSON, *supra* note 107, § 21.02.

194. Many states retain the nomenclature "board of adjustment" while others, including

many of the present state zoning enabling statutes were cast. The Act provides in part:

[A]ny person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board, or bureau of the municipality, may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality.<sup>195</sup>

One of the more common modifications to the Standard Act's section on standing has been the deletion of the phrase "or any taxpayer."<sup>196</sup> The natural inference to be drawn is that access to the courts is easier in those states retaining the "taxpayer" language;<sup>197</sup> however, no firm conclusion can be made as the courts have reached inconsistent results.<sup>198</sup>

Although the "person aggrieved" language is found in practically all of the state zoning enabling statutes, few of them offer any guidance in defining the term.<sup>199</sup> The courts have been left to determine, on a case-by-case basis, what constitutes standing for judicial review of a decision of the board of zoning appeals. Consequently, conflicts abound among the states concerning the standing requirements for persons seeking judicial review. A minority of states have either reduced or circumvented the problem of ambiguity by more clearly delineating who shall have standing to appeal zoning restrictions.<sup>200</sup> In a few states, judicial review of zoning decisions is

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Virginia, use "board of zoning appeals" or some similar phrase. VA. CODE ANN. § 15.1-497 (Cum. Supp. 1975). The difference appears to be semantical and not substantive.

195. For a recent summary and comparison of the various state zoning enabling statutes see 3 HOFSTRA L. REV. 795, 799 n.18 (1975).

196. See, e.g., N.Y. VILLAGE LAW § 7-740 (McKinney Supp. 1972).

197. See generally 3 R. ANDERSON, *supra* note 107, § 21.06.

198. See *Boryszewski v. Brydges*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975); *M. & R. Enterprises, Inc. v. Zoning Bd. of Appeals*, 155 Conn. 280, 231 A.2d 272 (1967); *Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966). *But see D'Almeida v. Sheldon Realty Co.*, 105 R.I. 317, 252 A.2d 23 (1969); *Blumberg v. Hill*, 119 N.Y.S.2d 855 (Sup. Ct. 1953).

199. See 3 R. ANDERSON, *supra* note 107, § 21.05; Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement*, 64 MICH. L. REV. 1070 (1966); Note, *The "Aggrieved Person" Requirement in Zoning*, 8 WM. & MARY L. REV. 294 (1967).

200. See, e.g., CONN. GEN. STAT. § 8-8 (Cum. Supp. 1975) ("any person owning land which abuts the land involved"). The most notable, both for its clarity and broadness, is the New Jersey statute which allows for challenge to the zoning laws by:

any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be effected [sic] by any action taken . . . or whose rights to use, acquire, or enjoy property . . . under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act. . . . N.J. REV. STAT. § 40.55-47.1 (Supp. 1975).

covered by the respective state's Administrative Procedure Act.<sup>201</sup> In most jurisdictions, in order to show aggrievement an individual must show that the challenged zoning violates a particular personal and legal interest, as opposed to a general community-shared interest.<sup>202</sup> The traditional focus has been on some legal or equitable interest in land.<sup>203</sup>

### 1. Residents of the Municipality

An owner,<sup>204</sup> co-owner,<sup>205</sup> tenant,<sup>206</sup> or prospective vendee<sup>207</sup> of land is generally accorded the status of an "aggrieved party,"<sup>208</sup> with the right to challenge zoning ordinances in state courts. With respect to neighboring landowners within the municipality, the problem becomes more complex as the distance between the challenged zoning and the affected property becomes greater. An adjoining landowner ordinarily has the right to appeal.<sup>209</sup> The courts have been inconsistent with respect to those relatively near, but not adjoining, the property involved. In cases which did find standing for this category of plaintiffs, the incurrence of special damage

201. See, e.g., HAWAII REV. STAT. § 46-4(b) (1968) and § 91-14 (Supp. 1974); ILL. ANN. STAT. ch. 24, § 11-13-13 (1962) (cities and villages), ch. 34, § 3157 (1960) (counties). As a precaution, one should always ascertain whether local planning or zoning commissions are covered by definition under a state's Administrative Procedure Act. If they are, attention should be directed to the section governing judicial review to determine the requirements for standing. Regarding the relevancy of Virginia's new Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 to -6.14:20 (Cum. Supp. 1975), see note 244 *infra* and accompanying text.

202. See, e.g., Gregorio v. Zoning Bd. of Appeals, 155 Conn. 422, 232 A.2d 330 (1967); Bryniarski v. Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967). See 3 R. ANDERSON, *supra* note 107, § 21.06; 2 E. YOKLEY, ZONING LAW AND PRACTICE § 18-3 (3d ed. 1965) [hereinafter cited as E. YOKLEY]; Ayer, *supra* note 107, at 346.

203. Note, 8 WM. & MARY L. REV., *supra* note 199, at 295-96. Some courts have taken a broader view in interpreting the qualifications of a "person aggrieved" and allow an appeal so long as the person is damaged within the scope of the purposes of the zoning ordinance. E.g., Krejpcio v. Zoning Bd. of Appeals, 152 Conn. 657, 211 A.2d 687 (1965); O'Connor v. Board of Zoning Appeals, 140 Conn. 65, 98 A.2d 515 (1953).

204. See, e.g., Durocher v. King County, 80 Wash. 2d 139, 492 P.2d 547 (1972).

205. See, e.g., Hayden v. Zoning Bd. of Appeals, 26 Conn. Supp. 168, 214 A.2d 837 (1965).

206. See, e.g., Lavere v. Board of Zoning Appeals, 39 App. Div. 2d 639, 331 N.Y.S.2d 141 (1972), *aff'd*, 33 N.Y.2d 873, 307 N.E.2d 559, 352 N.Y.S.2d 442 (1973).

207. See, e.g., Fletcher v. Planning & Zoning Comm'n, 158 Conn. 497, 264 A.2d 566 (1969); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). The majority view is that the equitable owner of land has a sufficient interest to demonstrate "aggrievement."

208. For a general discussion of the qualification of these parties as "persons aggrieved" see 3 R. ANDERSON, *supra* note 107, § 21.07; Comment, 64 MICH. L. REV., *supra* note 199; Note, 8 WM. & MARY L. REV., *supra* note 199, at 296-302.

209. See, e.g., Sarah Lawrence College v. City Council, 48 App. Div. 2d 897, 369 N.Y.S.2d 776 (1975); East Diamond Head Ass'n v. Zoning Bd. of Appeals, 479 P.2d 796 (Hawaii 1971) (according to provisions for review in Hawaii's Administrative Procedure Act. *But see* Kyser v. Zoning Bd. of Appeals, 155 Conn. 236, 230 A.2d 595 (1967)).

to the plaintiffs' property was found to have resulted from a zoning determination concerning another's land.<sup>210</sup>

## 2. *Nonresidents of the Municipality*

The state courts have generally held that nonresidents of a municipality cannot challenge its zoning regulations, even if their property is adjacent or contiguous to the questioned zoning.<sup>211</sup> They have equated the lack of property within the municipality with a lack of "person aggrieved" status, and, consequently, with a lack of standing. Other courts have permitted nonresident landowners to challenge the zoning restrictions of adjacent communities,<sup>212</sup> apparently on the grounds that nonresidents have standing "if [they] can allege and prove specific damages as a result of an adjoining district's action."<sup>213</sup>

The language in some of the cases does suggest an embryonic development of the regional approach to local zoning by the courts. In *Dahman v. City of Ballwin*,<sup>214</sup> the Missouri court held that a nonresident separated from the zoning city by a corporate boundary line had standing to challenge the validity of a proposed zoning classification of adjacent land, recently annexed into the city. The same court also found standing in *Allen v. Coffel*,<sup>215</sup> where nonresident owners of property contiguous to the zoning municipality had brought suit.<sup>216</sup> In *Scott v. City of Indian Wells*,<sup>217</sup> plain-

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210. See 3 R. ANDERSON, *supra* note 107, § 21.10; 2 E. YOKLEY, *supra* note 202, § 18-3; Note, 8 WM. & MARY L. REV., *supra* note 202, at 303-04.

211. See *Cablevision-Division of Sammons Communications, Inc. v. Zoning Hearing Bd.*, 320 A.2d 388 (Pa. Cmwlth. 1974); *Town of Huntington v. Town Bd.*, 57 Misc. 2d 821, 293 N.Y.S.2d 558 (Sup. Ct. 1968); *Wood v. Freeman*, 43 Misc. 2d 616, 251 N.Y.S.2d 996 (Sup. Ct. 1964), *aff'd*, 24 App. Div. 2d 704, 262 N.Y.S.2d 431 (1965); *Village of Russell Gardens v. Board of Zoning & Appeals*, 30 Misc. 2d 392, 219 N.Y.S.2d 501 (Sup. Ct. 1961). *Accord*, 3 R. ANDERSON, *supra* note 107, § 21.10 at 568-69; *Ayer*, *supra* note 107, at 356; Comment, 64 MICH. L. REV., *supra* note 199, at 1079. *But see* Note, 8 WM. & MARY L. REV., *supra* note 199, at 304-05.

212. See *Braghirol v. Town Bd.*, 70 Misc. 2d 812, 334 N.Y.S.2d 944 (1972); *Whittingham v. Village of Woodridge*, 111 Ill. App. 2d 147, 249 N.E.2d 332 (1969) (a corporate boundary line should not deny a nonresident landowner standing, if special damage could be shown to result by reason of the zoning change); *Roosevelt v. Beau Monde Co.*, 152 Colo. 567, 384 P.2d 96 (1963) (nonresident landowners would be similarly affected by the zoning as resident landowners, and, further, would have no other means of representing their interests); *Koppel v. City of Fairway*, 189 Kan. 710, 371 P.2d 113 (1962) (statute applied to all "affected property owners" and not simply to residents of zoning municipality); *Hamelin v. Zoning Bd.*, 19 Conn. Supp. 445, 117 A.2d 86 (1955).

213. Note, 8 WM. & MARY L. REV., *supra* note 199, at 305.

214. 483 S.W.2d 605 (Mo. App. 1972).

215. 488 S.W.2d 671 (Mo. App. 1972).

216. The court stated:

tiffs were inadvertently mailed notice of a hearing concerning the proposed development of abutting property in Indian Wells. The California court, after finding that plaintiffs and all other neighboring property owners had standing, noted that "local zoning may have even a *regional* impact."<sup>218</sup> In a more recent California case,<sup>219</sup> the court declared that "[e]ffects of environmental abuse are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application *where broad and long-term effects are involved*."<sup>220</sup>

The increasing protection afforded to nonresident, contiguous property owners may be misleading. Those gaining access to the courts in "boundary cases"<sup>221</sup> may just as likely be seeking to exclude as to include low- and moderate-income housing. A neighboring community often would be challenging the ordinance on the grounds that it lowers property values in both communities. It has been noted previously that high property values discourage the entry of low- and moderate-income classes. However, these cases have been significant for having recognized a burgeoning regional perspective in local zoning.

Courts have consistently failed to find standing in suits brought by civic and property owners associations<sup>222</sup> to appeal zoning regulations, even though they represent resident taxpayers of the zoning municipality.<sup>223</sup> The

[I]t is now well established that an adjoining, confronting or nearby property owner has standing, *without further proof of special damage*, to assert the invalidity of an ordinance. . . .

The decline of rural residence and the burgeoning growth of suburban communities, frequently clustered on the periphery of metropolitan centers, have made it apparent that the impact of zoning is no longer of concern only to the enacting municipality, but may have extraterritorial effects as well. *Id.* at 675 (emphasis added).

217. 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

218. *Id.*, 492 P.2d at 1141, 99 Cal. Rptr. at 749.

219. *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

220. *Id.*, 529 P.2d at 1023, 118 Cal. Rptr. at 255 (emphasis added).

221. Ayer, *supra* note 195, at 356; Comment, 64 MICH. L. REV., *supra* note 199, at 1080.

222. For a definition and analysis of the term "civic association" see 3 HOFSTRA L. REV. 795, 802 n.30 (1975).

223. See, e.g., *Stocksdale v. Barnard*, 239 Md. 541, 212 A.2d 282 (1965); *Point Lookout Civic Ass'n v. Town of Hempstead*, 22 Misc. 2d 757, 200 N.Y.S.2d 925 (Sup. Ct. 1960), *aff'd*, 12 App. Div. 2d 505, *aff'd*, 9 N.Y.2d 961, 176 N.E.2d 203, 217 N.Y.S.2d 227 (1961); *Miller v. Dassler*, 1 App. Div. 2d 975, 150 N.Y.S.2d 845 (1956) (unincorporated property owners association not entitled to intervene as adverse party in proceeding); see 3 R. ANDERSON, *supra* note 107, § 21.07 at 563; Ayer, *supra* note 107, at 359; Note, 24 VAND. L. REV., *supra* note 192, at 357-58; Note, 8 WM. & MARY L. REV., *supra* note 199, at 306.

lack of property ownership<sup>224</sup> and taxpayer status has led the courts to hold these associations incapable of qualifying as "aggrieved persons."<sup>225</sup>

A recent decision of the New York Court of Appeals joins a growing minority of jurisdictions which do recognize standing of civic associations to contest zoning restrictions.<sup>226</sup> In *Douglaston Civic Association v. Galvin*,<sup>227</sup> the New York court recently recognized the standing of a property owners association to contest the grant of a variance for construction of a multifamily dwelling in a single family district. The application for a variance was opposed by the association and nearby residents at the public hearing before the board. After the variance was granted, the homeowners and the association sought judicial review of the decision. Rather than conform to the "aggrieved person" test, the court enunciated a new rule of standing which, it has been suggested,<sup>228</sup> will enable qualifying civic associations in New York to challenge legislative as well as administrative zoning decisions. The court indicated that four factors should be considered in determining whether an organization may sue as the appropriate representative of its members:

- (1) [T]he capacity of the organization to assume an adversary position, (2) the size and composition of the organization as reflecting a position fairly

224. For a situation in which a civic association did own property see *Shore Acres Improvement Ass'n v. Anne Arundel County Bd. of Appeals*, 251 Md. 310, 247 A.2d 402 (1968). The court held that the association was not an "aggrieved person" due to the distance of its property from the questioned zoning and the fact that the two tracts of land were not within sight of one another. See 3 HOFSTRA L. REV. 795, 802 n.31 (1975).

225. See, e.g., *Manor Woods Ass'n v. Randol*, 29 App. Div. 2d 778, 287 N.Y.S.2d 734 (1968) (individual homeowners in the immediate residential area would be "aggrieved persons" within the meaning of the relevant statute); *Lido Beach Civic Ass'n v. Board of Zoning Appeals*, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (1961).

226. *East Camelback Homeowners Ass'n v. Arizona Foundation for Neurology & Psychiatry*, 19 Ariz. App. 118, 505 P.2d 286 (1973), *aff'g* 18 Ariz. App. 121, 500 P.2d 906 (1972) (although homeowners association allowed to attack grant by board of adjustment, issue of standing was not raised); *Citizens for Better Gov't v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973) (standing issue not discussed); *Garden Dist. Property Owners Ass'n v. City of New Orleans*, 98 So. 2d 922 (La. App. 1957); *North Shore Beach Property Owners Ass'n v. Town of Brookhaven*, 115 N.Y.S.2d 670 (Sup. Ct. 1952).

In *Raum v. Board of Supervisors*, 342 A.2d 450 (Pa. Comwlth. 1975), intervening challengers (referred to as "Main Line") were granted standing along with landowner-developers. Main Line was comprised of: (1) Main Line Housing Improvement Corporation; (2) Main Line Community Association; (3) residents of the township who desired low-income housing; and (4) nonresidents of the township who also desired low-income housing. The court acknowledged the standing of the township residents (both on their own and on behalf of the civic association) and determined that the remaining appellants had "derivative standing" as a result thereof. *Id.* at 458.

227. 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974).

228. 3 HOFSTRA L. REV., *supra* note 224, at 809 (1975).

representative of the community or interests which it seeks to protect . . . (3) the adverse effect of the decision sought to be reviewed on the group represented by the organization as within the zone of interests to be protected . . . [and (4)] full participating membership in the representative organization be open to all residents and property owners in the relevant neighborhood.<sup>229</sup>

The grant of standing to a property owners association is a double-edged sword. Groups interested in strictly enforcing zoning regulations would have standing to contest a zoning determination favorable to low- and moderate-income people, thereby perpetuating their exclusion from the community. It is highly improbable, in fact, that a property owners association would challenge a zoning regulation which effectively excludes low- and moderate-income people from the community. Nevertheless, allowing a property owners association to come into court may be the first step towards granting standing to interest groups of nonresidents.

Only within the past decade has judicial attention focused on the right of future residents to seek adequate housing within a given municipality. To date, this approach has been confined essentially to only two states, New Jersey and Pennsylvania,<sup>230</sup> where the definition of the general welfare has been expanded in recent cases to include regional as well as local needs. Although the question of standing was not at issue in all of the cases, the courts' emphasis on the regional effects of zoning suggests that

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229. The first three factors are taken from Justice Hopkins' concurring opinion at the Appellate Division. *Douglaston Civic Ass'n v. Galvin*, 43 App. Div. 2d 739, 740, 350 N.Y.S.2d 708, 711 (1973). The fourth factor was supplied by the Court of Appeals. *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 7, 324 N.E.2d 317, 321, 364 N.Y.S.2d 830, 835 (1974).

The rule of standing enunciated in *Douglaston* has been followed in *A.W.A.R.E., Inc. v. Town of North Hempstead*, 367 N.Y.S.2d 374 (Sup. Ct. Nassau County 1975) (civic association lacked standing to bring suit for failing to satisfy the criteria set forth by *Douglaston*). *Douglaston* has also been cited in later New York cases, which did not involve civic associations, as espousing a liberalized standing rule. See *Association of Employing Plumbing Contractors v. Gaynor*, 48 App. Div. 2d 892, 369 N.Y.S.2d 787 (1975); *Sarah Lawrence College v. City Council*, 369 N.Y.S.2d 776 (App. Div. 1975); *Manasse v. New York City Health & Hosp. Corp.*, 48 App. Div. 2d 804, 369 N.Y.S.2d 450 (1975); *Whalen v. Lefkowitz*, 36 N.Y.2d 75, 324 N.E.2d 536, 365 N.Y.S.2d 150 (1975); *Holowka v. Zoning Bd. of Appeals*, 80 Misc. 2d 738, 364 N.Y.S.2d 403 (1975).

230. The Pennsylvania Supreme Court was the first state court to recognize the rights of excluded persons by invalidating local zoning decisions in a series of developer cases. *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *In re Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965). In all three cases, the developers were found "aggrieved" by denial of a building permit and the subject ordinance declared invalid. See notes 87-93 *supra* and accompanying text for a discussion of these cases.

future residents also would have standing to attack exclusionary ordinances.<sup>231</sup>

In two New Jersey cases, excluded residents challenged restrictions in zoning ordinances concerning future construction of subsidized housing. In *Oakwood at Madison, Inc. v. Township of Madison*,<sup>232</sup> the plaintiffs were two property-owning developers and six low-income individuals. The latter represented the class of individuals residing outside of Madison township who had failed to find housing within the township due to the zoning restrictions.<sup>233</sup> Although Madison township had some low-income housing, the number of multifamily units that could have been constructed was severely limited by the zoning restrictions. The township contended that it was seeking a balanced community with regard to economic housing. The court rejected its reasoning and held the ordinance invalid in its entirety.<sup>234</sup>

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231. In *National Land*, the court stated that zoning ordinances would be held invalid if their fundamental goal was the exclusion of new residents to prevent anticipated administrative burdens. 419 Pa. 504, 215 A.2d 597, 612 (1965). To test the validity of a zoning ordinance as promoting the general welfare, Justice Roberts said that one should initially ascertain whether public interests rather than purely private interests are being benefited. *Id.* 215 A.2d at 611. In *Girsh*, Justice Roberts stated that “[Nether Providence] 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.’” 437 Pa. 237, 263 A.2d 395, 399 (1970). Subsequently, the court further admonished in *In re Kit-Mar Builders, Inc.* that:

[i]t 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. 439 Pa. 466, 268 A.2d 765, 768-69 (1970).

232. 117 N.J. Super. 11, 283 A.2d 353 (1971).

233. The challenged zoning ordinance restricted (with reference to 30 percent of the vacant, developable land) the number of multifamily dwellings, the number of bedrooms, the minimum lot size, and the minimum floorspace requirements. The ordinance was amended in 1973 to rectify the situation, but the amended ordinance was subsequently found invalid for perpetuating an “elite community” of the wealthy. *Oakwood at Madison, Inc. v. Township of Madison*, 128 N.J. Super. 438, 320 A.2d 223, 227 (1974), *on remand from* 62 N.J. 185, 299 A.2d 720 (1972).

234. The court stated:

[i]n pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned . . . into such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside. 117 N.J. Super. 11, 283 A.2d 353, 358 (1971).

In *Southern Burlington County NAACP v. Township of Mount Laurel*,<sup>235</sup> there were four classes of plaintiffs, all of whom lived in substandard housing: (1) present residents of Mount Laurel; (2) former residents of Mount Laurel who had to move due to the unavailability of suitable housing; (3) nonresidents in the region who wanted to live in Mount Laurel but could not afford the housing costs; and (4) organizations representing interests of racial minorities. The plaintiffs sought declaratory and injunctive relief with respect to the township's zoning ordinance and practices. The demographic effect of Mount Laurel's zoning ordinance was to prevent the influx of low-income families by keeping the cost of housing prohibitive. With respect to the standing issue, the court indicated that the trial court was correct in holding that the resident plaintiffs had standing to bring the action. Although the issue was not raised on appeal, both categories of nonresident plaintiffs were deemed to have the interests necessary for standing. With respect to the organizations, no opinion was expressed as to the standing issue.<sup>236</sup> The zoning ordinance was found to be invalid as incongruent with the general welfare of the *region*.<sup>237</sup>

While the results of these cases are laudable, it is possible that these New Jersey decisions may be attributed primarily to that state's liberal zoning enabling statute.<sup>238</sup> In any event, due to the autonomous nature of the respective state court systems, the enlightened approach of two states will aid only a few of the people seeking low- and moderate-income housing.<sup>239</sup>

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235. 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied* 96 S. Ct. 18 (1975).

236. 67 N.J. 151, 336 A.2d 713, 717 n.3 (1975) (citations omitted).

237. The court stated that:

[i]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when a regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.

67 N.J. 151, 336 A.2d 713, 726 (1975).

The affirmative action required by *Mount Laurel* applies to municipalities of "sizeable land area." *Segal Constr. Co. v. Zoning Bd. of Adjustment*, 134 N.J. Super. 421, 341 A.2d 667 (1975) (*Mount Laurel* inapplicable to Borough of Wenonah which had land area of scarcely more than one square mile, of which only 109 acres was undeveloped).

238. N.J. REV. STAT. § 40.55-47.1 (Supp. 1975). Text of this statute is set forth in note 200 *supra*. *But see* *Walker v. Borough of Stanhope*, 23 N.J. 657, 130 A.2d 372 (1957) (retail trailer home seller granted standing due to economic aggrievement caused by borough ordinance, even though he was neither a citizen nor taxpayer of borough and was located almost four miles away).

239. Comment, 22 SYRACUSE L. REV., *supra* note 192, at 610.

### 3. *The Virginia Perspective*

The Virginia enabling statutes are remarkably similar to the language of the Standard Act in their provisions for judicial review of zoning determinations.<sup>240</sup> Access to the courts in Virginia is obtained in a variety of ways.<sup>241</sup> To qualify as a "person aggrieved," it is usually necessary to show injury to some personal interest.<sup>242</sup> Also, "a real interest in the subject matter in controversy"<sup>243</sup> must be demonstrated. These standing requirements probably continue to apply despite Virginia's new Administrative Process Act,<sup>244</sup> since it is doubtful that a local planning or zoning commission would be covered thereunder.<sup>245</sup> However, should either be construed as an "agency" as defined in the Act, the requirements for judicial review are arguably more liberal than those in the zoning enabling statutes.<sup>246</sup>

240. See VA. CODE ANN. § 15.1-497 (Cum. Supp. 1975):

Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals, or any taxpayer or any officer, department, board or bureau of the county or municipality, may present to the circuit court of the county or city a petition specifying the grounds on which aggrieved within thirty days after the filing of the decision in the office of the board. . . . *Id.*

241. See Note, *Land Use Law in Virginia*, 9 U. RICH. L. REV. 513, 539-40 (1975).

242. See, e.g., *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 63, 168 S.E.2d 117, 120 (1969) ("one challenging the constitutionality of a statute or ordinance has the burden of showing that he himself has been injured or threatened with injury by its enforcement"). Cf. *Wilhelm v. Morgan*, 208 Va. 398, 157 S.E.2d 920 (1967); *DeFabio v. County School Bd.*, 199 Va. 511, 100 S.E.2d 760 (1957); *County of Fairfax v. Parker*, 186 Va. 675, 44 S.E.2d 9 (1947); *Grosso v. Commonwealth*, 177 Va. 830, 13 S.E.2d 285 (1941).

243. *Abbott v. Board of Supervisors*, 200 Va. 820, 823, 108 S.E.2d 243, 245 (1959); accord, *Brinkley v. Blevins*, 157 Va. 41, 45, 160 S.E. 23, 24 (1931). These cases were both brought under declaratory judgment statutes. With respect to *Abbott*, it has been suggested that the court decided the case on its merits before concluding that the plaintiff lacked standing. *Gibson, The Annual Survey of Virginia Law*, 45 VA. L. REV. 1402, 1451 (1959).

244. VA. CODE ANN. §§ 9-6.14:1 to -6.14:20 (Cum. Supp. 1975), *repealing* General Administrative Agencies Act, VA. CODE ANN. §§ 9-6.1 to -6.14 (1973 Repl. Vol.).

245. By definition, an agency under Virginia's Administrative Process Act is:

[A]ny authority, instrumentality, officer, board, or other unit of the State government empowered by the basic laws to make regulations or decide cases but excluding . . . (iii) municipal corporations, counties, and other local or regional governmental authorities including sanitary or other districts, and joint State-federal, interstate, or inter-municipal authorities. VA. CODE ANN. § 9-6.14:4A(iii) (Cum. Supp. 1975).

246. The relevant statute reads in pertinent part:

Any person affected by and claiming the unlawfulness of any regulation, or party aggrieved by and claiming unlawfulness of a case decision . . . shall have a right to the direct review thereof either (i) by proceeding pursuant to express provisions therefor in the basic law under which the agency acted or (ii), in the absence, inapplicability, or inadequacy of such special statutory form of court review proceeding, by an appropriate and timely court action against the agency as such or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia. *Id.* § 9-6.14:16.

It appears that contiguous property owners residing both in and outside of a zoning municipality may qualify as "persons aggrieved." When there is a proposed zoning amendment reclassifying twenty-five or fewer parcels of land, written notice is required to be given to

the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. . . . [and] to the owner, their agent or the occupant, of all abutting property and property immediately across the street from the property affected which lies in an adjoining county or municipality of the Commonwealth. . . .<sup>247</sup>

It may be inferred that this notice requirement is a statutory recognition of the potential for these individuals to be "persons aggrieved," assuming there is some adverse effect to their property as a result of the proposed zoning determination.

The Virginia Supreme Court had an opportunity to consider the standing of property owners associations in *Belle-Haven Citizens Association v. Schumann*.<sup>248</sup> A developer had received building permits to construct two high-rise apartment buildings on the undeveloped twenty-six acres of a larger tract of land. Appellants, who objected to the issuance of the permits, were: (1) four taxpayers residing in the vicinity of the land; (2) a corporation owning land and paying taxes in the subject district; and (3) two property owners associations, which owned no land but which did pay annual registration taxes to the state of Virginia. Only the first two categories of plaintiffs were accorded standing. The court found it unnecessary to decide whether the associations had standing, since they had been dismissed from the case under a decree deciding the merits.<sup>249</sup> Should the situation arise again, the Virginia Supreme Court might find the rationale of the New York court in *Douglaston Civic Association v. Galvin*<sup>250</sup> persua-

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247. *Id.* § 15.1-431.

248. 201 Va. 36, 109 S.E.2d 139 (1959).

249. With respect to the third category, the court said:

The third and final assignment is that the court erred in holding that Belle-Haven Citizens Association, Incorporated, and Bucknell Manor Citizens Association, Incorporated, were not proper parties to the cause and dismissing them as parties complainant. This, as the decree states, was on the ground that these two corporations did not own any real estate and were not aggrieved by the decision of the Board of Zoning Appeals within the meaning of § 15-850 of the Code. Exception was taken to this ruling only by these two corporations and since they were dismissed by the decree which decided the case against their contention on its merits, no prejudice resulted to them from this ruling. *Id.* at 42, 109 S.E.2d at 143.

250. 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974). See note 227 *supra* and accompanying text.

asive. *Douglaston* and *Belle-Haven* are factually similar. Nearly identical statutes were applicable to both, and both came before their respective courts on similar procedural grounds. On the other hand, the Virginia court is not likely to take a regional approach in its attitude towards the general welfare, whereby future residents would be included in the definition of "parties aggrieved."

In *Board of County Supervisors v. Carper*,<sup>251</sup> an amendment to a Fairfax County zoning law which imposed a two-acre minimum lot size restriction upon the western two-thirds of the county was struck down for its exclusionary purpose, which served private rather than public interests and which bore no relation to the health, safety, morals or general welfare of the community.<sup>252</sup> *Carper* was fundamentally concerned with the deprivation of the property rights of the plaintiffs and the exclusionary effects of the amendment on a *county-wide* basis.<sup>253</sup> The court's language bears a remarkable resemblance to the general welfare language of the Pennsylvania court in *National Land & Investment Co. v. Kohn*.<sup>254</sup> However, the latter case referred to the *regional* impact as opposed to the *intra-county* impact of the challenged zoning ordinance in *Carper*.

Fourteen years later, the Virginia court cited *Carper* as authority for striking down an "inclusionary"<sup>255</sup> zoning amendment in *Board of Supervisors v. DeGross Enterprises, Inc.*<sup>256</sup> The amendment required developers of fifty or more dwelling units to commit themselves, before rezoning or site plan approval, to build at least fifteen percent of the dwelling units as low and moderate-income housing with fixed sales and rental ceilings. The court deemed this to be "socio-economic zoning,"<sup>257</sup> and concluded that, as the legislative intent was neither to include nor exclude socio-economic groups, it amounted to an unconstitutional taking without just compensation. This reasoning has been criticized as "unfounded,"<sup>258</sup> and "patently absurd."<sup>259</sup>

251. 200 Va. 653, 107 S.E.2d 390 (1959).

252. *Id.* at 661, 107 S.E.2d at 396.

253. Comment, 22 SYRACUSE L. REV., *supra* note 192, at 605 n.31.

254. 419 Pa. 504, 215 A.2d 597 (1965). *See* note 231 *supra*.

255. Note, *Socio-Economic Zoning: One Court's Response*, 35 U. PITT. L. REV. 837, 840 (1974).

256. 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973). *See also* the companion case, *Board of Supervisors v. Lukinson*, 214 Va. 239, 198 S.E.2d 603 (1973).

257. 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973).

258. Note, 35 U. PITT. L. REV., *supra* note 255, at 840.

It may well be true that the Virginia legislature only intended to authorize "physical" zoning. However, it must be remembered that no matter how "physical" a zoning ordinance appears to be, it will almost inevitably have social effects. *Id.* at 841.

259. Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2

In *Board of Supervisors v. Williams*,<sup>260</sup> existing zoning was again found invalid as applied to the land in question. In dictum, the court said that the zoning had an exclusionary effect similar to that which had been held impermissible in *Carper*.<sup>261</sup> The court made no reference to "socio-economic zoning" or to *DeGroff*; however, the court may have desired to avoid repeating an overstatement of legislative intent, as had been done in *DeGroff*.

In conclusion, nonresidents must make strong showings of aggrievement in order to have standing in Virginia. While it is unclear whether property owner associations may attack exclusionary ordinances, future residents are confronted with the Virginia court's policy of considering only the general welfare of the isolated zoning localities. It has been argued, however, that a regional concept may be used to grant standing to contiguous property owners in adjacent municipalities.

#### IV. CONCLUSION

Substantive constitutional challenges to exclusionary zoning ordinances have been historically unsuccessful, whether based upon due process, equal protection or right to travel arguments. Courts give such ordinances only a cursory review to determine whether they serve *any* rational goal of the municipality. Although courts in Pennsylvania and New Jersey have begun to apply a more vigorous standard of review, neither the federal courts nor other state courts appear disposed to follow suit.

The procedural difficulties are no less severe. In order to attain standing in federal court these challengers must demonstrate some personal injury resulting from the zoning ordinance's alleged unconstitutionality. Standing in state courts is based on similar principles with the complaining party required to show damage to a cognizable legal or personal interest.

Although there are minor indications that challengers to exclusionary zoning are making progress in placing the issues squarely before the courts, the likelihood of a successful challenge still remains remote.

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HASTINGS CON. L.Q. 179, 198 (1975).

Only when a court disapproves of a particular zoning ordinance is the term "socio-economic" used—as if it indicated a socialist conspiracy. Yet when a court approves certain zoning, it earns the label of careful planning for the general welfare. *Id.*

260. 216 Va. 49, 216 S.E.2d 33 (1975).

261. *Id.* at 58, 216 S.E.2d at 41.