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Low-Income Housing in the Suburbs: The Problem of Exclusionary Zoning

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NOTES

LOW-INCOME HOUSING IN THE SUBURBS: THE PROBLEM OF EXCLUSIONARY ZONING*

The goal of a decent home for all Americans, first announced by Congress over twenty years ago,[1] remains unfulfilled as the demand for housing becomes increasingly imperative.[2] The existing need for adequate housing is shared by all segments of the urban population, although inadequacies fall most heavily on the poor, the black, and other minority groups whose plight has been exacerbated by the flight of the white middle class to the suburbs.[3] As a consequence of suburban migration, a deflated tax base has limited the ability of the cities to provide adequate housing. Moreover, with the departure of the more affluent city dwellers, two economically and racially disparate societies have evolved.[4]

Usually by means of exclusionary zoning devices and building codes, the suburban communities have, sometimes inadvertently, succeeded in preventing any significant influx of low-income groups.[5] This exclusion is especially significant as industry begins to locate in the suburbs,[6] since inadequate transportation facilities may limit the ability of low-income groups to reach

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1. Declaration of Policy of the Housing Act of 1949, 42 U.S.C. §1441 (1964). This was reaffirmed in the Housing & Urban Development Act of 1968, 42 U.S.C. §1441a (Supp. IV, 1965-1968). "Today, after more than three decades of fragmented and grossly underfunded federal housing programs, decent housing remains a chronic problem for the disadvantaged urban household." U.S. NATIONAL COMM'N ON CIVIL DISORDERS REPORT 467 (Bantam ed. 1968) [hereinafter cited as KERNER REPORT].

2. *See generally* C. RAPKIN & W. GRIGSBY, THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS (1960).

3. For purposes of this note any precise definition of the word "suburb" is unnecessary. Generally it is used in a broad context to encompass bedroom communities, outlying but non-self-sustaining towns, and the outlying residential areas of the city itself. For a discussion of definitional problems in this area, see Miner, *The Folk-Urban Continuum*, 17 AM. SOCIOLOGICAL REV. 529 (1952); Wirth, *Urbanism as a Way of Life*, 44 AM. J. SOCIOLOGY 1 (1938).

4. The "flight" to the suburbs has been heavily subsidized by the federal government through FHA loans and highway appropriations — thus creating, or helping to create, the urban housing problem. Eleven major cities can expect to become more than 50% black by 1984. Washington, D.C. and Newark, N.J. are already over 50% black. KERNER REPORT, *supra* note 1, at 391.

5. "Exclusionary zoning" encompasses large-lot and minimum floor-space zoning ordinances, as well as an express ban on apartments. *See* Dietsch, *Cracking the Suburbs*, THE NEW REPUBLIC, Sept. 12, 1970, at 8; Graham, *Court Tests of Zoning Against the Poor*, N.Y. Times, June 14, 1970, §4, at 11, col. 5.

6. The Bureau of Labor Statistics reported that between 1960 and 1967, 62% of all industrial buildings and 52% of all commercial buildings were constructed outside the central cities, and that over 50% of all new jobs created were outside the cities. U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, CHANGES IN URBAN AMERICA 1-5 (Rep. No. 353, 1969), *cited in* Note, *Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339, 340 n.4 (1970).

potential employment. Consequently, even where transportation facilities are available, unskilled and semi-skilled workers are forced to commute long distances to their jobs.[7]

The solution to the lack of available low-income housing has traditionally been through government subsidized housing programs.[8] However, such programs have been singularly unsuccessful in attempts to locate in the suburbs.[9] Recognizing this failure, the National Advisory Commission on Civil Disorders has suggested a reorientation of federal housing programs, directing the major thrust into non-ghetto areas.[10] In order to build low-income housing in the suburbs, however, the traditional barrier of exclusionary zoning, in all forms, must be overcome.

This note will explore the potential legal challenges to exclusionary zoning and evaluate their probability of success. The desirability of low-income housing outside the central city and the nature and operation of exclusionary devices traditionally utilized to preserve the homogeneous character of the suburbs will also be examined. Following this analysis, the possibility of an affirmative duty to use housing as a means of achieving desegregation will be explored.

DESIRABILITY OF LOCATING LOW-INCOME HOUSING IN THE SUBURBS

Right to Decent Housing

In examining the interrelationship between low-income housing and exclusionary zoning, the initial question is whether an enforceable *right* to decent housing exists. In this context, the distinction between "the right to be housed" and the "right to free choice" in housing is useful, since threats to free choice may arise even when a right to housing is recognized.[11]

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7. "When companies move away from a city to a suburb with no living space for blue-collar workers the worker has the option of either traveling to the job from the city or else quitting. In too many instances, civil rights groups say, 'He's had to quit,' and this in turn has contributed to unemployment in city areas." Wall Street J., Nov. 27, 1970, at 12, col. 4 (eastern ed.). *See also* Hilaski & Willacy, *Employment Patterns and Place of Residence*, 92 MONTHLY LAB. REV., Oct. 1969, at 18-26. *But see* E. BANFIELD, THE UNHEAVENLY CITY 34-35 (1970).

8. For a history of discrimination in public housing in the United States see Comment, *Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871 (1966). For purposes of this note "low-income housing" is intended to include both public and private sponsored projects, whether apartments, single family or duplex dwellings, grouped on one site. Likewise there is no necessity to distinguish among the various housing programs that may be utilized.

9. "To date, housing programs serving low-income groups have been concentrated in the ghettos. Non-ghetto areas, particularly suburbs, for the most part have steadfastly opposed low-income, rent supplement, or below-market interest rate housing, and have successfully restricted use of these programs outside the ghetto." KERNER REPORT, *supra* note 1, at 482.

10. *Id.*

11. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 207, 215 (1970).

The importance of decent housing has been recognized in both legislative[12] and executive[13] pronouncements and the Supreme Court has proclaimed that "[h]ousing is a necessity of life."[14] Although these pronouncements seem to indicate a trend toward favoring a "right to housing," it is still a goal rather than a fact.[15] This attention is not misplaced, however, since access to housing has become the vortex about which other rights of the poor and the black revolve.[16]

If no widely accepted "right" to housing presently exists, can there be a right to a choice of housing location? Without such a right, the constitutionally guaranteed right to equal protection and due process of law are meaningless, since the poor may be effectively isolated from the mainstream of society and denied equal access to jobs and schools. In the absence of available suburban housing, the mobility of the poor is nonexistent. Trapped in the cities, the poor find that jobs and educational opportunities are beyond their reach. Thus, the desirability of locating low-income housing in the suburbs is apparent.[17]

This problem could be partially alleviated by a recognition of the need for low-income housing in the suburbs. Since 1962 the announced policy of the federal government has been to eliminate discrimination in federally assisted housing projects.[18] The Department of Housing and Urban Development (HUD) has adopted regulations requiring, whenever possible, that HUD projects be located outside areas of racial concentration.[19] While this does not necessarily mean public housing will be placed in the suburbs, it does seem to guarantee — absent special circumstances — that public housing will no longer be constructed exclusively in ghetto areas or urban renewal neighborhoods. Although the desirability of residential integration by locating public housing in the suburbs has been criticized,[20] it has been en-

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12. Civil Rights Act of 1866, 42 U.S.C. §1983 (1964); Housing Act of 1949, 42 U.S.C. §1441 (1964); Dep't of Housing and Urban Development Act of 1968, 42 U.S.C. §3631 (Supp. V, 1965-1969); Fair Housing Act of 1968, 42 U.S.C. §§3601-31 (Supp. IV, 1965-1968).

13. *E.g.*, KERNER REPORT, *supra* note 1, at 467-82; 1 REPORT OF PRESIDENT'S COMM. ON URBAN HOUSING, TECHNICAL STUDIES 27 (1967). *See generally* NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. No. 34, 91st Cong., 1st Sess. (1968); Michelman, *supra* note 11; Note, *Decent Housing as a Constitutional Right — 42 U.S.C. §1983 — Poor People's Remedy for Deprivation*, 14 How. L.J. 338 (1968).

14. Block v. Hirsh, 256 U.S. 135, 156 (1921). *See also* Hunter v. Erickson, 393 U.S. 385 (1969); 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).

15. *See* Michelman, *supra* note 11, at 215.

16. Abrams, *The Housing Problem and the Negro*, in THE NEGRO AMERICAN 512, 520 (T. Parsons & K. Clark eds. 1965). For example, equal employment opportunities are relatively meaningless when the potential work force is denied housing. *See* authorities cited in note 7 *supra*. *But see* Note, *Constitutional Law — Civil Rights — Thirteenth and Fourteenth Amendments Applied To Enjoin Referendum on Low Income Housing Project*, 15 WAYNE L. REV. 1617, 1621 (1969).

17. *See* authorities cited in note 7 *supra*. *But cf.* E. BANFIELD, *supra* note 7, at 35-38.

18. Exec. Order No. 11,063, 3 C.F.R. 261 (Supp. 1962).

19. HUD LOW-RENT HOUSING PRECONSTRUCTION HANDBOOK, RHA 7410.1, ch. 1, §1.2g.

20. *Hearings on S. 3029 Before the Subcomm. on Housing and Urban Affairs of the*

dorsed by recent government advisory committee reports[21] and has been approved by some lower federal courts.[22]

The existence of a right to suburban location is presently being decided. As yet, however, courts have not found a legally enforceable interest except in the area of governmentally controlled and subsidized low-income housing. Generally, government sponsored or supported restrictions on housing choice are forbidden by both the Constitution[23] and fair housing legislation[24] — while private discrimination in making housing available is still largely ignored.[25] Where governmental discrimination involving urban renewal is shown to exist there apparently is a right not to be relocated in racially closed housing[26] and not to have all public housing sites located in a manner that creates segregated neighborhoods.[27]

Although in some instances exclusionary zoning is the result of active governmental discrimination,[28] more frequently the enactment of zoning restrictions are probably not racially motivated. Instead it is the effect rather than the purpose of the zoning ordinance that is exclusionary. In order to an-

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Senate Banking & Currency Comm., 90th Cong., 2d Sess. (1968) (testimony of Senator Robert F. Kennedy): "To seek a rebuilding of our urban slums is not to turn our backs on the goal of integration. It is only to say that open occupancy laws alone will not suffice and that sensitivity must be shown to the aspirations of Negroes and other non-whites who would build their own communities and occupy decent housing in the neighborhoods where they now live. . . . For it is comparability of housing and full employment that are the keys to free movement and to the establishment of a society in which each man has a real opportunity to choose whom he will call neighbor." *Id.* at 641. *See* Kennedy, *Industrial Investment in Urban Poverty Areas*, in RACE AND POVERTY 153, 157 (J. Kain ed. 1969); Piven & Cloward, *Desegregated Housing: Who Pays for the Reformers' Ideal*, in RACE AND POVERTY 175, 181-82 (J. Kain ed. 1969). *See also* Note, *Public Housing and Urban Policy*: Gautreaux v. Chicago Housing Authority, 79 YALE L.J. 712 (1970). *But cf.* Grinstead, *Overcoming Barriers to Scattered-Site Low-Cost Housing*, 2 PROSPECTUS 327 (1969); note 21 *infra*.

21. *E.g.*, KERNER REPORT, *supra* note 1, at 481-82; PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 13, 48 (1968). *See also* Kain & Pershey, *Alternatives to the Gilded Ghetto*, in RACE & POVERTY 167 (J. Kain ed. 1969).

22. Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969); El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (Ct. App. 1969).

23. U.S. CONST. amend. XIV, §1.

24. *E.g.*, Fair Housing Act of 1968, 42 U.S.C. §§3601-31 (Supp. IV 1965-1968).

25. In Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), there was an affirmative showing of governmental discrimination, but it is debatable whether an extension of the *Gautreaux* rationale into exclusionary zoning problems is feasible. There may be a viable distinction here between the "right in" as opposed to the "right to" public housing. Once housing programs exist, those who participate are entitled to administration of the program free from economic or racial discrimination. *Cf.* Goldberg v. Kelly 397 U.S. 254 (1970); Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967); Gonzalez v. Freeman 334 F.2d 570 (D.C. Cir. 1964). *But see* Note, *supra* note 16.

26. *E.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1969). *See also* Michelman, *supra* note 11, at 216.

27. Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

28. *E.g.*, Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

alyze the specific devices used to exclude certain groups from suburban housing, the classes that are the victims of this exclusion – the prospective tenants in low-income housing – must be examined.

Characteristics of Low-Income Housing Tenants

In 1960, sixty-one per cent of all nonwhite housholds in major metropolitan areas were poor.[29] Since only thirty per cent of the urban poor are nonwhite,[30] it would be expected that low-income housing tenants would be predominantly white. However, this is not the case. Nonwhites occupy over half of all units in public housing, and more are remaining in public housing.[31] The greater mobility of the poor white is partially responsible for the higher white turnover, which accelerates as the proportion of blacks to whites increases.[32]

By comparison, the mobility of blacks is restricted in various ways. Housing cost is a major stumbling block, as is the hostility of whites in outlying areas.[33] Furthermore, exclusionary zoning practices hinder mobility by preventing migration to the suburbs for both the white and the nonwhite poor.[34] The cumulative effect of the obstacles to suburban migration faced by the urban poor, especially the black poor, is increased racial segregation in the cities and the suburbs.[35] This segregation becomes especially serious when economic opportunities become concentrated in the suburbs rather than in the cities.[36]

Courts have recognized that exclusion from the suburbs effectively reinforces the ghetto.[37] Since a majority of those residing in low-income housing

29. G. SCHERMER ASSOCIATES, MORE THAN SHELTER: SOCIAL NEEDS IN LOW- AND MODERATE-INCOME HOUSING 34 (Nat'l Comm'n on Urban Problems, Research Rep. No. 8, 1968). Less than $4,000 family income is the generally accepted monetary definition of poverty. In comparison, 25% of urban whites were considered poor.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* text accompanying notes 41-49 *infra*. *See also* J. VANDER ZANDEN, AMERICAN MINORITY RELATIONS 235 (2d ed. 1966).

34. Grier, *The Negro Ghettos and Federal Housing Policy*, 32 LAW & CONTEMP. PROB. 550 (1967). There is a distinct possibility that the relative immobility of low-income families is denying them access to suburban located housing projects. 22 VAND. L. REV. 1386, 1393 (1969). *See also* Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 999 (1968).

35. Black population in Seattle rose over 60% between 1960 and 1970, while in the surrounding county the black population remained negligible. Diuker & Shouldberg, *Locational Analysis of Low Income Housing in Seattle and King County*, 1970 URBAN L. ANNUAL 85, 86. In St. Louis the statistics are even more revealing: between 1950 and 1970 the black population of the city almost doubled, while the white population dropped 54%. *See* statistics *cited in* Complaint, Park View Heights Corp. v. City of Black Jack, Civ. No. 71C 15(A), 9 (E.D. Mo., filed Jan. 7, 1971). *See also* KERNER REPORT, *supra* note 1, at 248 (in almost every city there has been a steady increase in the black percentage of the total).

36. *See* note 6 *supra*.

37. *E.g.*, Appeal of Girsh, 437 Pa. 237, 244, 263 A.2d 395, 398 (1970). "[W]hen racial

are black, and all low-income tenants are by definition poor, the courts have frequently couched their discussion in terms of racial discrimination.[38] However, the exclusionary effect inexorably operates against white and black alike. The effect of exclusion is to deny minorities the opportunity to escape the central city, because they are disproportionately represented among poor persons[39] needing public housing.[40] Suburban residents, aware of the usual racial composition of low-income groups, have traditionally opposed their entry into outlying communities.

The Objections of Suburbanites

In resisting any influx of the poor, suburban residents have evolved a series of seemingly rational reasons for their attitude. Generally, those in the immediate vicinity of a proposed low-income housing site are most vocal in opposition, although frequently supported by the remainder of the community.[41] The most persistent objection is that suburban relocation of the poor will result in decreased property values.[42] The fallacy in this argument, however, is that decline in property value is primarily due to affected residents who panic upon learning that a site has been selected

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discrimination herds men into ghettos . . . it too is a relic of slavery." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 442-43 (1968).

38. *E.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Buchanan v. Warley, 245 U.S. 60 (1917); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla., 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

39. "In . . . 1968 . . . the poverty rate among persons of Negro and other races was about three times the rate among whites." U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, POVERTY IN THE UNITED STATES: 1959 TO 1968 1 (ser. P-60, No. 68, 1969). *See also* NATIONAL COMM'N ON URBAN PROBLEMS, *supra* note 13, at 45: "In 1957, 51 percent of the nonwhite population was poor, compared with 12 percent of the white population. Nonwhites thus constitute a far larger share of the poverty population . . . than of the American population as a whole . . . . Moreover, the nonwhite proportion of the poverty population has been increasing, slowly but steadily, since the first racial count was made in 1959; it was 28 percent then, and 32 percent by 1967."

40. *See* text accompanying note 29 *supra*. *See also* GOVERNOR'S ADVISORY COMM'N ON HOUSING PROBLEMS, REPORT ON HOUSING IN CALIFORNIA 38-42 (1963); KERNER REPORT, *supra* note 1, at 467-74; NATIONAL COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 34, 91st Cong., 1st Sess. 114 (1968); PRESIDENT'S COMM. ON URBAN HOUSING, A DECENT HOME 42 (1968).

41. In a survey of local housing authorities in Florida over 50% of those responding listed the hostility of the citizenry in the vicinity of proposed low-income housing sites as *the* most serious obstacle to such housing location. (Survey on file with the *University of Florida Law Review.*)

42. *Id. See* Lakewood Homes, Inc. v. Board of Adjustment, 52 Ohio Op. 2d 213, ___, 258 N.E.2d 470, 522 (app. VIII) (C.P. Allen County 1970), *modified*, 25 Ohio App. 2d 125, 267 N.E.2d 595 (1971); RAYMOND & MAY ASSOCIATES, ZONING CONTROVERSIES IN THE SUBURBS: THREE CASE STUDIES 35-44 (Nat'l Comm'n on Urban Problems Research Rep. No. 11, 1968); Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1067 (1963); Interview with Mr. A. Suskind, Executive Director, Gainesville, Fla., Housing Authority, Feb. 8, 1971. *Cf.* W. Kilpatrick, Public Housing in Florida, 1959, at 13—results of survey on effect of public housing upon adjacent private housing (unpublished thesis in University of Florida Research Library).

nearby[43] and glut the housing market in their haste to move. The inevitable consequence is depressed property value. Low-income housing is thus only the catalyst rather than the effective cause of reduction in realty value.

Implicit in the fear of a drop in property values is the envisioned threat of friction between black tenants and surrounding white residents.[44] Opposition to an integrated neighborhood merges into opposition to low-income housing. Other objections include the belief: that housing projects will place an increased tax burden on neighborhood residents;[45] that public utilities will be inadequate to serve the needs of the new residents;[46] that neighborhood schools will become overcrowded;[47] that the character of the community will be altered;[48] and that the projects will become slums.[49] These objections have been both the cause and the result of exclusionary devices that have kept low-income groups out of the suburbs and postponed the time when assimilation must begin.

The Exclusionary Devices

The earliest attempts to exclude the poor and the black from suburban areas took the form of express bans against construction of apartments[50] and settlement of blacks.[51] Since low-income groups could seldom afford the cost of a house, the ban on multifamily dwellings generally had the

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43. L. Laurenti, Property Values and Race 47 (1960); Babcock & Bosselman, *supra* note 42, at 1067.

44. Along with depressed property values, friction between the races was the main objection to locating low-income housing in those communities from which a response to the survey of local housing authorities in Florida was received. Interview with Mr. A. Suskind, note 42 *supra*. Obviously, not all low-income housing is for minority groups. Especially in Florida, low-income projects for the elderly are also included in low-income housing construction. The preference for retirement housing in the community underscores to some extent the racial character of local opposition.

45. *See generally* Lakewood Homes, Inc. v. Board of Adjustment, 52 Ohio Op. 2d 213, ____, 258 N.E.2d 470, 522-24 (C.P. Allen County 1970). There is as yet no agreement on the validity of this objection. *See* authorities cited in Babcock & Bosselman, *supra* note 42, at 1062-65.

46. *But see, e.g.,* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970) (rejecting this argument).

47. Lakewood Homes, Inc. v. Board of Adjustment, 52 Ohio Op. 2d 213, 258 N.E.2d 470 (C.P. Allen County 1970). There is as yet no agreement on the validity of this objection. *See* authorities cited in Babcock & Bosselman, *supra* note 42, at 1063 n.161.

48. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); Babcock & Bosselman, *supra* note 42, at 1067. A community can protect its character by requiring projects to be built in accordance with reasonable building code requirements.

49. Lakewood Homes, Inc. v. Board of Adjustment, 52 Ohio Op. 2d 213, 258 N.E.2d 470 (C.P. Allen County 1970). Deterioration of housing may also be prevented through strict building and occupancy code enforcement. Raymond & May Associates, *supra* note 42, at 46.

50. *E.g.,* Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925); Minkus v. Pond, 326 Ill. 467, 158 N.E. 121 (1927).

51. *E.g.,* Buchanan v. Warley, 245 U.S. 60 (1917); Bowen v. Atlanta, 159 Ga. 145, 125 S.E. 199 (1924); Jackson v. State, 132 Md. 311, 103 A. 910 (1918).

desired effect of preventing the settlement of poor families. A few judges recognized that the existence of separate districts for single-family and multifamily housing constituted economic segregation.[52] But after zoning by use districts was upheld by the United States Supreme Court in *Euclid v. Ambler Realty Co.*,[53] segregation of multifamily housing was generally accepted. Although occasionally this method of exclusion is accomplished by restricting multifamily housing to areas where it already exists,[54] the more common treatment is to establish use districts zoned for multifamily dwellings within the core city.[55]

Attempts to completely exclude blacks from the suburban community have been coupled with these controls on apartment location.[56] The earliest

52. R. B. Construction Co. v. Jackson, 152 Md. 671, 137 A. 278 (1927) (Offutt, J., dissenting): "The ordinance is nothing more nor less than a vast, comprehensive, and complete plan or scheme of segregation, under which the population of the city in respect to their dwelling places are graded and classified according to their means." *Id.* at 690, 137 A. at 286. *See also* State *ex rel.* Twin City Bldg. & Constr. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885 (1919), *rev'd on rehearing*, 176 N.W. 159 (1920); Altschuler v. Scott, 5 N.J. Misc. 698, 137 A. 883 (Sup. Ct. 1927); Jersey Land Co. v. Scott, 100 N.J.L. 45, 126 A. 173 (Sup. Ct. 1924); Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

53. 272 U.S. 365 (1926).

54. *E.g.*, HASBROUCK HEIGHTS, N.J., ZONING ORDINANCE, *as amended*, Sept. 21, 1955, *cited and construed in* Fanale v. Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958): "No apartment house, or other multiple family dwelling which is arranged, intended or designed to be used by more than two families shall be erected or used in any zone or district in the Borough of Hasbrouck Heights." *Id.* at 323, 139 A.2d at 751. *See also* Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N.Y.S. 178 (2d Dep't 1931), *aff'd per curiam*, 261 N.Y. 506, 185 N.E. 714 (1933) (construing a similar ordinance). *But see* NETHER PROVIDENCE, PA., ZONING ORDINANCE, *as amended* June 23, 1952, Jan. 19, 1959, *cited in* Brief for Appellant at 10, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (it was held unconstitutional). For a current example of tactics being used to exclude low-income groups, see recital of facts in Complaint, Park View Heights Corp. v. City of Black Jack, Civ. No. 71C 15(A) (E.D. Mo., filed Jan. 7, 1971). *See generally* Bell, *Controlling Residential Development on the Urban Fringe: St. Louis County, Missouri*, 48 J. URBAN L. 409 (1971) for the background of this complaint.

55. *E.g.*, STERLING, ILL., ZONING ORDINANCE §5 (providing that only single and two-family houses may be built in residential districts), *cited and construed in* Speroni v. Board of Appeals, 368 Ill. 568, 15 N.E.2d 302 (1938): "While a municipality may not expressly prohibit the erection of apartment buildings or restrict permissible locations to districts unfit for human habitation or already overcrowded with buildings of a permanent nature, the record indicates that such is not the effect of the ordinance challenged here. By its provisions, apartment buildings may be built in *commercial* or *industrial* districts." *Id.* at 572, 15 N.E.2d at 304 (emphasis added). *See also* EUCLID, OHIO, ORDINANCE 2812, Nov. 13, 1922, *cited and construed in* Euclid v. Ambler Realty Co., 272 U.S. 365, 372, 380-82 (1926) (provided for 6 use districts with apartments excluded from the residential district). Use districts have long been authorized in Florida. "[T]he governing body [of a municipality] may divide the corporate area of the said municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts." FLA. STAT. §176.03 (1969) (first enacted in 1939).

56. *See generally* Abrams, *The Housing Problem and the Negro*, in THE NEGRO

efforts took the form of express racial zoning, but in 1917 the Supreme Court, in *Buchanan v. Warley*,[57] held that such explicit restrictions violated the Constitution.[58] Subsequently, lower federal and state courts have followed the *Buchanan* rationale by invalidating zoning laws that blatantly attempt to prescribe separate areas of residence for whites and blacks.[59] Although restrictive covenants are also occasionally utilized,[60] suburban communities rely primarily on zoning to continue the exclusion of the black and the poor.

The most common means of exclusionary zoning is large lot zoning — prescribing a minimum lot size.[61] By inflating residential prices, this zoning device results in a dual exclusionary effect on low-income housing. By limiting the amount of land available for low-income housing, when housing project vacancies are filled the poor are forced to select from less desirable housing available at higher cost.[62] The supply of low-income housing will be reduced, thereby excluding the poor from nearby job opportunities. Although a larger lot may not cost proportionately more than a smaller one, the differential is generally substantial enough to price a large lot beyond the reach of many prospective purchasers.[63] More overt economic discrimination, such as minimum housing cost rather than lot size restrictions, has

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AMERICAN 512, at 516 (T. Parsons & K. Clark eds. 1965); G. MYRDAL, AN AMERICAN DILEMMA, 623-24 (anniv. ed. 1962).

57. 245 U.S. 60 (1917).

58. *Id.* at 80-81.

59. City of Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951); State v. Wilson, 157 Fla. 342, 25 So. 2d 860 (1946); Clinard v. Winston-Salem, 217 N.C. 119, 6 S.E.2d 867 (1964); Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1936).

60. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (holding such racial covenants violate equal protection).

61. *Compare* ordinances *cited and construed in* County Comm'rs v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (5 acres valid); State *ex rel.* Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (6th Dist. Ct. App. 1960) (2 acres valid) (dicta), *with, e.g.*, Aronson v. Town of Sharon, 246 Mass. 598, 195 N.E.2d 341 (1964) (100,000 sq. ft., with width of 200 ft., unconstitutional as applied); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (4 acres unconstitutional). *See* cases cited in Annot., 95 A.L.R.2d 716, 761 (1964). *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §7.29 (1968). Minimum floor space requirements are a similar means of regulating entry to an area, by controlling the size of the structure rather than the lot size. *E.g.*, Lionshead Lake Inv. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) (minimum floor space requirements upheld). *See* cases collected in Annot., 96 A.L.R.2d 1409 (1964). Minimum lot size regulations have been upheld in Florida where the restriction is "reasonable." Garvin v. Baker, 59 So. 2d 360 (Fla. 1952).

62. Additionally, the absence of low-income housing may also perpetuate segregation, since racial minorities are disproportionately represented in low-income groups. *See* text accompanying notes 29-32 *supra*. *See also* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781-82 (1969).

63. BUILDING THE AMERICAN CITY, H.R. DOC. No. 34, 91st Cong., 1st Sess. 214 (1968). *See also* Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970). Additionally, incidental effects of low-density zoning, such as increased land improvement costs and informal building practices, militate against low-income groups.

seldom been utilized[64] and probably would not be allowed.[65] The effects of such practices on low-income housing are only slightly less substantial than on private buyers. Consequently, as vacant land within central metropolitan areas becomes increasingly scarce,[66] the over-all effect of suburban zoning has been to constrict urban growth[67] and to interpose a serious obstacle to the suburban location of low-income groups.[68]

Attempts to circumvent, or even to comply with, local zoning requirements have been further complicated by referendum and initiative petitions. By either forcing approval by petition[69] of a large percentage of the zoning board, or relegating the issue to the people of the community by way of a referendum,[70] local zoning decisions controversial enough to raise opposition may be singled out for special consideration. Since the introduction of low-income housing is almost certain to arouse significant opposition among area residents,[71] the referendum becomes a potent hurdle to locating low-income housing in the suburbs.

Other problems may further complicate and impede construction of low-income housing. The most common is discrimination in site selection within the community.[72] Assuming that local zoning problems have been overcome,

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64. *Compare* County Comm'rs v. Ward, 186 Md. 330, 46 A.2d 684 (1946) ($2,500 minimum housing cost questioned but not reached), *with* Benequit v. Monmouth Beach, 125 N.J.L. 65, 66-67, 13 A.2d 846, 847 (Sup. Ct. 1940) (construing minimum cost of building without reaching constitutionality), *and* Cassell v. Lexington Township, 163 Ohio St. 340, 127 N.E.2d 11 (1955) (no minimum cost allowed where not pursuant to comprehensive plan).

65. *See* Barkerville v. Town of Montclair, Docket No. L-35387-68 P.W. (N.J. Super. Ct., Mar. 30, 1970), *cited in* Aloi & Goldberg, *Racial and Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANNUAL 9, 38 (1971) (first clear holding that minimum construction cost for residential zoning is illegal because unrelated to the health, safety, or general welfare of the community). An analogous situation is acreage zoning. *See, e.g.*, Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942); National Land & Inv. Co. v. Easttown, 419 Pa. 504, 215 A.2d 597 (1965). *But see* Florida Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952).

66. *See* Note, *supra* note 63, at 908.

67. *See* text accompanying notes 29-40 *supra*.

68. In the survey of housing authorities in Florida, local zoning was cited as a major obstacle to location of low-income housing outside areas of racial concentration. (Survey on file with the *University of Florida Law Review*.)

69. *E.g.*, FLA. STAT. §176.06 (1969); GAINESVILLE, FLA., CODE OF ORDINANCES §29-21 (1960), *as amended*, Ordinance 1090, June 25, 1962, and Ordinance 1346, Sept. 8, 1965. Such provisions have generally been upheld. *See, e.g.*, Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962); Northwood Properties Co. v. Perkins, 325 Mich. 419, 39 N.W.2d 25 (1949); Farmer v. Meeker, 63 N.J. Super. 56, 163 A.2d 729 (Super. Ct. 1960).

70. *See, e.g.*, Valtierra v. Housing Authority of San Jose, 313 F. Supp. 1 (N.D. Cal. 1970), *rev'd sub nom.*, James v. Valtierra, 402 U.S. 137 (1971); Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970). *Cf.* Hunter v. Erickson, 393 U.S. 385 (1969).

71. *See* text accompanying notes 41-49 *supra*. *See generally* Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753 (1968); 1969 L. & SOCIAL ORDER 453.

72. *See generally* Note, *Poverty Law — Constitutional Law — Selection of Sites for Public Housing*, 48 N.C.L. REV. 155 (1969); Note, *Discriminatory Site Selection in Public Housing*

local officials charged with ultimate approval may yet veto sites in all-white areas.[73]

Site acquisition may impose additional problems, since potential sellers may be reluctant to sell property for use as low-income housing sites. While the power of eminent domain is sometimes available to acquire land for public housing,[74] condemnation proceedings often generate ill will within the community and therefore may not be practical for land acquisition.[75]

Although the exclusion devices already discussed frequently arise in the path of attempts to provide low-income housing; the more prevalent barriers have been local low density zoning ordinances. The following discussion is directed to methods thus far used to remove such zoning requirements, through both legislation and litigation.

EQUAL PROTECTION ATTACKS

The Standard of Review

In determining whether governmental action violates equal protection, two basic standards of review have emerged — the "state interests" and the "rigid scrutiny" tests.[76] Under the more common state interest criterion, state

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and Federal Judicial Response, 64 NW. U.L. REV. 720 (1969); Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970); Note, *Public Housing and Urban Policy:* Gautreaux v. Chicago Housing Authority, 79 YALE L.J. 712 (1970).

73. Under federal and state laws, experts from the local governing body, the local housing authority, and the federal government must independently consider project plans and determine not only that the project is needed and wanted, but also that it is well planned, feasible as to cost and size, and complies with myriad technical requirements. *See* 42 U.S.C. §§1415(7) (a) (i), (iii), (b)(i) (1964); HUD LOW RENT HOUSING PRECONSTRUCTION HANDBOOK, RHA 7410.1, ch. 4, §2. *Compare* Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969), *and* Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969), *with* Thompson v. Housing Authority of City of Miami, 251 F. Supp. 121 (S.D. Fla. 1966). For a history of discrimination in public housing, see Comment, *Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871 (1966).

74. Condemnation of land for housing is generally considered a public purpose for the requirements of eminent domain. *E.g.*, Berman v. Parker, 348 U.S. 26 (1954); Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (1938). *But cf.* FLA. STAT. §421.13 (1969) (all housing projects subject to the zoning ordinances applicable to the locality). *Compare*, on federal level, United States v. Certain Lands in the City of Louisville, 78 F.2d 684 (6th Cir. 1935) (Public Works Authority held not to have the power to use eminent domain to acquire land for low-cost housing), *with* City of Cleveland v. United States, 323 U.S. 329 (1945) (acquisition of land for low-cost housing not necessarily only a local function). *See generally* Grinstead, *Overcoming Barriers to Scattered-Site Low-Cost Housing*, 2 PROSPECTUS 327, 341-45 (1969).

75. Interview with Mr. A. Suskind, Executive Director, Gainesville, Fla. Housing Authority, Feb. 8, 1971. Building permit procedures may also impede the construction of low-income projects. *See generally* Comment, *Restriction of Building Permits as a Means for Controlling the Rate of Community Development*, 2 URBAN L. ANNUAL 184 (1969).

76. *See generally* Sager, *supra* note 62; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 353-61 (1949); Note, *Low-Income Housing and the*

action is presumed valid unless a discriminatory intent[77] or the absence of a rational relation to any permissible public purpose can be shown.[78] This test is usually employed when economic regulation is under attack.[79]

However, where a legislative classification is based upon a "suspect" trait[80] or affects "fundamental interests,"[81] a more rigorous standard will be applied.[82] Non-benign[83] classifications based on race bear an extraordinary burden of justification.[84] While classification based on wealth could also be termed highly suspect,[85] generally such classification has been regarded only as "traditionally disfavored,"[86] and has not been equated with racial classifications.[87] Several criminal cases have held, however, that ability to pay as a classification criterion may be impermissible where fundamental interests are affected.[88] In addition, while of some effect, the fact that there is no express or implied *intent* to discriminate against the poor or the black is not determinative.[89] Intent or lack of intent may be irrelevant where the

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Equal Protection Clause, 56 CORNELL L. REV. 343, 344-48 (1971); Note, *Snob Zoning: Must a Man's Home Be a Castle?*, 69 MICH. L. REV. 339, 342-50 (1970); Note, *Zoning: Closing the Economic Gap*, 43 TEMPLE L.Q. 347, 353-56 (1970); 118 U. PA. L. REV. 437, 439-43 (1970).

77. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese aliens).

78. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Tigner v. Texas, 310 U.S. 141 (1940).

79. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Under this test the Supreme Court gives great deference to legislative classifications. Only once in the past 30 years, in Morey v. Doud, 354 U.S. 457 (1957), has economic legislation been invalidated under the "rationality" test.

80. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (wealth suspect when qualification for voting); Korematsu v. United States, 323 U.S. 214, 216 (1944) (race suspect).

81. Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (right of interstate movement); Reynolds v. Sims, 377 U.S. 533, 565-66 (1964) (right to vote). *Cf.* Note, *Snob Zoning*, *supra* note 76, at 344 n.35.

82. *E.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

83. Where racial classifications are used to achieve equality through preferential treatment to groups previously the object of discrimination, they have been termed "benign." *E.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968). *See generally* Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531 (1963); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966).

84. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

85. McDonald v. Board of Elections, 394 U.S. 802 (1969). Wealth "would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." *Id.* at 807.

86. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966).

87. *See* Sager, *supra* note 62, at 785-87. *But see* Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 75.

88. Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

89. Express or implied intent to discriminate, however, may make it easier to strike

effect of the ordinance is economically and racially discriminatory.[90]

Using the traditional "state interests" equal protection standard, a successful equal protection attack upon low density zoning ordinances seems unlikely.[91] Control of population density has long been recognized as a valid state objective,[92] and zoning appears to be a rational response to this end. As a result, the state interests test would seem insufficient to overturn local zoning. The alternative test for measuring a challenge to exclusionary zoning, the rigid scrutiny standard, appears to offer potentially greater success. The Supreme Court has recognized that housing is a fundamental interest,[93] having a direct effect on other fundamental rights. In viewing this recognition in conjunction with the classification by wealth engendered by exclusionary zoning,[94] and with the racial composition of low-income groups,[95] the rigid scrutiny test may indeed prove applicable.[96] Additionally, the effect of exclusionary zoning on freedom of movement, another recog-

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down the ordinance. *See, e.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

90. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401, 507-08 (D.D.C. 1967); Ranjel v. City of Lansing, 293 F. Supp. 301, 312 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970). The landmark equal protection decisions have emphasized effect rather than intent. *See* Hunter v. Erickson, 393 U.S. 385 (1969) (anti-open housing provision struck); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax unconstitutional); Griffin v. Illinois, 351 U.S. 12 (1958) (indigent defendants entitled to free transcript).

91. Low density zoning ordinances include such restrictions as minimum acreage or lot size, minimum housing cost, and exclusion of multifamily dwellings.

92. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

93. Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelley v. Kraemer, 334 U.S. 1 (1948); Block v. Hirsh, 256 U.S. 135, 156 (1921); *cf.* Berman v. Parker, 348 U.S. 26 (1954) (Douglas, J., concurring): "Miserable and disreputable housing conditions may do more than spread disease and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden." *Id.* at 32.

94. *See* text accompanying notes 33-36 *supra.*

95. *See* text accompanying notes 39-40 *supra.*

96. Since a finding of intent may be practically impossible in many circumstances, the rigid scrutiny test would appear to be the more justifiable approach. When dealing with a long-standing low density zoning ordinance, it will be difficult to show a discriminatory intent. Where a recent change in the ordinance—especially through local referendum—is involved, a finding of discrimination may be more readily ascertainable (Dailey v. City of Lawton, 296 F. Supp. 266, 268-69 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970)), though not compelled. Southern Alameda Spanish Speaking Organization v. Union City, 314 F. Supp. 967 (N.D. Cal.), *aff'd*, 424 F.2d 291 (9th Cir. 1970). Moreover, the motives of legislators and voters, or both, may conflict or be difficult to prove. As the Supreme Court has stated, however, the fourteenth amendment "nullifies sophisticated as well as simple-minded modes of discrimination." But even though unlikely, such admissions may occur. *See, e.g.*, Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969) (admissions of city officials facilitated a finding of denial of equal protection). Lane v. Wilson, 307 U.S. 268, 275 (1939). *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) where the Court stated: *"It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."* *Id.* at 725 (emphasis added).

nized fundamental interest,[97] may operate to invoke this more exacting standard of review.

Application of Equal Protection

While the Supreme Court has not yet directly confronted exclusionary low-density zoning, lower federal courts have increasingly utilized an equal protection rationale in striking ordinances having an exclusionary effect on low-income groups.[98] In *Dailey v. City of Lawton*[99] the district court found the refusal of local officials to rezone property to permit construction of a low-rent housing project to be racially motivated.[100] On appeal, the Tenth Circuit Court of Appeals held that failure to show racial prejudice on the part of officials would not have been fatal.[101] However, the court attached considerable weight to the finding of racial motivation in affirming the district court,[102] indicating that discriminatory intent is an important element of proof, even where the discrimination alleged is racial rather than economic.[103]

Where no discriminatory motivation can be shown, equal protection advocates have pointed to the effect of the zoning ordinance. It was precisely this problem that occupied the New York federal district court in *Kennedy Park Homes Association v. City of Lackawanna*.[104] The Lackawanna city council had amended its zoning ordinance to rezone land originally intended for use as a low-income housing development site; it was rezoned for exclusive use as a park and recreation area. Using a modified rigid scrutiny equal protection standard, the court held the effect of such action was to deny equal protection to low-income groups.[105] The fact that sewage problems would thereby be aggravated was held not to be sufficient state interest to overcome the need to plan for the housing needs of all residents of the city.[106]

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97. Shapiro v. Thompson, 394 U.S. 618 (1969). *See also* Edwards v. California, 314 U.S. 160 (1941) (arbitrary exclusion of indigents from the state constituted denial of equal protection).

98. *E.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

99. 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

100. 296 F. Supp. at 268-69.

101. 425 F.2d at 1039. "If proof of a civil right [*sic*] violation depends on an open statement by an official of any intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." *Id.*

102. *Id.* at 1039-40.

103. *See also* Southern Alameda Spanish Speaking Organization v. Union City, Case No. 51590 (N.D. Cal. July 30, 1970) (on remand from 9th Cir.); Thompson v. Housing Authority of City of Miami, 251 F. Supp. 121 (S.D. Fla. 1966).

104. 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

105. 318 F. Supp. at 695.

106. *Id.* at 697. *Cf.* Progress Development Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961) (community conspiracy to condemn land for public park to prevent construction of

On appeal, the Second Circuit affirmed, stressing that almost all black residents of the city were concentrated in one ward.[107] Examining the circumstances, the court found substantial evidence to support the charge of discrimination. The rezoning and the failure to provide improved sewage facilities, despite recommendations to the contrary by city planners, constituted "specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation."[108] To justify such action the court required that the city show a compelling governmental interest.[109] Upon failure to present such a showing, the actions of the city were held unconstitutional on equal protection grounds.[110] Inadvertent discrimination was determined to be no defense, for the city could not place its minorities at a severe disadvantage without justification.[111] The importance of the *Kennedy Park Homes* decision is its application of a more rigorous equal protection standard where no clearly enunciated discriminatory intent was apparent. The resulting discrimination was sufficient to require the city to demonstrate some compelling interest to overcome the presumption of unconstitutionality.[112]

The problem in applying *Kennedy Park Homes* to exclusionary zoning in general is that in the New York case the city had taken specific discriminatory action, both by rezoning the land and by declaring a moratorium on low-income housing construction. Usually, existing ordinances may adequately bar the ingress of low-income groups. Moreover, zoning regulations frequently will have totally excluded low-income groups from *all* parts of a community, not just confined them to one area. However, such distinctions should not affect the applicability of the *Kennedy Park Homes* rationale, since in either case the effect is the same.

The general thrust of the Second Circuit's decision is that the rigid scrutiny equal protection standard should be applied to governmental action that places a minority group under a "severe disadvantage." Since any exclusionary zoning ordinance constitutes a heavy burden on low-income groups, the same standard may apply to all such exclusionary zoning ordinances. Whether the rigid scrutiny standard will always be applied is uncertain, however, especially in view of a recent decision by the Supreme Court involving referendums as an exclusionary device.[113]

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integrated housing development); G & D Holland Constr. Co. v. City of Marysville, 12 Cal. App. 3d 989, 994, 91 Cal. Rptr. 227, 230 (1970) (only a chimeral connection between problem of sewage and population density).

107. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 110 (2d Cir. 1970).

108. *Id.* at 114.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See* text accompanying notes 80-90 *supra.*

113 James v. Valtierra, 402 U.S. 137 (1971). *See* text accompanying notes 132-149 *infra.*

Special Problems Involving Referendum Zoning

The use of the referendum as a means of barring "undesirables" from the community is a somewhat specialized exclusionary device[114] that has increasingly confronted lower federal courts. Referendum zoning, which requires the holding of an election prior to the construction of low-income housing, arguably places a greater burden on minorities by making them vulnerable to the whim of the majority.[115] Since such provisions commonly are required where minority housing is involved, they would appear to deny minorities equal protection.[116] The initial Supreme Court decisions indicated this might indeed be the case.

In *Reitman v. Mulkey*[117] the Supreme Court held that a California constitutional provision, in effect, authorized racial discrimination and was thus unconstitutional where it repealed fair housing laws and provided for a referendum before enactment of any new fair housing statute.[118] In *Hunter v. Erickson*[119] the Court invalidated a provision of the Akron, Ohio, city charter requiring a referendum before enactment of any anti-discrimination legislation because its effect was to make enactment of legislation for minorities more difficult than for others.[120] Futhermore, the impact of the law fell squarely on minorities.[121] Although the *Hunter* and *Reitman* decisions involved racial discrimination, their rationale was interpreted by lower federal courts as also proscribing economic discrimination.

Early lower court decisions discounted motive as the governing factor in determining whether equal protection was being denied low-income groups. In *Ranjel v. City of Lansing*[122] a Michigan federal district court

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114. *See* text accompanying notes 69-71 *supra.*

115. *See, e.g.,* James v. Valtierra, 402 U.S. 137 (1971) (referendum before construction of low-income housing); Hunter v. Erickson, 393 U.S. 385 (1969) (referendum before anti-discrimination legislation could be enacted); Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968) (anti-discrimination legislation subject to referendum).

116. *See* text accompanying notes 69-71 *supra.*

117. 387 U.S. 369 (1967).

118. *Id.* The California supreme court had dismissed a writ of mandamus to keep the proposed amendment off the ballot, finding that it would be more appropriate to pass on the legality after the election rather "than . . . interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls." Mulkey v. Reitman, 64 Cal. 529, 535, 413 P.2d 825, 829 (1966).

119. 393 U.S. 385 (1969).

120. *Id.* at 390-91.

121. "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Id.* at 391. Popular sovereignty was also held subject to constitutional limitations. "[I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Id.* at 392.

122. 293 F. Supp. 301 (W.D. Mich.), *rev'd,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970).

found racial motivation behind a referendum challenging the rezoning of a residential district to permit low-rent housing and held that it consequently was a denial of equal protection.[123] The Sixth Circuit disagreed, however. On appeal, it was held that "if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial."[124]

The Ninth Circuit Court of Appeals, in *Southern Alameda Spanish Speaking Organization [SASSO] v. Union City*,[125] confronted the referendum issue when a city-wide vote had nullified a city ordinance rezoning a tract of land to permit construction of a federally financed housing project.[126] The court rejected the argument that referendum zoning violated constitutional provisions by subjecting zoning decisions to the bias and self-interest of the voters.[127] Like the *Ranjel* court, it refused to inquire into the motives behind the referendum.[128] Other courts, however, have not exhibited similar reluctance.[129] Generally, repeal of existing ordinances is not in itself sufficient but — if coupled with a clearly discriminatory effect — may be sufficient to indicate denial of equal protection.[130]

Where no discriminatory motivation can be shown, advocates of the equal protection argument point to the exclusionary effect of the referendum. After failing to find any discriminatory motives behind the rejection of a low-income housing referendum in *SASSO*, the Ninth Circuit acknowledged that a substantial constitutional issue remained.[131]

The issue posed in *SASSO* was squarely presented in *Valtierra v. Housing Authority of San Jose*.[132] In that case, low-income plaintiffs challenged a California constitutional provision[133] requiring approval of any low-rent hous-

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123. 293 F. Supp. at 312.

124. 417 F.2d at 324. This seems clearly mistaken in view of Hunter v. Erickson, 393 U.S. 385 (1969). *See* Reitman v. Mulkey, 387 U.S. 369 (1967).

125. 424 F.2d 291 (9th Cir. 1970).

126. *Id.* at 292.

127. *Id.* at 294.

128. *Id.* at 295.

129. *E.g.*, Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968); Otey v. Common Council of Milwaukee, 281 F. Supp. 264 (E.D. Wis. 1968); *cf.* Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

130. *Cf.* Hunter v. Erickson, 393 U.S. 385 (1969); Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970); Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969).

131. Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970). "Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually — if not always — are members of minority groups." *Id.* at 295-96.

132. 313 F. Supp. 1 (N.D. Cal. 1970), *rev'd sub nom.*, James v. Valtierra, 402 U.S. 137 (1971).

133. CAL. CONST. art. XXXIV.

ing project by a majority of the qualified municipal electors.[134] The district court, relying on the *Hunter v. Erickson* rationale,[135] held that the effect of the provision was to impose "an impermissible burden which constitutes a substantial and invidious denial of equal protection" on legislation for the poor.[136] The court used the more rigorous equal protection standard to arrive at its conclusion.[137] As in *Kennedy Park Homes v. City of Lackawanna,*[138] the argument that the provision was not motivated by discrimination was insufficient justification.[139] The district court was thus willing to declare discrimination in *access* to housing a sufficiently fundamental interest to invoke the stringent rigid scrutiny equal protection test.

On appeal,[140] the United States Supreme Court reversed. Writing for a 5-3 majority, Justice Black asserted that "[p]rovisions for referendum demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[141] Emphasizing that referendum laws had long been used in California, the Court held that "[t]his procedure for democratic decision-making does not violate the constitutional command that no State shall deny to any person the 'equal protection of the law'."[142] The referendum permitted local residents to participate in decisions that would increase local expenditures for public services, lower tax revenues, and affect future community development.[143] Since the basic thrust of the fourteenth amendment was to prohibit legal distinctions based on race[144] and the questioned provision contained no racial classification, the Court could find no evidence indicating that the California law was directed at any racial minority.[145] While the district court had relied primarily on *Hunter v. Erickson*[146] to support its finding of discrimination,[147] the Supreme Court did not consider that case persuasive, since in *Hunter* the referendum dealt with racial, not economic, discrimination.[148] The Court emphasized, however, that in California referen-

134. 313 F. Supp. at 2.

135. 393 U.S. 385 (1969) (Akron, Ohio, ordinance requiring approval of voters before enactment of any fair housing ordinance declared unconstitutional).

136. Valtierra v. Housing Authority of San Jose, 313 F. Supp. 1, 5 (N.D. Cal. 1970).

137. *Id.* at 4.

138. 436 F.2d 108 (2d Cir. 1970).

139. Valtierra v. Housing Authority of San Jose, 313 F. Supp. 1, 6 (N.D. Cal. 1970). "[A]lthough proof of bad motive may help to prove discrimination, lack of bad motive has never been held to cure an otherwise discriminatory scheme."

140. James v. Valtierra, 402 U.S. 137 (1971).

141. *Id.* at 143.

142. *Id.*

143. Both appellants and appellees agreed that the building of federally financed low-cost housing entails costs to the community. *Id.* at 143 n.4.

144. *Id.* at 140-41, *citing* Hunter v. Erickson, 393 U.S. 385, 391-92 (1969).

145. *Id.* at 141. Appellees had argued that the racial composition of low-income groups was sufficient to allow the inference that the referendum requirement, while couched in broad language, was aimed at racial minorities. Brief for Appellees at 62-68.

146. 393 U.S. 385 (1969).

147. Valtierra v. Housing Authority of San Jose, 313 F. Supp. 1 (N.D. Cal. 1970).

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

dums were not limited to issues involving public housing, but were also required for other subjects.[149]

While the *Valtierra* decision is certain to influence future equal protection attacks on referendum zoning, there are possible distinctions that may avoid its full impact. Since the California constitutional provision involved was adopted in 1950, before residential segregation was a legal issue, the Court's finding that it was not racially motivated is more easily defensible.[150] Thus, even though several other states already have similar statutory provisions,[151] any wholesale adoption of referendum zoning after *Valtierra* may not be accorded the same deference by the courts as was the California provision.

Possibly more significant as a basis for distinction in future equal protection challenges is the absence in *Valtierra* of a showing of racial motivation in the California referendum requirement.[152] Implicit in the decision is the possibility that if a racially discriminatory *motive* can be demonstrated, an equal protection attack will be more favorably received. If indeed the Court is willing to consider motive as well as effect, it marks a significant departure from the lower court decisions.[153] Apparently, however, the Court is not willing to apply the rigid scrutiny standard where the discrimination is economic rather than racial. Whether this will be extended to other forms of exclusionary zoning is as yet unclear. Although the immediate effect of the decision will probably be to impede equal protection attacks against all modes of exclusionary zoning directed against low-income groups, its application to other methods is at least questionable, since they do not employ the same "democratic decisionmaking" favored in *Valtierra*. Even so, the Court's decision severely restricts the application of an equal protection rationale by implying that economic classifications are not inherently suspect.

Substantive Due Process

Balancing the interests of the municipality in community planning against interests of the individual landowner has traditionally constituted the general

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149. *Id.* at 142. The three dissenting justices would have utilized the "rigid scrutiny" equal protection standard to strike the referendum provision, contending that poverty as a classification was no less suspect than race. "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and . . . singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect." *Id.* at 145 (Marshall, J., dissenting).

150. In 1950 residential segregation per se had not yet been seriously challenged. But, on the other hand, there were indications that it might be the subject of litigation in the future, since the Supreme Court had outlawed racially restrictive covenants two years earlier. Shelley v. Kraemer, 334 U.S. 1 (1948). Whether this decision was in part the impetus behind adoption of the California referendum provisions is an open question.

151. *E.g.*, Iowa Code Ann. §403A.25 (Supp. 1971); Miss. Code Ann. §7322-22-24 (Supp. 1969); *cf.* Fla. Stat. §163.440 (1969) (referendum to determine applicability of community redevelopment act).

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

153. *See, e.g.*, Southern Alameda Spanish Speaking Organization v. Union City, 424

basis for reviewing zoning ordinances. The rights of those whose access to the area is barred by such zoning have not been considered.[154] The standard formula for upholding zoning ordinances against due process attacks has been a "[s]ubstantial relation to the public health, safety, morals or general welfare"[155] test, which places the burden on the questioning party to show that no substantial relation exists.[156] The problem with such a presumption of validity, couched in a limited standard of reviewability, is that it effectively precludes challenge by outsiders[157] and presents a formidable obstacle even for individual property owners.[158] Consequently, a due process attack on exclusionary zoning has seldom been attempted.

Due process has been used, however, where the purposes behind enactment of the zoning ordinance have not borne a substantial relation to the general welfare, especially where restrictions indicate an attempt to bar "undesirables" from a particular area. Holding that the purpose behind the restriction was to exclude low-income groups, the Virginia supreme court in *Board of County Supervisors of Fairfax County v. Carper*[159] found a two-acre minimum lot size requirement invalid. The court cited evidence showing that applications for subdivisions had virtually halted with the passage of the ordinance.[160] Such an ordinance, according to the court, bore no relation to the general welfare.[161] Likewise, the Supreme Court of Pennsylvania overturned a four-acre minimum lot size requirement in *National Land & Investment Co. v. Easttown Township Board of Adjustment*,[162] finding that the primary purpose was to exclude newcomers.[163]

F.2d 291, 295 (9th Cir. 1970); Ranjel v. City of Lansing, 417 F.2d 321, 324 (6th Cir. 1969).

154. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 784 (1969). *See also* Note, *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).

155. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). *See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927).

156. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); State *ex rel.* Helseth v. DuBose, 99 Fla. 812, 128 So. 4 (1930).

157. *See, e.g.*, Sager, *supra* note 154, at 784.

158. Note, *Zoning: Closing the Economic Gap*, 43 TEMPLE L.Q. 347 (1970). "[I]ndividuals wishing to challenge such an ordinance have been forced to present extensive evidence showing that the municipal action is unconstitutionally arbitrary or unreasonable. The effect of this has been to discourage zoning attacks, since few plaintiffs can afford the extensive factual research required to carry the burden of proof." *Id.*

159. 200 Va. 653, 107 S.E.2d 390 (1959).

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

161. *Id.* "The practical effect of the amendment is to prevent people in the low income bracket from living in the western areas [where the two-acre restriction applied] and forcing them into the eastern area, thereby reserving the western area for those who could afford to build houses on two acres or more. This would serve private rather than public interests. Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare." *Id.* Discrimination in zoning a particular tract may likewise be invalid. *E.g.*, G. & D. Holland Constr. Co. v. City of Marysville, 12 Cal. App. 3d 989, 91 Cal. Rptr. 227 (1970).

162. 419 Pa. 504, 215 A.2d 597 (1965).

163. *Id.* at 527-28, 215 A.2d at 610.

Proof of a discriminatory motive is impossible in most instances and, therefore, due process objections generally would appear to be ineffectual. Recent Pennsylvania cases, however, suggest that a redefinition of the general welfare test may be evolving. While invalidating a two-acre minimum lot size requirement as more than "necessary,"[164] the Pennsylvania supreme court rejected a strict factual examination of the community's present development as determinative of the ordinance's validity.[165] If consistently followed, the Pennsylvania approach would greatly facilitate acquisition of land for low-income housing projects. Standard arguments voiced by local residents would be of little significance in determining necessary size.

Even more important for prospective low-income housing builders and tenants is the decision in *Appeal of Girsh*.[166] In that case, the Pennsylvania supreme court held that failure to provide for apartments anywhere in the township of Nether Providence was unconstitutional, even though multi-unit developments were not explicitly prohibited.[167] A private developer had purchased property zoned for single family residences and sought to have the zoning ordinance amended to permit construction of a high rise apartment project. When the requested change was denied, the developer appealed, challenging the validity of the zoning ordinance. The court reversed a lower court decision upholding the ordinance, emphasizing the limiting effect on the influx of new citizens.[168]

The conclusion that a failure to zone for apartments is unreasonable per se indicates that the burden of persuasion has been shifted to the municipality.[169] In *Girsh* the developer stressed that his project would involve luxury apartments, thus attracting "high class" residents into the town.[170] Whether the court was impressed with this argument is unclear, but in the opinion no emphasis is placed on the type of apartment involved. Low-income developments, either apartments, single-family or duplex houses, are arguably included. Although the *Girsh* requirement that there be a "reasonable accommodation" for various types of housing is not wholly satisfactory,[171] it is preferable to the previously applied standard.[172] It represents an expansion of the general welfare definition to include outsiders as well as property owners and the municipality. If other courts are willing to adopt

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164. Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970).

165. *Id.* The "present community development" criteria regarded in *Kit-Mar* was initially applied in the "substantial relation" formula of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

166. 437 Pa. 237, 263 A.2d 395 (1970). *See generally* Washburn, *Apartments in the Suburbs:* In re Appeal of Joseph Girsh, 74 DICK. L. REV. 634 (1970).

167. Appeal of Girsh, 437 Pa. 237, 246, 263 A.2d 395, 397 (1970).

168. *Id.* at 244-45, 263 A.2d at 398-99.

169. The municipality must show the absence to be reasonable if the ordinance is to be upheld. *Compare Girsh, with* text accompanying note 155 *supra. See* Aloi & Goldberg, *Racial and Economic Zoning: The Beginning of the End,* 1971 URBAN L. ANNUAL 9, 44 (1971).

170. Brief for Appellant at 33, 38, 46, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

171. Note, *supra* note 158, at 353.

172. *See* note 165 *supra.*

this approach, substantive due process may be established as an effective and potent attack on exclusionary zoning.[173]

Moreover, *Girsh* recognized the necessity for a more regional approach to zoning as a means of avoiding exclusionary effects altogether.[174] While the concept of zoning as being a regional rather than a wholly municipal function is not new, it is only now beginning to be recognized as an important device in dealing with exclusionary zoning. For some time courts have been willing to examine the effect of zoning on an adjacent municipality, requiring that the adjoining uses be considered.[175] Recently this examination has been extended to a regional level.[176] The *Girsh* court illustrates the result brought about by this broader view. Recognizing the dangers inherent in parochial zoning ordinances,[177] the court found that outlying municipalities should not be allowed to isolate themselves from urban migration:[178]

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

Stated in terms of *Girsh*, the issue essentially becomes whether those who first settle a suburban community have the right to stifle further growth through exclusionary zoning. The Supreme Court as early as 1926 held that instances might arise "[w]here the general public interest would so far out-

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173. Where exclusionary zoning is at issue, shifting the burden of showing a sufficient connection from the individual challenging the zoning ordinance to the municipality defending it would seem to fit within expansion of the "general welfare" requirement. *But cf.* cases cited note 156 *supra.*

174. Appeal of Girsh, 437 Pa. 237, 244, 263 A.2d 395, 398-99 (1970).

175. *E.g.*, LaSalle Nat'l Bank v. City of Chicago, 4 Ill. 2d 253, 122 N.E.2d 519 (1954); Hutting v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963); Chusud Realty Corp. v. Village of Kensington, 22 App. Div. 2d 895, 255 N.Y.S.2d 411 (2d Dep't 1964). *See also* Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600 (1965); Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 108-15 (1965). *But see* City of Little Rock v. Sun Bldg. & Dev. Co., 199 Ark. 333, 134 S.W.2d 582 (1939); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Gruber v. Mayor & Township Comm'n, 39 N.J. 1, 186 A.2d 489 (1962) (holding that the general welfare refers solely to the needs of the area doing the zoning).

176. Kunzler v. Hoffman, 48 N.J. 277, 225 A.2d 321 (1966). "Although municipalities in their consideration of use variances have not yet been compelled to recognize values that transcend municipal lines, they certainly should be encouraged to consider regional needs and be supported by the courts when they do so for sound reasons." *Id.* at 287, 225 A.2d at 326. *See* Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). *But cf.* Beshore v. Town of Bel Air, 237 Md. 398, 206 A.2d 678 (1965) (no need to look to adjoining uses when dealing with undeveloped lands).

177. Appeal of Girsh, 437 Pa. 237, 245, 263 A.2d 395, 398-99 (1970).

178. *Id.* at 245 n.4, 263 A.2d at 399 n.4. *See generally* Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957); Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

weigh the interest of the municipality that the municipality would not be allowed to stand in the way."[179] *Girsh* made this long-ignored warning the basis of its decision, indicating that substantive due process is potentially an effective attack, operating within the zoning system. If other communities fail to redefine the concepts of "general public interest" or "general welfare" in broader terms, fresh challenges are imminent.[180]

Supremacy Clause as a Possible Challenge

Although application of the Supremacy Clause[181] has generally been restricted to situations in which alternative remedies have been exhausted or are inapplicable,[182] it has been relied upon to supplement equal protection and due process[183] challenges to zoning that affect federally funded low-income housing projects. Since Housing and Urban Development provisions state that sites for low-rent housing should be located outside areas of racial concentration of minority groups,[184] the argument has been that federal policy has impliedly dictated that zoning cannot be used as a bar. While zoning ordinarily does not exclude public housing specifically, it accomplishes the same result through low-density requirements that make it impossible to build units that comply with prescribed regulations. Alternatively, the local government may rezone an area intended as a low-income housing site for another use.[185]

In addition to HUD's low-rent housing manual,[186] various legislation indicates a similar congressional intent.[187] The district court in *Ranjel v.*

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179. Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926).

180. Since this note was sent to the printer, a state court has struck a New Jersey community's entire zoning ordinance because it excluded low-income families. Wall Street J., Nov. 1, 1971, at 18, cols. 2, 3. For an account of the most recent developments *see* Waters, *The Battle of the Suburbs,* Newsweek, Nov, 15, 1971, at 61.

181. U.S. Const. art. VI, §2.

182. Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (only applied when there is a conflict between federal law and an otherwise valid state enactment).

183. Valtierra v. Housing Authority of San Jose, 313 F. Supp. 1 (N.D. Cal. 1970), *rev'd sub nom.*, James v. Valtierra, 402 U.S. 137 (1971); Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich.), *rev'd,* 417 F.2d 321 (6th Cir. 1969), *cert. denied,* 397 U.S. 980 (1970); Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (Ct. App. 1969).

184. "The aim of a Local Authority in carrying out its responsibility for site selection should be to select from among sites which are acceptable under the other criteria of this Section those which will afford the greatest opportunity for inclusion of eligible applicants of all groups regardless of race, color, creed, or national origin, *thereby affording members of minority groups an opportunity to locate outside areas of concentration of their own minority group. Any proposal to locate housing only in areas of racial concentration will be prima facie unacceptable . . . .*" HUD Low-Rent Housing Manual 205.1, ¶4(g) (Feb. 1967 rev.), *cited in* Hicks v. Weaver, 302 F. Supp. 619, 622 (E.D. La. 1969). *See also* HUD Low-Rent Preconstruction Handbook, RHA 7410.1, ch. 1, §1, ¶2(a) (June 1969 rev.).

185. *E.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

186. *See* note 184 *supra.*

187. Civil Rights Act of 1866, 42 U.S.C. §1982 (1964); Title VI of Civil Rights Act of

City of Lansing[188] cited federal statutes[189] to reinforce its decision that a referendum to rezone a proposed low-income housing site violated the Supremacy Clause.[190] However, the decision was reversed by the Sixth Circuit, which held that the housing manual regulations were merely guidelines, without the force of federal law and thus not in conflict with state law.[191] The court went on to hold, however, that even if the manual were considered to be federal law, no conflict with state laws existed.[192]

On the other hand, the district court in *Hicks v. Weaver*[193] ruled that the HUD interpretation of Title VI of the Civil Rights Act of 1964[194] was "entitled to considerable weight by the courts."[195] The court held that failure to locate low-income housing outside all-black neighborhoods created a strong inference that Title VI was being violated.[196] But in *Hicks* zoning was not responsible for the absence of housing outside black neighborhoods. These cases may indicate that, as in equal protection challenges, lack of provable discriminatory intent may dictate a result in favor of the local ordinance.[197]

The use of a challenge based on the Supremacy Clause suffered a serious setback in *James v. Valtierra*[198] when the Supreme Court rejected its application to referendum zoning.[199] Since the Court dealt only with referendum zoning, the decision does not completely foreclose the use of the Supremacy Clause as a challenge, but it renders the argument somewhat tenuous as the statutes on which it relies may be similarly interpreted where the exclusion is accomplished by other means.

1964, 42 U.S.C. §2000(d) (1964); Fair Housing Act of 1968, 42 U.S.C. §3601 (Supp. IV, 1965-1968).

188. 293 F. Supp. 301 (W.D. Mich. 1969).

189. *See* note 187 *supra* for these statutes.

190. Ranjel v. City of Lansing, 293 F. Supp. 301, 309 (W.D. Mich. 1969). "Article VI, clause 2, of the United States Constitution provides that the Constitution and all laws enacted pursuant thereto shall be the supreme law of the land. An action approved by the entire electorate of the State of Michigan could not serve to nullify rights created by or arising out of the United States Constitution. There is little doubt that the action by the City of Lansing in this case . . . would deprive plaintiffs of fundamental constitutionally secured rights . . . . Because of the supremacy clause of the Constitution, that action is impermissible." *Id.* at 310.

191. Ranjel v. City of Lansing, 417 F.2d 321, 323 (6th Cir. 1969).

192. *Id.* at 323-25.

193. 302 F. Supp. 619 (E.D. La. 1969).

194. *Id.* at 622, *citing* HUD LOW RENT HOUSING MANUAL, §205.1, ¶14(g) (Feb. 1967 rev.).

195. *Id.*

196. *Id.* at 623. *See generally* Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970).

197. *See* text accompanying notes 152-153 *supra*.

198. 402 U.S. 137 (1971).

199. *Id.* at 140. "By the Housing Act of 1937 the Federal Government has offered aid to States and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted." *Id.*

REMEDIAL LEGISLATION

Because the case-by-case approach is likely to accomplish reform only in a piecemeal fashion and over a long period of time, legislation may prove the most effective means of eliminating exclusionary zoning. Both Congress and state legislatures are beginning to recognize this fact.

In the most innovative statutory approach yet taken, the Massachusetts Legislature recently enacted a "Snob Zoning Amendment"[200] calculated to override, to some extent, local opposition to low-income housing projects and to stimulate construction of such projects in the suburbs.[201] A prospective builder may appeal to a state agency to review and reverse a refusal by the local zoning board to waive local zoning restrictions by showing that the decision was not "reasonable and consistent with local needs."[202] This phrase is statutorily defined in terms of general regional need for low-income housing. In turn, this depends on whether over ten per cent of the total housing or over one and one-half per cent of the total land area is comprised of low-income housing, or alternatively, on whether the application would result in the initiation of construction on three-tenths of a per cent (or ten acres) of land area in the town in a given calendar year.[203] Where these limits have not been exceeded, the five-member board is empowered to issue a comprehensive permit in lieu of the various permits required at the local level.[204] The aim of the Massachusetts procedure is to remove some of the obstacles to low-income housing construction in the suburbs, and there are indications that this is being accomplished.[205]

While no other state has yet adopted a similar approach, some states have enacted redevelopment legislation granting the redevelopment agency authority to override local zoning ordinances where cooperation is not forthcoming.[206] Furthermore, the President's Committee on Urban Housing has similarly recommended that housing authorities be given the power to supersede local zoning ordinances in constructing low-income housing.[207] Another approach, proposed in New Jersey, was to limit the permissible objectives of zoning so that "in no event shall any zoning ordinance be deemed to have a valid objective if the effect of such ordinance is to exclude racial, religious or ethnic minorities."[208]

An Alabama statute enacted in 1935[209] proscribes total exclusion of any

200. MASS. ANN. LAWS ch. 40B, §§20-23 (1969).

201. Note, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246, 257 (1970).

202. MASS. ANN. LAWS ch. 40B, §§22-23 (1969).

203. *Id.* §20. The Act is criticized in HARV. J. LEGIS., *supra* note 201.

204. *Id.* §23.

205. Note, *supra* note 201, at 257 n.51.

206. *E.g.*, N.Y. UNCONSOL. LAWS §6266(3) (McKinney 1970). *But see* FLA. STAT. §§163.360(1), (2)(a), (b)(3) (1969).

207. PRESIDENT'S COMM. ON URBAN HOUSING, TECHNICAL STUDIES 143 (1967).

208. N.J. S. 803 (1969), *cited and discussed* in Aloi & Goldberg, *supra* note 169, at 55. The New Jersey legislature declined to accept such a far-reaching approach.

209. ALA. CODE tit. 37, §775 (1959).

economic group, although permitting different residence districts by economic class. The statute prohibits zoning regulations that "discriminate in favor of or against any class of inhabitants."[210] Enactment of similar legislation in other states would at least enable low-income groups to have access to suburban housing, however, it would permit segregation within the community.

Members of Congress are also becoming aware of the threat posed by exclusionary zoning. A bill recently introduced would deny federal assistance under HUD programs to localities that exclude federally assisted low-income housing through restrictive land use practices.[211] The bill would affect federal subsidies for projects such as water and sewer facilities as well as housing projects. If enacted, it will offer the suburbs the choice of either discontinuing exclusionary zoning practices or foregoing federal subsidies under HUD programs.

Federally initiated attacks on exclusionary zoning are likely to be strongly influenced by President Nixon's recent statement on federal policies for equal housing.[212] The President drew a sharp distinction between economic and racial discrimination in housing, stating: "We will not seek to impose economic integration upon an existing local jurisdiction,"[213] but pledged vigorous opposition to any racially motivated discrimination and promised that "economic measures as a subterfuge for racial discrimination" would not be tolerated.[214] He rejected proposals that would compel communities to accept federally sponsored housing, but emphasized that communities would be encouraged "to discharge their responsibility for helping to provide decent housing opportunities to the Americans of low and moderate income who live or work within their boundaries."[215]

Although legislation may well offer the long-term solution to exclusionary zoning, judicial remedies are still the most feasible means of obtaining

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210. *Id.*

211. The Urban Land Improvement and Housing Assistance Act of 1971, S. 609, 92d Cong., 1st Sess. (1971). Its sponsor, Senator Jacob Javits of New York, recognized: "The housing crisis is particularly serious in the central cities where the available land is most limited and most expensive. The poor can be effectively locked in this way into a decaying inner city housing stock through fragmented, outmoded and restrictive suburban zoning ordinances." 117 CONG. REC. 886 (daily ed. Feb. 5, 1971) (remarks of Sen. Javits).

212. N.Y. Times, June 12, 1971, at 1, col. 8. An even more far-reaching proposal by HUD Secretary George Romney would bar local governments from using zoning or building codes to bar low-income projects in developing areas where federal programs are available. *See* N.Y. Times, June 3, 1970, at 1, col. 5. The text of the proposed bill is quoted in Aloi & Goldberg, *supra* note 169, at 62, *citing* Council of State Government, Newsletter, June 1, 1970.

213. N.Y. Times, June 12, 1971, at 1, col. 8.

214. N.Y. Times, June 12, 1971, at 14, col. 2. Three days after the Nixon statement, the Justice Department filed suit against the town of Black Jack, Mo., United States v. City of Black Jack, Docket No. 71C 372 (1) (E.D. Mo., filed June 14, 1971) (petition for declaratory and injunctive relief. County adopted a zoning ordinance that had the effect of prohibiting any new multiple-family use of occupancy within the city, effecting racial segregation in housing).

215. N.Y. Times, June 12, 1971, at 14, col. 2.

immediate relief in a given situation. Recognizing that a majority of suburbanites do not want low-income housing in their neighborhoods,[216] legislators are likely to proceed slowly in forcing housing on their constituents. Consequently, constitutional attacks in the courts will provide the principal source of relief in the immediate future.

Potential Affirmative Duty To Desegregate the Suburbs

The problem of exclusionary zoning is not solved by determining that it may be vulnerable to various constitutional attacks. Assuming a willingness on the part of the courts to receive constitutional arguments, the question of who is to propound them remains. Indigents, both black and white, have been the most frequent plaintiffs attacking exclusionary zoning practices,[217] but their ability to litigate depends on legal and financial aid from special interest organizations.[218] A more desirable plaintiff would be the local housing authority, at least in cases involving public housing. The issue then becomes whether such housing officials have an affirmative duty to desegregate the suburbs through low-income housing.[219]

Where the affirmative duty question is more narrowly framed, as in cases in which officials are being challenged for failure to locate low-income projects outside areas of racial concentration, court responses have been mixed. Early decisions found no affirmative duty to desegregate. In *Gautreaux v. Chicago Housing Authority*[220] the court held that a showing of affirmative discriminatory state action was required.[221] The complaint was therefore dis-

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216. *National Polling Day: The Surprising Americans*, ABC TV, Friday, April 16, 1971, 10:00-11:00 p.m. EST. The over-all response of the national sample to the question: "Are you willing to have a low-income housing project located in your neighborhood?" was: *Willing* — 60%, *Not Willing* — 36%, *Not Sure* — 4%. When subdivided into areas of residence, the response of the sample group is more revealing:

	Cities	Suburbs	Towns	Rural
Willing	59%	43%	74%	66%
Not Willing	36%	51%	24%	31%
Not Sure	5%	6%	2%	3%

Thus, only in the suburbs do opponents of low-income housing constitute a majority.

217. *E.g.*, Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

218. *E.g.*, NAACP Legal Defense and Education Fund, National Office for the Rights of the Indigent, American Civil Liberties Union.

219. Where federal officials are involved, the duty to eliminate discrimination is clear. Exec. Order No. 11,063, 3 C.F.R. 261 (Supp. 1962). The problem is that local officials constitute the housing authorities.

220. 265 F. Supp. 582 (N.D. Ill. 1967).

221. *Id.* at 584. "A public housing program, conscientiously administered in accord with the statutory mandates surrounding its inception and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing patterns of racial concentration in housing, however desirable such alterations may be. A showing of affirmative discriminatory state action is required." *Id.*

missed because it failed to allege discriminatory intent in selection of housing sites. Likewise, a Florida federal district court rejected an attack on low-income housing location where no discriminatory motive was shown.[222]

In the somewhat analogous area of segregated educational facilities, however, courts are leaning toward an affirmative duty to integrate.[223] Recent housing decisions also indicate that at least some courts believe local officials have an affirmative duty to integrate.[224] When the Tucson, Arizona, housing authority located a low-income project in the only black middle class neighborhood in the city, a suit was brought alleging that the housing authority had a positive duty to avoid discrimination. The Arizona court of appeals agreed, finding the absence of racial considerations insufficient justification for the action taken.[225] It held that the housing authority must avoid a discriminatory effect in site selection.[226] In a similar situation the Third Circuit Court of Appeals held that HUD *must* assess the effect of federally subsidized housing on increasing racial segregation,[227] listing eleven factors that should be considered.[228]

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222. Thompson v. Housing Authority of City of Miami, 251 F. Supp. 121 (S.D. Fla. 1966).

223. *See* Comment, 44 N.Y.U.L. REV. 1172, 1176-78 (1969).

224. *See, e.g.*, Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (Ct. App. 1969).

225. El Cortez Heights Residents & Property Owners Ass'n v. Tucson Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (Ct. App. 1969).

226. "We realize that the United States Constitution denounces racial classification for the purposes of segregating the races, but we also believe the Constitution is very color conscious, and that public housing sites should not be selected with eyes closed to the racial composition of the area. . . . *The duty imposed . . . is not simply the negative duty to not discriminate. It is a mandate that prohibits housing authorities from acting in a manner that results in discrimination.*" *Id.* at 134, 457 P.2d at 296 (emphasis added).

227. Shannon v. HUD, 435 F.2d 809 (3d Cir. 1970).

228. *Id.* at 821-22. "[W]e suggest that some considerations relevant to a proper determination by HUD include the following:

"1. What procedures were used by the LPA [local public agency] in considering the effects on racial concentration when it made a choice of site or type of housing?

"2. What tenant selection methods will be employed with respect to the proposed project?

"3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?

"4. Where is low income housing, both public and publicly assisted, now located in the geographic area of the LPA?

"5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees, located in the geographic area of the LPA?

"6. Are some low income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?

"7. What is the projected racial composition of tenants of the proposed project?

"8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?

"9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low income housing to certain areas, and if so how has this effected [*sic*] racial concentration?

The conclusion to be drawn from these decisions is that the courts are still groping for an answer to the affirmative duty question. The apparent trend is toward recognition of a duty on the part of officials to avoid direct discrimination, but as yet only the Arizona court has expressly required desegregation through housing location.[229] No court has found an affirmative duty where the segregation is economic rather than racial, and in light of the Supreme Court's decision on referendum zoning,[230] movement in that direction will probably be slow. Furthermore, no case has found that housing or city officials have an obligation to *contest* local zoning ordinances that exclude housing projects. In all of the cases thus far decided in the affirmative duty area, zoning has been a primary issue in only one case.[231]

CONCLUSION

While the affirmative duty issue may not be resolved in the foreseeable future, there does appear to be expanding awareness of the problems posed by exclusionary zoning in all its forms and a growing willingness by the courts and legislatures to deal with the problems in a manner that will obviate the more serious abuses. The arsenal of potential challenges is expanding dramatically as judges and legislators seek solutions that will insure meaningful choices to the poor in housing location.

The most blatant discrimination has been all but eliminated; the more subtle methods are now under attack. Whether changes will be wrought through legislation or court decision is immaterial. Reliance on either to the exclusion of the other limits the effectiveness of a permanent solution. Constitutional challenges suffer the infirmity of being factually distinguishable in subsequent court tests; legislation, while more encompassing, is meaningful only if enforced. In the absence of comprehensive statutes, low-income groups must rely on litigation to establish their right to be free from discrimination in housing location and choice. At least some courts appear willing to respond to these appeals.

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"10. Are there alternative available sites?

"11. At the site selected by the LPA how severe is the need for restoration, and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?"

The court added: "The time may come when, in order to achieve the goals of the national housing policy, HUD will have to take steps to overcome the effects of contrasts in urban and suburban land use regulations. What those steps should be we do not here suggest." *Id.* at 822. Retired Supreme Court Justice Tom Clark, writing for the Second Circuit, implied that the duty to affirmatively integrate communities existed when he stated: "Even were we to accept the City's allegation that any discrimination . . . resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify." Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970).

229. El Cortez Heights Residents & Property Owners Ass'n v. Tuscon Housing Authority, 10 Ariz. App. 132, 457 P.2d 294 (Ct. App. 1969).

230. James v. Valtierra, 402 U.S. 137 (1971). *See* text accompanying notes 140-153 *supra.*

231. Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970).