Exclusionary Zoning: Will the Law Provide a Remedy?

I. Introduction

The concept of zoning is relatively new. In fact, not until 1926 did the Supreme Court declare its constitutional validity in the landmark case of *Village of Euclid v. Ambler Realty Co.*[1] With zoning power handed to local governments by *Euclid,* it was only a matter of time until abuses occurred. In recent years, a primary form of abuse known as exclusionary zoning has developed. The purpose of this Note is to provide an overview of the many forms and varieties this type of zoning can assume. However, a true understanding of exclusionary zoning must include more than an examination of its manifestations. Consequently, the reasons for its development, how it is implemented, the responses of the judiciary, and the direction of the law will also be discussed. Once these aspects of the problem have been digested, it will be quite apparent that the legal system has only begun the long and arduous task of forming a viable and acceptable solution. Until such a solution is found, other troublesome issues such as school desegregation and busing, inner-city blight, and waste in our welfare system will continue, for it is submitted that the roots of many of these problems lie in exclusionary zoning.

II. What Is Zoning?

> Zoning has been defined as:
> the division of a city by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put.[2]

The legality of zoning is legislative in nature. The states, under their general police powers, have passed enabling acts which give localities the power to zone.[3] It is important to note that the zoning

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[1]272 U.S. 365 (1926).

[2]Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 384 (1925). Another court has held: "The essence of zoning in a city is territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, among other considerations, and uniformity of use within the division." Collins v. Board of Adjustment, 3 N.J. 200, 205-06, 69 A.2d 708, 710 (1949).

[3]A typical example of such an enabling act is N.J. Stat. Ann. § 40:55-30 (1948) which provides:

power can be constitutional only if used to promote public health, safety, morals, or general welfare.[4] The reason for this constitutional limitation is that zoning actually prohibits private owners of land from putting the land to *any* use they desire. In essence, then, a zoning ordinance can deprive an owner of property rights, and even do so without compensation, in violation of the fifth and fourteenth amendments to the United States Constitution. Only when a greater public good[5] arises from a zoning ordinance do courts find it constitutional. Therefore, most zoning litigation is based upon whether an ordinance is in actuality creating a greater public good. As will be illustrated throughout this discussion, the determination of a greater public good is the critical point at which municipalities may abuse their power and zone with the unspoken but underlying purpose of excluding the minorities and the poor. Thus, judicial review of the local ordinance becomes necessary when this abuse is alleged in a complaint.

Why have we developed a system of regulated land uses that runs directly counter to constitutionally protected property rights? The answer to this question is found in this country's change from an agrarian culture, upon which the founding fathers based our constitutional principles, to a highly industralized, extremely mobile, continually expanding society. By the turn of the century, unregulated growth was devastating the landscape and creating

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> Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State. Such ordinance shall be adopted by the governing body of such municipality, as hereinafter provided, except in cities having a board of public works, and in such cities shall be adopted by said board.
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> The authority conferred by this article shall include the right to regulate and restrict the height, number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use of buildings and structures and land for trade, industry, residence, or other purposes.

The constitutional provision authorizing zoning ordinances is N.J. CONST. art. 4, § 6, para. 2. *See also* IND. CODE § 18-1-1.5-10 (Burns 1974).

[4]Nectow v. Cambridge, 277 U.S. 183, 187-88 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[5]The greater public good can be defined as a desire to promote the public health, safety and welfare, coupled with the realization that private interests must sometimes be subordinated to the needs of society as a whole, to prevent some public evil or to fill some public necessity. *See* Hamilton Co. v. Louisville & Jefferson County Planning & Zoning Comm'n, 287 S.W.2d 434, 436 (Ky. 1956).

health and safety problems.[6] Zoning developed to enable communities to grow in an orderly and healthy manner by limiting or preventing the overlapping of incompatible land uses. In its early stages, therefore, zoning was regarded as a blessing.[7] Certain areas were classified for certain uses, and future growth could be planned and orderly.

The original reasons for the creation of zoning schemes must be remembered if one is to comprehend and appreciate how they could be stretched and twisted over a period of fifty years into justifications for exclusionary zoning. In fact, a majority of courts have upheld justifications of exclusionary zoning practices probably because of adherence to outdated zoning precedents and rules of law under a changing set of circumstances. However, courts are slowly but surely fashioning new legal concepts to meet the times. These new concepts will be discussed at length in the following sections, but first it is necessary to become familiar with established doctrines and attitudes of zoning law.

III. The Euclid Decision and Its Ramifications

Village of Euclid v. Ambler Realty Co.[8] is undoubtedly the most important decision in the field of zoning.[9] *Euclid* established the legal tests to determine the constitutionality of local zoning ordinances, provided attorneys and the courts with an abundance of useful language, and seemed to have so settled the issue of zoning that the Supreme Court left the area untouched from 1928 until 1974.[10]

The *Euclid* case involved a tract of land located between railroad tracks and highways. The owner of the land held it for a number of years, watching its value rise, with plans to sell it later to an industrial concern. However, prior to the time of sale, the Village passed an ordinance restricting the area in which the tract was located to residential use. Consequently, the market value of the land sharply declined, and the owner sought to enjoin the enforcement of the ordinance. He contended that the ordinance deprived him of liberty and property without due process of law

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[6] *See* M. Scott, American City Planning 152-82 (1969); Doebele, Jr., *Key Issues in Land Use Controls* in Urban Land Use Policy 3 (R. Andrews ed. 1972).

[7] For an indication of how rapidly and extensively the concept of zoning grew, see C. Haar, Land-Use Planning 147-48, 165-66 (1959).

[8] 272 U.S. 365 (1926).

[9] D. Hagman, Public Planning and Control of Urban Land Development 385 (1973).

[10] In 1928, the Supreme Court reaffirmed the holdings of *Euclid* in Nectow v. Cambridge, 277 U.S. 183 (1928). In 1974, the Court reentered the zoning field in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

under the fourteenth amendment and, further, that it denied him equal protection of the laws under the same provision. The Court thus had to decide whether the ordinance was an unreasonable and confiscatory violation of the owner's constitutionally protected property rights under the guise of a police power regulation. After a lengthy discussion of the rapidly changing and complex conditions of the period, and analogizing the need for zoning regulations to the need for traffic regulations once the automobile became widely used, the Court held that, before an ordinance could be declared unconstitutional, its provisions must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[11] The *Euclid* Court found the ordinance quite reasonable and relevant to the general welfare. The justifications cited for the zoning ordinance, which the Court upheld, were protection of the health and security of children from territory devoted to trade and industry, suppression and prevention of disorder, facilitation of the extinguishment of fires, and expedition of the repair of streets where traffic is the heaviest.[12]

One of the most widely used and fundamental concepts fashioned in *Euclid* has come to be known as the "presumption of validity." The Court stated that if "the validity of the legislative classification for the zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[13] Translated into practical terms, a person wishing to challenge a zoning ordinance in court[14] would have an extremely difficult task, since a municipality's justifications for an ordinance can be held "debatable" in almost every instance. Once the "debatable" threshold determination has been made, *Euclid* states that the ordinance is presumed to be constitutionally valid.[15] Such a presumption is particularly burdensome in exclusionary zoning cases in which a municipality's true reasons for creating an ordinance may never be openly discussed, but in which other fabricated justifications, if "debatable," are permitted to prevail.

The *Euclid* Court also commented on apartment houses and stated that they are very often "mere parasites" and "come very near being nuisances."[16] Municipalities wishing to exclude multifamily dwellings often seize upon this language to bolster their

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[11]272 U.S. at 395.

[12]*Id.* at 391.

[13]*Id.* at 388.

[14]This most often occurs after a variance has been denied by the local zoning board or its board of appeals.

[15]272 U.S. at 388.

[16]*Id.* at 395.

position. Many times, however, the courts deciding multi-family zoning cases fail to take notice of other comments contained in the *Euclid* opinion which limit the applicability of those statements. These limitations will be analyzed in a subsequent section of this Note. Most appropriate at this point is a discussion of the vital changes that have occurred in our society since the date of the *Euclid* decision, for it is the nature of these changes, accompanied by adherence to *Euclidean* principles, which has evolved into exclusionary zoning.

IV. Rapid Growth and Its Effect: Exclusionary Zoning

In the almost five decades since Justice Sutherland wrote the *Euclid* opinion, two main factors have dramatically affected living habits in America. The first was the upper-class and middle-class exodus to suburbia. The second was a rapid increase in population[17] coupled with the housing industry's inability to keep pace with this extremely rapid growth, which resulted in a serious housing shortage.[18] White, middle-class America moved to the suburbs to escape the problems of the cities — high crime rates, deterioration of the public school systems, congestion and overcrowding — and to satisfy their desires for open space and recreational facilities. As highways improved, speed limits increased, and automobile engines became more powerful, travel from suburban homes to city offices became increasingly easy. Suburbia soon became a mass of autonomous municipalities, each with its own governmental organization, school system, and taxing structure. Metropolitan earnings flowed into suburban governments. Suburban communities began to attract industry to create a wider tax base. Since the bulk of suburban government's revenue is based on a property tax, the game of fiscal zoning emerged. Each suburban division attempted to attract land uses that would increase its property tax collections, including industrial uses, commercial uses, and luxury housing. Uses which would not pay for services the government was required to provide were discouraged. For example, excluding low-income housing would keep the tax base up because the cost of educating the children residing in such housing would be greater than the taxes collected from the assessed value of the property. The greater the success of fiscal zoning, the better the schools could be, the more improved the road system would be, and the "better type" of people the community would

[17] 1975 World Almanac 146 (1974). The population has increased by about eighty million since the time of the *Euclid* decision.

[18] For figures on this shortage, see M. Stegman, Housing and Economics 9-37 (1970).

attract. The suburban communities, indeed, had much to be proud of and, of course, to protect. Exclusionary zoning became the method by which they could achieve this end.

What happened in the cities while this suburban growth was taking place? First, much-needed city tax revenues were diminished since money earned by suburban dwellers from business with the city's permanent residents was being carried off to pay suburban taxes. This led to continual cutbacks in the services the cities could provide, including the quality of education. Second, as suburbia began to attract more and more industry, so too flowed the jobs. However, many city workers could not afford to follow. As an illustration, if a certain industry went to a community which zoned its residential area into minimum four-acre lots, it is readily apparent that the high cost of buying a home on such a large piece of property effectively excluded many potential residents. Yet many suburban communities are so zoned, resulting in increased welfare rolls in the cities, while the outlying areas continue to flourish and even complain of labor shortages.[19] Finally, by using these restrictive zoning measures, suburban areas effectively exclude "undesirables." Consequently, the cities are increasingly inhabited primarily by the poor, who are often members of minority groups.[20] The result is an inner core of the poor and minorities with inferior schools, inadequate housing, and lack of employment, surrounded by predominantly white municipalities with superior schools, an abundance of jobs, and a healthy environment.

This critical situation did not go unnoticed by the federal government. To alleviate the serious housing shortage throughout the nation, the Housing and Urban Development Act of 1968[21] set a goal of twenty-six million housing units to be constructed by 1978, with six million of these units designated for low-income and moderate-income families. The Department of Housing and Urban Development (HUD) also designed special programs to alleviate the poor, minority core situation and to permit people with low incomes to be dispersed throughout the suburbs. Specifically, section 236 of the National Housing Act of 1934, as added by the Housing and Urban Development Act of 1968,[22] was created to encourage developers to build low-income housing by providing

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[19]*See* Lakeland Bluff, Inc. v. County of Will, 114 Ill. App. 2d 267, 271, 252 N.E.2d 765, 767 (1969). Testimony on behalf of the plaintiff revealed that the basic cause of a labor shortage in the Joliet area was the lack of low-cost housing in the area for employees.

[20]B. SIEGAN, LAND USE WITHOUT ZONING 173 (1972); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 4, fig. 3 (1974).

[21]42 U.S.C. § 1441(a) (1970).

[22]12 U.S.C. § 1715z-1 (1970).

them with profit incentives.[23] The requirements of the program often dictate that first priority be given to those developers who select sites in the outlying areas.[24] Thus, HUD is embarked upon a policy of low-income housing dispersion by having its attendant burdens shared by all rather than by only the large, core urban areas.

HUD's policy, however, has met with strong resistance in outlying suburban areas which typically object to the construction of high density buildings. These objections are based upon the results that may follow high density housing, such as overcrowded schools and roads, overburdened sewage systems, or reduced aesthetic character. In accordance with these general concerns, communities, under their general welfare power, will often pass zoning ordinances prohibiting multi-unit dwellings. Many times such zoning ordinances "mask an underlying desire to keep poor and minority groups out of the area.[25] Developers who wish to pursue a section 236 housing project most commonly must apply for a variance to the zoning ordinance. Suburban pressures will usually not yield, and the variance will be denied. Undaunted developers must then challenge the validity of the zoning ordinance itself. It is at this point that judicial review and case law can have a profound effect on the future of zoning. Federal policy can do little to change the present course of events, since most zoning power rests autonomously at the local level. Moreover, continued adherence to *Euclidean* zoning principles, with the presumption of validity applying to "debatable" ordinances, means that surface justifications will continue to prevail and the underlying problem may never be resolved.

V. Exclusionary Zoning

This discussion of exclusionary zoning tactics is premised on the fact that exclusionary zoning has been a product of judicial adherence to the original concepts of zoning encompassed within the *Euclid* opinion, while the social conditions under which these con-

[23]For example, the 1968 Act authorizes periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families. This is accomplished by making monthly payments to the mortgagee to reduce the owner's interest payments from the market rate. The owner must then pass the benefit of this interest reduction to its low income tenants in the form of lower rents. The program also provides for federal insurance of private mortgage loans. *Id.*

[24]Those developers who propose projects outside areas of total or substantial minority concentration will receive a "superior" rating among the applications submitted. 24 C.F.R. § 200.700-.710 (1974).

[25]C. Edson & B. Lane, A Practical Guide to Low and Moderate Income Housing 9:2 (1972).

cepts were formulated have rapidly changed. Exclusionary zoning can be defined as a means by which a local government can exclude those whom the community does not wish to have as residents by creating zoning ordinances which frustrate the ability of "undesirables" to move into the community. This is accomplished under the guise of the general police powers promoting the health, safety, morals, and general welfare of the inhabitants. In formulating this definition, an attempt has been made to grasp the reality of the situation. Certainly a municipality, and naturally its solicitor, would find such a definition outrageous since they would never admit to the practice of zoning for exclusionary purposes. One charged with exclusionary tactics would, for example, justify passage of an ordinance restricting multi-unit dwellings by proffering such explanations as maintaining property values, avoiding burdens on present sewage systems, or preventing overcrowding of schools. In presumption of validity jurisdictions, a party charging exclusionary tactics would have the burden of refuting those justifications before the ordinance could be declared constitutionally invalid. Such a burden is, indeed, heavy. The question is whether such justifications can be presumed valid given present growth patterns and population pressures. The answer must be that they cannot.

Some of the exclusionary tactics used by the suburbs are aimed directly at the poor, the blacks, and other minority groups. However, this motive will rarely be found in the text of the ordinance or the transcripts of zoning board meetings, or voiced by suburban zoning officials. The ordinance will almost always appear neutral on its face and "debatable."

The exclusion of multi-unit dwellings is probably the most widely used method of exclusionary zoning. The municipality passes an ordinance which limits its residentially zoned areas to single-family houses. In essence, apartment dwellers are zoned out of a particular locality.[26] The justification usually stated is that large multi-unit dwellings will not pay their way and will put a strain on existing services, roadways, and schools. In many intances this will be true, especially in small towns, but it is not true of every municipality which uses this justification. Each case should be examined in light of the particular surrounding circumstances. Frequently, an ordinance excluding apartments is directly aimed at excluding apartment dwellers. Such people are often viewed as "transients" who develop no pride in or concern

[26]The exclusion of multiple unit dwellings means that nowhere in the community may an apartment house be built. It does *not* mean that they are only restricted to certain areas within a community. This distinction is extremely critical for a full comprehension of exclusionary zoning.

for their community. This view ignores the fact that many apartment dwellers are newlyweds or elderly persons on fixed incomes who usually have a concern for their community. The younger couples may have jobs within the area and may eventually raise children and purchase homes in the community. The older apartment residents may be retirees who wish to live out a peaceful and safe life, and so they too may have an interest in the soundness and well-being of the area.

There is also the widely held misconception, emanating from the nineteen-twenties, that apartments necessarily breed overcrowded and congested living conditions. In *Euclid*, which is often cited by local governments to bolster their positions in creating ordinances excluding apartments, the Court noted:

> [T]he coming of one apartment house is followed by others, interfering by their height and bulk, with the full circulation of air and monopolizing the rays of the sun which otherwise would fall upon smaller houses, and bring, as their necessary components, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities — until finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, *which in a different environment would be not only entirely unobjectionable but highly desirable, come very near being nuisances.*[27]

A close reading of *Euclid*, however, reveals that apartment houses are often mentioned in the same context as hotels, thus implying that in 1926 the two types of structures had similar physical characteristics. This is not always the case today. Apartment houses are often of the garden variety, that is, only two or three stories tall. The *Euclid* Court was certainly not addressing itself to this type of housing. Thus, if a community wished to avoid the results contemplated by *Euclid*, it could zone only for garden-type apartments, specify distances between each structure, require adequate parking facilities, and provide for wide-open areas. In fact, the *Euclid* Court actually suggested the above alternative when the Court stated that in different circumstances apartment houses "would be not only entirely unobjectionable but highly desirable."[28] Zoning out apartments completely ignores the

[27] 272 U.S. at 394-95 (emphasis added).

[28] *Id.* at 395.

harsh realities of an ever-growing population, the extreme shortage of housing, and the rights of people to live where they want in the best housing they can afford.

A second popular tactic used to accomplish exclusionary zoning is termed "large-lot" zoning. This entails zoning residential areas into minimum lot sizes of two or three acres. The suburban municipality can thus limit the total amount of housing, and the type of people, in the community, since large lots are more expensive than small ones. In many instances, such planned future growth is certainly within the "general welfare" of the people. The need to forecast future growth rates in order to provide adequate schools, sewage disposal, transportation, and social programs is a goal that should be actively pursued by all levels of government, especially state and local. On the other hand, a suburban community cannot stand in the path of increasing population pressures by large lot zoning. As the demand for housing increases, it cannot be so necessary to the general welfare that each unit be three acres apart.[29]

Another method utilized in exclusionary zoning is the prohibition of mobile homes. In other words, people desiring to live in this type of housing are forced to move where it will be accepted. Many communities have zoning ordinances which exclude mobile homes entirely. Again, the motives for these ordinances appear to involve a misconceived stereotyping of the appearance of such homes, their effect on bordering property values, and the kind of occupants they attract. Another possible motive may be that mobile homes may not be taxable as real property[30] and the local government would take almost a total loss on services, especially educational services, provided to the occupants. With the present shortage of low-income and moderate-income housing, this type of structure can help fill the gap between the huge demand and the small supply of new houses.[31] Today's mobile homes must also be recognized as drastically different from the "trailer" type homes of thirty years ago.[32] Also, there is no reason to believe that once

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[29]Certainly some responsibility to accommodate an increasing population must be recognized, and in the Pennsylvania case of National Land Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965), such a duty was acknowledged.

[30]For a breakdown of how the states regard mobile homes for purposes of taxation, *see* M. DRURY, MOBILE HOMES 46-52 (1972) [hereinafter cited as DRURY].

[31]In fact, many people choose to live in mobile homes. *See* Elias, *Significant Developments and Trends in Zoning Litigation*, in INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 22 (Southwestern Legal Foundation 1973) [hereinafter cited as Elias].

[32]The outward appearance of mobile homes has changed from the plain, expressionless masses on wheels to attractive homelike structures. Industry-

mobile homes are permitted within a community, chaotic residential growth will occur. Nothing prevents the locality from restricting mobile homes to mobile parks which, in turn, can be required to be landscaped and to have paved roads, recreational facilities, setback requirements, and a maximum number of units. That is, zoning regulations can be used to create an appealing environment for this type of housing and thus to alleviate the fears of reduced property values and aesthetic injury. With the aforementioned inner-city problems, and the concomitant movement of industry to the suburbs, it is unlikely that total exclusion of mobile homes is promotive of the "general welfare."

Exclusionary zoning may also be accomplished by following administrative procedures that create long and costly delays and thereby discourage developers, prospective tenants, or mobile home dwellers from attempting to live in or build new low-income and moderate-income housing within the community.

What is evident from the above discussion is the increasing resistance, via exclusionary zoning, of neighborhood groups and their suburban governments to permit the minorities and the poor to live within their communities, to find or retain employment, and to enjoy the benefits the community has to offer. This is not to advocate a massive rush to open up the suburbs to the inner-city dwellers by complete abolition of zoning, but it is an appeal to ease some of the more rigid restrictions so that a better balance can be struck, thereby allowing the cities to be strong and viable entities and allowing the suburbs to retain their traditional characteristics. How the legal system has dealt with this suburban resistance is examined in the remainder of this Note.

VI. The Litigation Process

The judiciary enters this legislative area when it is alleged that a zoning ordinance violates constitutional property rights. The Supreme Court in *Euclid* held that property may be zoned if done in a reasonable manner, that is, for the general welfare. The

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wide regulations require them to be equipped with adequate plumbing and sanitation facilities. In the past, the absence of these facilities often created eyesores directly outside each unit. Also, most of today's mobile homes are only mobile in the sense that they are constructed at the factory and then moved to a permanent tract. Once there, they no longer remain on wheels.

In 1963, the two trade associations of the mobile home industry established the first self-imposed national standards in the housing industry. The Mobile Home Manufacturer's Association and the Trailer Coach Association can be commended for establishing requirements that have made noticeable improvements in the overall quality of the mobile home. See Drury, *supra* note 30, at 110-11, for details of the regulations.

litigation process, therefore, will focus on the reasonableness of the ordinance in relation to the health, safety, morals, or general welfare of the people whom it regulates. Since the *Euclid* presumption of validity attaches once it is shown that the ordinance is at least "debatable," a plaintiff must show that a zoning restriction affecting his property is unreasonable and unrelated to the general welfare in violation of his constitutional rights. To strengthen his case, a plaintiff may also allege that the zoning ordinance is in violation of other constitutionally and statutorily protected rights. For example, an ordinance may have some effect on racial mobility.

The most common forms of attack come under the due process clause of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment. The plaintiffs are usually developers under section 236 programs designed to stimulate dispersion of low-income housing—a policy which frequently clashes with local zoning ordinances and practices. In many cases, potential tenants of the proposed housing also join as plaintiffs and broaden the issues involved beyond those concerning the developer to ones touching on public policy. It is in this area that the judiciary can have a significant impact on exclusionary zoning. A brief introduction to the arguments most frequently used will aid in the later case analysis.

A. The Due Process Argument

The United States Constitution prohibits deprivation of property without due process of law. The due process argument focuses on the traditional rights in property, the reasonable limitations upon those rights under the concept of zoning as pronounced in *Euclid*, and the abuse of the local legislative power in creating unreasonable zoning laws not related to the general welfare.

B. The Equal Protection Argument

In recent years, equal protection has become one of the most widely used doctrines in the presentation of an exclusionary zoning case. The fourteenth amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The development of this clause as applied to exclusionary zoning has been from a rather narrow to a broader interpretation of what constitutes a denial of equal protection. It is important to recognize that this expansion is occurring, but it should also be noted that its pace has been sluggish since most courts tenaciously cling to the traditional *Euclidean* concepts.

The equal protection clause was first utilized in cases in which owners were denied uses of land that were allowed to others.

The clause was appropriate in these instances and, hence, there was little reluctance by the courts to apply it when such occasions arose.[33] Typically, an area was zoned for a particular purpose, but a municipality would allow another use in that sector.[34] A set of criteria was used upon which the decision was based. If another person then desired to use the same area in a manner not provided for in the zoning laws, and the municipality refused to allow the use, the person could bring an equal protection challenge to determine whether the municipality was consistent in the application of the criteria.

The next step in the evolution of the equal protection argument came on those occasions when zoning laws were directly motivated by desires to exclude blacks and other minority groups.[35] Once that motivation was factually established by the plaintiffs, discrimination was obvious, and a claim of unequal protection of the laws was upheld.

Exclusionary zoning laws, however, became very sophisticated. Rarely was discriminatory language or innuendo employed, and discriminatory motive was readily refuted by the zoning authorities. Yet the equal protection clause could still be employed to challenge a zoning ordinance if it could be shown that the *effect* of the law was discriminatory. As one court aptly stated:

> If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. . . . [I]t is enough for the complaining parties to show that the local officials are *effectuating* the discriminatory designs of private individuals.[36]

Attendant with the urban-suburban dichotomy, the federal policy of dispersion, and the recalcitrance of suburban communities to submit to any outward pressures as shown by their exclusionary zoning tactics, the logical progression of the equal protection clause should turn toward affording a remedy to the class of citizens being excluded, namely, the poor. Whether such an amorphous class can come within the fourteenth amendment is the controversy that presently rages in the courts. Does the fact that most poor people are members of minority groups carry any legal significance? Should the poor as a class be a "suspect"

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[33]For a recent federal case applying this rule, *see* City of Miami v. Woolin, 387 F.2d 893 (5th Cir. 1968); *cf.* Chicago Title & Trust Co. v. Village of Wilmette, 27 Ill. 2d 116, 124-26, 188 N.E.2d 33, 38 (1963).

[34]This is commonly termed a legal non-conforming use.

[35]See text accompanying notes 74, 76 & 79 *infra*.

[36]Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970) (emphasis added).

classification triggering a strict scrutiny test whereby a compelling interest of the community must be shown before a zoning ordinance will be allowed to stand? Is the right to live wherever one chooses a fundamental right which will also trigger the strict scrutiny test? In essence, do the suburban exclusionary tactics deny the poor the equal protection of the laws by preventing them from enjoying the same benefits enjoyed by those in the suburbs? Does the power to zone, with these exclusionary results, come within the concept of the general welfare? These are the equal protection questions now being confronted by the courts. How the case law develops will, in part, determine the future parameters of a municipality's power to zone.

C. The Supremacy Clause

Article VI, clause 2 of the United States Constitution provides yet another basis for attack upon exclusionary zoning laws, but a supremacy clause argument has been less successful, thus far, than an argument based upon due process or equal protection. Yet, with new HUD regulations, this could become an important legal weapon in an action to declare a local zoning ordinance invalid. The reasoning behind the use of the supremacy clause is that HUD has formulated a policy of dispersion which is to be implemented by giving priority approval to developers requesting federal funds for low-income housing, if the facilities are placed in suburban areas.[37] Local exclusionary zoning ordinances preventing developers from doing this are arguably in violation of the supremacy clause. This thesis was used by the trial court in *Ranjel v. City of Lansing*[38] to declare invalid a referendum which would have prevented an amended zoning ordinance allowing low-income housing in a predominantly white neighborhood. However, on appeal,[39] the Sixth Circuit stated that since HUD's policy was not contained in the Federal Register, and did not have presidential approval, it did "not rise to the dignity of federal law."[40] Therefore, the referendum was not in violation of the supremacy clause. This decision has effectively arrested the use of the supremacy clause, but it is arguable that its future use is merely dependent on a regulation being officially issued, presidential approval, or legislation by Congress implementing HUD's policy.

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[37]HUD Low-Rent Housing Manual, § 205.1, para. 4g. *See* text accompanying notes 22-24 *supra.*

[38]293 F. Supp. 301 (W.D. Mich.), *rev'd,* 417 F.2d 321 (6th Cir. 1969).

[39]417 F.2d 321 (6th Cir. 1969).

[40]*Id.* at 323.

VII. Has Case Law Shown a Way?

While the *Euclid* decision has long been an almost sacred guide in defining the limits of the zoning power, and zoning ordinances created under the guidelines of the decision have been virtually invulnerable if any reason could be found to uphold them, recently the *Euclidean* barriers appear to be weakening. An ambitious federal housing policy, shortages of housing, urban sprawl, and shifting industrial sites are a few of the pressures that are eroding the barriers. In jurisdictions most affected by these forces, the judiciary has been willing to reexamine traditional theory and adopt new principles.

A. An Alternative Suggestion

If *Euclid* can be distinguished from an exclusionary case, doctrines such as the presumption of validity will be considerably weakened, thereby undercutting much of the forcefulness in a municipality's justifications for an exclusionary ordinance. *Euclid* can be viewed as merely approving a general zoning process which limits the intrusion of industrial and business development into residential areas. But present exclusionary zoning is attempting to limit certain types of residences in *residentially* zoned areas. A careful reading of the *Euclid* opinion, along with its general tone, indicates that the principles it advances should not be used for such purposes. The dicta concerning apartment houses is certainly not applicable to the many varieties of apartments that can be built today without the tragic consequences Justice Sutherland envisioned.[41] In addition, the opinion contains many statements which suggest that the zoning principles it advances are not to remain static but are to adjust to changing conditions. First, the Court justified the disputed regulation for reasons analogous to those justifying traffic regulations, which reasons would have been regarded as arbitrary and unreasonable just fifty years earlier.[42] The Court held that although "the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions" that constantly develop in a changing world.[43] Why this language has not been extracted from the opinion and used to attack local regulations that can no longer be constitutionally justified is a mystery. It is only a matter of redefining the scope of the zoning power relative to a vastly changed environment. Some courts have, indeed, accomplished this by focusing solely on the due process

[41] See notes 26-28 *supra* and accompanying text.
[42] 272 U.S. at 387.
[43] *Id.*

and equal protection arguments.[44] The same end could be achieved, and the forcefulness of the results compounded, if *Euclid* were distinguished and its language used to support new parameters of zoning authority. In that way, the reliance on *Euclid* by the majority of the courts could be diminished at a quicker pace than at present.

B. An Emerging Theory

Judicial awareness of exclusionary tactics began to surface about twelve years ago in dissenting opinions in zoning cases.[45] Although dissents do not set policy or create law, they may portend later judicial creativity. However, the judiciary is still extremely reluctant to intervene, since the enactment of zoning ordinances is legislative in nature, and the purpose of the courts is not to rule on the wisdom of a legislative enactment. This current of judicial thought is aptly enunciated in *Robinson v. City of Bloomfield Hills,*[46] in which the court announced that it would "not sit as a super-zoning commission."[47] For alleged abuses, the court held, the remedy is in the ballot box, not in the courts.[48] The ordinance comes to the court "clothed with every presumption of validity."[49] These statements, obviously *Euclidean* in nature, might be categorized as judicial hedging. There are serious legal questions involved in challenges to zoning ordinances, especially ordinances designed to exclude certain groups. An attitude that evades this responsibility by suggesting that a remedy to these disputes can be found by relying on the ballot box is absurd. The majority of suburban communities prefer exclusionary zoning tactics, though they may not recognize them as such, as a means of preserving their community character and style of living. Consequently, their elected zoning officials will always represent that viewpoint. What kind of relief is there in telling the excluded groups to wait for the next election? The courts obviously have jurisdiction over these matters, since the disputes involve constitutional property rights, due process infringements, and denials of equal protection. Although an ordinance may be valid, the courts should at least examine the issues presented.

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[44]See discussion of due process and equal protection arguments at text accompanying notes 60-108 *infra.*

[45]*See* Vickers v. Township Comm., 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (Hall, J., dissenting). *See also* Lionshead Lake v. Wayne Township, 10 N.J. 165, 181-84, 89 A.2d 693, 701-02 (1952) (Oliphant, J., dissenting).

[46]86 N.W.2d 166 (Mich. 1957).

[47]*Id.* at 169.

[48]*Id.*

[49]*Id.* at 170.

One of the earliest attempts at judicial recognition of exclusionary schemes came in the New Jersey case of *Vickers v. Township Committee.*[50] The attempt failed in a 5-2 decision, but the dissenting opinion has become a landmark in exclusionary zoning litigation. The case arose on a challenge to the validity of a township zoning ordinance amendment which prohibited trailer camps and trailer parks in an industrial district. In effect, this meant that trailers were prohibited anywhere in the township. The plaintiff, who wished to develop a trailer camp, tried to show that the trailer camp would have no adverse economic effect upon any surrounding areas. The township maintained that it would be unattractive and would reduce neighboring property values, and that future growth plans provided for a strictly industrial area. Thus, the issue was whether the township had the power to bar trailer camps within its boundaries. The trial court held that the prohibition of trailer camps could be legislated. The appellate court reversed and held that the zoning ordinance must be set aside as an unreasonable and arbitrary exercise of the zoning power.[51] The New Jersey Supreme Court upheld the trial court, stating that a court could "act only if the presumption in favor of the validity of the ordinance is overcome by an affirmative showing that it is unreasonable or arbitrary."[52] The court found that the plaintiff had not overcome such a presumption, and that a municipality did not need to provide a place for every use and could exclude those it believed repugnant to its planning scheme.

The two dissenting justices, however, strongly disapproved of the majority's reasoning. The opening statement of the dissent indicates the vigorous tone of the objections.

> The majority decides that this particular municipality may constitutionally say, through exercise of the zoning power, that its residents may not live in trailers—or in mobile homes . . . . I am convinced such a conclusion in this case is manifestly wrong. . . . The import of the holding gives almost boundless freedom to developing municipalities to erect exclusionary walls on their boundaries, according to local whim or selfish desire, and to use the zoning power for aims beyond its legitimate purposes. Prohibition of mobile home parks, although an important issue in itself, becomes, in this larger aspect, somewhat a symbol.[53]

The dissenters pointed out that the township was on the outer ring of the urban centers of Philadelphia and Camden, and that

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[50]37 N.J. 232, 181 A.2d 129 (1962).

[51]68 N.J. Super. 263, 172 A.2d 218 (1961).

[52]37 N.J. at 242, 181 A.2d at 134.

[53]*Id.* at 252-53, 181 A.2d at 140.

there was significant industrial development occurring in the locale with an inevitable population migration into the area. The justices further reasoned that the intelligent application of constitutional law to planning law could only be understood by an analysis of particular ordinances in relation to the whole background of the "changing physical, economic, and social environment."[54] They felt that judicial scrutiny had become too superficial and one-sided under *Euclidean* doctrine and had ignored the realities of the day. What constitutes the general welfare "transcends the artificial limits of political subdivisions and cannot embrace merely narrow local desires."[55] This viewpoint was a radical departure from customary zoning principles. It advanced the theory that if the valid authority for zoning law is based on promoting the "general welfare," that term must embrace a regional rather than an artificial political perspective. There was a sense that the justifications used to raise the presumption of validity were actually shielding an underlying exclusionary attitude towards mobile homes. The dissenters rejected the notion that promoting the general welfare was automatically what the municipality said it was, and characterized the exclusionary tactics as economic segregation.

The reasoning in the *Vickers* dissent was far ahead of its time, but it vividly describes a current vein of thought in zoning law. The dissenters maintained that the factors used by the township to justify their amended zoning ordinance created "Chinese walls on the borders of roomy and developing municipalities"[56] which, in effect, brought about community-wide segregation by keeping out all but the "right kind" of people and providing for only a certain type and cost of dwelling. To them, zoning could not be deemed proper if used "to control who the residents of your township will be."[57] Asserting that mobile homes are perfectly respecable and healthy, and a useful form of housing chosen by several million people, and that municipalities "should stop acting on the basis of old wives' tales,"[58] the dissenters concluded that the total restriction of mobile homes was unreasonable and arbitrary.

The dissent in *Vickers* represents a view which recognizes that the social effects of exclusion are highly undesirable, and that the judicial role should be more probing in evaluating what constitutes a valid exercise of the zoning authority based on the nebulous concept of the general welfare. The dissenters step

[54] *Id.* at 255, 181 A.2d at 142.
[55] *Id.* at 263, 181 A.2d at 146.
[56] *Id.* at 266, 181 A.2d at 147.
[57] *Id.*
[58] *Id.* at 267, 181 A.2d at 148.

outside municipal boundaries and evaluate an exclusionary municipal zoning ordinance "on the basis of zoning allocations throughout the region in which the challenged municipality is located."[59]

Three years later the Pennsylvania Supreme Court applied the principles of the *Vickers* dissent in *National Land & Investment Co. v. Kohn.*[60] In *Kohn,* the issue concerned the validity of an ordinance which established a minimum lot size of four acres. The plaintiff wanted to construct a single dwelling on a one-acre lot. The community maintained that the four-acre minimum was necessary for proper sewage disposal and pollution control, and to prevent undue burdens on the road system. The *Kohn* court resolved this dispute by first pointing out the crucial importance of the location of Easttown Township, the jurisdiction at issue. The Pennsylvania Supreme Court, after noting that the township was directly in the path of population pressures approaching from two directions, Philadelphia on the east and Valley Forge on the west, found that the four-acre minimum was directed more toward retaining the rural character of the township than toward the reasons the township advanced. Expert testimony revealed that the fears voiced by the local zoning authority would not be realized even if the minimum lot size was reduced to one acre. "At some point along the spectrum, however, the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference."[61] The court adopted the reasoning of the *Vickers* dissent and held that a township cannot stand in the way of a growing population searching for comfortable places to live:

> A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid.[62]

Thus, in Pennsylvania, under *Kohn,* it is no longer enough for zoning to be reasonable in relation to the needs of only the political subdivision. The needs of the entire area must be considered.

Pennsylvania reaffirmed these basic tenets in two 1970 decisions. *Appeal of Kit-Mar Builders, Inc.*[63] dealt with a zoning ordinance delineating a two-acre minimum lot size. The restriction was declared unreasonable in light of the surrounding circumstances,[64] and again the Pennsylvania Supreme Court found

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[59]D.R. MANDELKER, THE ZONING DILEMMA 11 (1971).

[60]419 Pa. 504, 215 A.2d 597 (1965).

[61]*Id.* at 524, 215 A.2d at 608.

[62]*Id.* at 532, 215 A.2d at 612.

[63]439 Pa. 466, 268 A.2d 765 (1970).

[64]The primary justification for the zoning ordinance was that lots of a smaller size would create sewage problems, yet the standards contained

that burdens on an existing sewage system could not justify exclusionary zoning.[65] A village can protect itself by conditioning a building permit upon a general assessment for sewage reconstruction. Thus, a presumption of validity can no longer attach to a sewage burden justification. The Pennsylvania Supreme Court refused to allow a municipality to exclude people instead of making community improvements:

> [C]ommunities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.[66]

The other Pennsylvania decision maintaining that a regional perspective must be applied when creating zoning ordinances or, for that matter, adjudicating their validity, is *Appeal of Girsh*.[67] A zoning law that did not prohibit, but failed to provide for, apartment land use was held unconstitutional as an unreasonable land use restriction. In fact, in considering the location of the municipality as the next logical place for population growth, the Pennsylvania Supreme Court stated that the municipality could not freeze its present population level by limiting residentially zoned areas to single-family dwellings.[68] A zoning scheme without a reasonable provision for apartment dwellings would be unreasonable per se. In other words, the court imposed an affirmative duty on the municipality to provide for apartment housing. In answering objections that such structures would destroy the attractive character of the area, the court replied that aesthetic zoning was not a valid exercise of the police power. The township could protect itself by requiring the apartments to be built "in accordance with reasonable set-back, open space, height, and other light-and-air requirements, but it cannot refuse to make any provision for apartment living."[69] It is evident that the *Girsh* court perceived that the township was not as fearful of apartments, in and of themselves, as it wished the court to believe.

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in the Pennsylvania laws indicated that the required absorption area for a three-bedroom house on a lot with the minimum acceptable percolation rate would be only slightly more than 1,000 square feet. This fact, coupled with the two-acre minimum lot requirement, in an area subjected to rapid population expansion, led the court to hold the minimum lot size unreasonable. *Id.* at 477-78, 268 A.2d at 770.

[65] *Id.* at 472, 268 A.2d at 767.

[66] *Id.* at 474, 268 A.2d at 768-69.

[67] 437 Pa. 237, 263 A.2d 395 (1970).

[68] *See generally* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

[69] 437 Pa. at 245, 263 A.2d at 399.

The court felt that the exclusionary purpose went deeper than prohibiting multi-family dwellings. "In refusing to allow apartment development as part of its zoning scheme, appellee has in effect decided to zone out the people who would be able to live in the township if apartments were available."[70]

In 1971, the reasoning of these three Pennsylvania cases influenced a New Jersey court. In a period of only nine years, the dissent in *Vickers* had become majority reasoning in the case of *Oakwood at Madison, Inc. v. Township of Madison.*[71] The case dramatically illustrates the proposition that zoning laws cannot be used to restrict inevitable growth in a particular region, since this would not promote the general welfare. In *Oakwood* the town's population had grown from 7,366 in 1950 to 48,715 in 1970. The zoning ordinance under attack set minimum floorspace requirements, set one-acre and two-acre minimum lot sizes, and substantially limited multi-family dwellings by limiting the number of individual units that could be built in a year. Under the ordinance, the minimum purchase price for a home in this area was estimated at $45,000. The plaintiffs owned vacant land in the area and were seeking to build low-income housing, since much new industry had recently come to Madison Township. Plaintiffs also included six low-income individuals who were seeking housing inside the township. The township urged that it was safeguarding against flood and surface drainage problems by zoning into districts with low population density. But the Superior Court of New Jersey held, in the absence of any record by which they could substantiate this claim, that the zoning ordinance was invalid for failing to promote a reasonably balanced community in accordance with the general welfare. The court found that a municipality must assume an obligation to meet not only the housing needs of its own population, but that of its region as well. Indeed the court ruled that the "general welfare does not stop at each municipal boundary."[72]

What has emerged from these few opinions is the obligation of a municipality, when legislating zoning ordinances, to consider the regional needs of an area, rather than only the interests within its political subdivision. If a community neglects this task, its laws may be declared invalid as an unreasonable restriction of property use in violation of the due process clause. The power to zone can be legitimate only if used to promote the general welfare. Under these holdings, the general welfare is *regional* in nature. Implicit in these decisions is the desire of the judiciary to allow people the basic right to live wherever they may choose,

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[70] *Id.*

[71] 117 N.J. Super. 11, 283 A.2d 353 (1971).

[72] *Id.* at 20, 283 A.2d at 358.

to relieve artificially induced population pressures, and to prohibit local governments from using exclusionary measures to evade the burdens created by low-income housing, which burdens, until recently, have been confined to the inner cities. These decisions by a few jurisdictions, weakening exclusionary barriers, also focused on benefiting the poor and the minorities who have been denied many of the basic rights others take for granted, such as selecting where and in what mode they will live.

C. The New Equal Protection

Beyond a challenge that a zoning law is not a reasonable exercise of the police power in furtherance of the general welfare is the fact that the operation of such laws can be patently discriminatory. On this basis, both the racial minorities and the poor have been directly affected. Therefore, they often seek redress under the equal protection clause.[73] The tide of litigation under this clause ranges from cases alleging racially motivated discrimination to those challenging zoning ordinances that discriminate against the poor. Between these two extremes is the shady area in which the poor and the racial minorities are so inextricably coupled that the basis for a court's decision is difficult to extrapolate.

The complainants, a construction company and a potential black tenant, in *Dailey v. City of Lawton,*[74] brought an action to enjoin the city from denying a zoning change for the construction of low-income housing. The City of Lawton, Oklahoma, tried to justify its denial on the basis of overcrowding of local schools and recreational facilities, and overextension of fire-fighting capabilities. The federal district court found from the facts that the ordinance was racially motivated, and that there was not enough support for the city's justifications to outweigh the racial prejudice.[75] For example, the facts showed that other property in the area received the permissive zoning sought by the plaintiffs, and that the petitions opposing the zoning change were signed only by whites. The city maintained that no such motive was evident on the face of the zoning ordinance, but the court stated that it was sufficient for complainants to show that the effect of the ordinance was discriminatory. This they did, and the ordinance was declared violative of the fourteenth amendment.

In *Crow v. Brown,*[76] the problem of attempting to effectuate the federal policy of low-income housing dispersion was cen-

[73]See note 33 *supra* and accompanying text.

[74]425 F.2d 1037 (10th Cir. 1970).

[75]296 F. Supp. 266 (W.D. Okla. 1969).

[76]332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972).

tral. Fulton County, situated on the outer rim of Atlanta, had granted a building permit to a developer to construct apartment buildings. When the county zoning authorities later discovered that the developer intended to construct low-income housing, which they secretly feared would draw inner-city blacks, they denied the building permit. The plaintiffs were eligible black persons on the waiting list of the Atlanta Housing Authority for low-rent public housing. The Fulton County Commissioners stated that, when they first changed the zoning ordinance, it was on the basis that "nice" apartments would be built, not low-rent apartments. The court replied that "although the Commissioners say they want only 'nice' apartments . . . it is clear that they are not talking about the physical quality of the building."[77] The court found that, after the county had legitimately zoned the tracts for construction of apartments, to deny access to these particular tenants was violative of the equal protection clause.[78]

When the owners of a particular tract of land in Lackawanna, New York, sought to construct a low-income housing project, the city took measures to frustrate them, one of which was to rezone the tract for a park. In the ensuing litigation, *Kennedy Park Homes Association, Inc. v. City of Lackawanna*,[79] the evidence revealed that blacks and low-income groups had historically been confined to the city's first ward, where a plant of the Bethlehem Steel Corporation was located.[80] The owner's tract was located in a different ward. The court found that the owners were seeking to exercise their constitutional property rights,[81] and that the effect of the city's action was adverse to the enjoyment of those rights. In such circumstances, the court ruled, the city must show a compelling governmental interest to overcome a finding of unconstitutionality.[82] It appears, therefore, that the court was applying a strict scrutiny test when it ruled that the denial of decent housing to low-income[83] and minority families was in violation of the equal protection clause.

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[77]332 F. Supp. at 389.

[78]*Id.* at 390.

[79]436 F.2d 108 (2d Cir. 1971), *cert. denied*, 401 U.S. 1010 (1971).

[80]Lackawanna was a three-ward city with 98.9 percent of all its nonwhite citizens living in the first ward. The second ward, with a population of 8,974, had only one nonwhite person, and only twenty-nine nonwhites resided in the third ward. In addition, there were three low-income housing projects in the city—all of which were located in the first ward. 436 F.2d at 110.

[81]That is, the "freedom from discrimination by the States in the enjoyment of property rights." *Id.* at 114, *quoting from* Shelley v. Kraemer, 334 U.S. 1, 20, 68 (1948).

[82]436 F.2d at 114.

[83]*Id.* at 109 (those of low income specifically referred to).

These last few cases seem to indicate that the use of the equal protection clause may be based on more than racial discrimination. The innumerable statements referring to those receiving low incomes, the "class" of people who live in apartments, and the "type" who have mobile homes suggest that the holdings could apply to the poor as well. Whether or not the equal protection clause can be used to invalidate economic segregation via zoning ordinances is a step most courts prefer not to take. Nevertheless, some willingness has appeared.

The case of *Southern Alameda Spanish Speaking Organization v. City of Union City*[84] speaks directly to the applicability of the equal protection clause to protect against zoning used to exclude the poor. Yet, a final decision on that issue was not made by the court, since the case dealt with the legality of a referendum having to do with the zoning scheme, rather than with the legality of the scheme itself.

SASSO had requested that a zoning ordinance be changed so that the construction of federally financed, low-income housing would be permissible in Union City. The request was granted. Thereafter, some disturbed citizens, realizing that low-income housing would attract Mexican-Americans, initiated a referendum and overrode the zoning grant.[85] SASSO sought an injunction directing Union City to implement the zoning change notwithstanding the referendum. SASSO first argued that the referendum would permit the electorate to regulate zoning without following the general welfare standards laid down by the United States Supreme Court. Since the referendum did not allow for these safeguards, it left zoning to the capricious and arbitrary whims of the public. The Ninth Circuit rejected this argument and held that the referendum was neutral on its face and did not zone or regulate land use; it merely stayed the zoning ordinance adopted by the council.[86] But is this explanation sound? If the court's reasoning were carried to its logical conclusion, the court would have to accept SASSO's contention. With the use of the referendum, the citizens of Union City could continually approve or disapprove of granted amendments until the end they sought was effectively achieved, that is, the exclusion of those they did not desire. Is this not relegating the zoning power to the preferential whims of the people?

A crucial point in the case, however, is the fact that the judges acknowledged that SASSO did have a basis for an equal

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[84]314 F. Supp. 967 (M.D. Cal.), *aff'd*, 424 F.2d 291 (9th Cir. 1970).

[85]California law provides for this measure under CALIF. ELECTION CODE §§ 4051-52 (1961).

[86]424 F.2d at 294.

protection argument. They noted that the effect of the referendum was to deny decent housing to low-income residents and that, "[i]f apart from voter motive, the result of this zoning by referendum is discriminatory in this fashion, . . . a substantial constitutional question is presented."[87] The court then went on to hold that if land use planning improved the quality of life for a city's residents in general, the poor could not be excluded from the enjoyment of those benefits. As a matter of law, it might well be "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."[88] The impact of such a statement is that the equal protection clause was expressly applied to the poor as a class. It appears that the judge writing the opinion, upon realizing what he had said, decided to add the last phrase which ties the poor to minority groups, as if that made him feel more comfortable with the proposition he was advancing.

The United States Supreme Court has also seemed a bit unsure about taking the step toward recognizing economic segregation as within the ambit of the equal protection clause. The Court, however, noted probable jurisdiction to hear the case of *James v. Valtierra*.[89] The appellees in *Valtierra* challenged an article of the California Constitution which provided that no low-rent housing project could be developed, constructed, or acquired by any state public body without the approval of a majority of those voting at a community election.[90] The primary contention of the appellees was that this provision violated the equal protection clause because it required those persons seeking low-rent public housing to be subject to a referendum, while other groups seeking any other type of housing were not required to submit to such a procedure. Based on this argument, a three-judge district court enjoined the enforcement of the referendum.[91] The Supreme Court reversed the district court since the referendum provision was not based on race and required approval for every low-rent housing project.[92] Thus, the Court seemed to be saying that wealth is not a suspect classification.

There were three vigorous dissents in *Valtierra*. Justices Marshall, Brennan, and Blackmun maintained that the referen-

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[87] *Id.* at 295. An examination of this quote reveals that the court either did not realize what it was saying or inadvertently conceded that the zoning process under dispute was "zoning by referendum." *Id.*

[88] *Id.* at 296.

[89] 402 U.S. 137 (1971).

[90] CALIF. CONST. art. XXXIV, § 1.

[91] 313 F. Supp. 1 (N.D. Cal. 1970) (three-judge court).

[92] 402 U.S. at 142-43.

dum provision "is an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny."[93] They further asserted that the fourteenth amendment not only prohibits racial discrimination, but also prohibits "singling out the poor to bear a burden not placed on any other class of citizen."[94] Whether or not *Valtierra* will put an end to the trend toward protecting the poor's interests remains to be seen.[95] For those seeking to weaken exclusionary barriers, *Valtierra* need not be construed so broadly as to prevent the utilization of the equal protection clause in attacking local zoning ordinances. First, *Valtierra* was not a zoning case. Rather, it can be viewed as a case dealing with the validity of a referendum. A close reading of the majority opinion reveals that much of the decision is based on upholding a referendum as a matter of democratic decision-making. Thus, if a direct attack were made on a zoning law designed to exclude the poor, the Court's decision might be otherwise, especially in light of the dissenters' viewpoint. Second, the Supreme Court has afforded remedies to the poor when there has been an unjustified discrimination between the rich and the poor. Some examples include an indigent's right to free counsel,[96] proscription of the poll tax,[97] and an indigent's right to a free transcript.[98] Third, there have been some zoning cases since *Valtierra* signaling that zoning ordinances that have the effect of excluding the poor are violative of the equal protection clause.

A recent case dealing explicitly with the exclusion of the poor is *Southern Burlington County NAACP v. Township of Mount Laurel.*[99] Since the case was decided subsequent to *Valtierra,* it takes on an added importance. In *Mount Laurel,* the defendant township preferred only homes for persons with high incomes. The township consistently prohibited trailer or mobile homes, and multi-family uses had been restricted by ordinance as early as 1954.[100] When variances were requested to build apartments, they were granted only for high-rent structures. There was evidence that revealed that the attitude of the local zoning authority showed no concern for the welfare of its low-income resi-

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[93]*Id.* at 145.

[94]*Id.*

[95]*See generally* Note, *The Equal Protection Clause and Exclusionary Zoning After* Valtierra *and* Danderidge, 81 YALE L.J. 61 (1971); Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645 (1971).

[96]Douglass v. California, 372 U.S. 353 (1963).

[97]Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[98]Griffin v. Illinois, 351 U.S. 12 (1956).

[99]119 N.J. Super. 164, 290 A.2d 465 (1972), *aff'd,* 67 N.J. 151 (1975).

[100]119 N.J. Super. at 168, 290 A.2d at 467.

dents.[101] Finally, it was dramatically illustrated that the township would do nothing for those living in substandard conditions. For example, the township refused to condemn deplorable structures in order to escape the required relocation of the affected families.[102] The condition of those structures decayed to the point where human existence within them became impossible.[103] When the families moved out, the township would move in and tear the buildings down. Thus, Mount Laurel Township not only prohibited low-income, multi-family uses by ordinance, but also utilized measures to drive out their low-income residents.

The plaintiffs were residents who lived in blighted areas of Mount Laurel and who had attempted to find livable quarters elsewhere within the township. Their attempts had proved futile, since there was no low-income housing in Mount Laurel. Many were forced to move to adjoining municipalities to find shelter. In the face of this situation, sixty-six percent of Mount Laurel Township was vacant land. The plaintiffs contended that the zoning ordinance prohibiting multi-family structures was designed to foster economic segregation, thus denying them equal protection of the laws. The New Jersey court agreed.

In reaching its decision, the court immediately dispensed with the *Valtierra* case by asserting that its majority opinion should be given little weight because low-income housing was not singled out for mandatory referendums under the California law. The court then restated the reasoning of the dissenting opinion in *Valtierra* as the basis of its holding.[104] Dicta from *Southern Alameda Spanish Speaking Organization*, and even some language from *Euclid* that warned of the effects of legislative zoning, were also relied upon.[105] Although the court accepted the general principle against judicial scrutiny of the exercise of police powers by a legislative body, the court nevertheless recognized its duty

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[101]For example, in a 1968 discussion with the mayor, a township committeeman stated that "it was the intent of the township to clear out substandard housing in the area and thereby get better citizens." *Id.* at 169, 290 A.2d at 468. In a 1969 township committee meeting, a variance for multi-family dwelling units was rejected because the committee did not see a need for such construction. In 1970, under pressure from federal and state government to encourage low-cost housing, a meeting was held at which a committeeman stated that approval should be given only to those development plans which provide direct and substantial benefits to the township's taxpayers. *Id.*

[102]*Id.* at 171, 290 A.2d at 469.

[103]Therefore, by necessity, some of the plaintiffs were living in vermin-infested structures where drains did not work, cesspools backed up into toilets, no indoor hot and cold running water plumbing was available, and ceilings were collapsing. *Id.* at 167, 290 A.2d at 467.

[104]*Id.* at 171, 290 A.2d at 469.

[105]See note 43 *supra*.

to scrutinize the issue of discrimination. "The Courts, however, must be ever watchful of any discriminatory acts of local units of government against the rights and privileges of the poor and underprivileged."[106] In ultimately holding the ordinance void as violative of the equal protection clause, the court concluded that it is "improper to build a wall against the poor income people."[107] The court found that the zoning patterns and practices of the defendant municipality clearly exhibited economic discriminations. The poor had been deprived of adequate housing and the opportunity to obtain such by subsidies. Federal, state, county, or local finances had been used solely for the betterment of middle-income and upper-income persons.

With *Mount Laurel* the judiciary finally took the last step toward recognizing that suburban governments could not use exclusionary zoning tactics to exclude the poor as a class without violating the equal protection clause of the fourteenth amendment. Even more significant, "[t]his is probably the only decision to date wherein a zoning ordinance has been held invalid specifically on the basis that the ordinance discriminated against the poor."[108] Nevertheless, such a radical departure from traditional zoning law did not satisfy the court in finding a remedy for the complainants. The court ordered Mount Laurel Township to undertake a study to identify the housing needs for persons of low income and moderate income presently residing in the township and employed by the municipality, and the expected or projected number of low-income and moderate-income people that could reasonably be anticipated to be employed within the county. Upon completion of this investigation, the township was ordered to develop an affirmative action program to enable and encourage the satisfaction of the needs uncovered by the study.

D. A Recent Obstacle?

Against this backdrop, the United States Supreme Court in 1974 reviewed the case of *Village of Belle Terre v. Boraas,*[109] the first zoning case it heard since 1928.[110] The village had an ordi-

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[106]119 N.J. Super. at 175, 290 A.2d at 471.

[107]*Id.* at 176, 290 A.2d at 472.

[108]Elias, *supra* note 31, at 17-18.

[109]416 U.S. 1 (1974).

[110]See note 10 *supra*. Recently the United States Supreme Court imposed a serious threshold obstacle upon litigants seeking to challenge exclusionary zoning tactics. In Warth v. Seldin, 95 S. Ct. 2197 (1975), various groups of petitioners sought declaratory, injunctive, and monetary relief against the respondent town of Penfield, New York, and members of the town's zoning, planning and town boards. Petitioners alleged that Penfield's zoning ordinance, by its terms and as enforced, in violation of petitioner's constitutional rights,

nance which restricted land use to one-family dwellings and specifically excluded lodging houses, boarding houses, fraternity houses, and multiple-dwelling houses. The ordinance also required that no more than two persons unrelated by blood, adoption, or marriage could live together as a "family" in a one-family dwelling.[111] When the village discovered that six students from a nearby university, none related by blood, adoption, or marriage, were living in the same house, it sought an order to remedy this violation of the ordinance. The owners of the house and three of the tenants then brought an action to have the ordinance declared unconstitutional.[112] The main thrust of their argument was that the ordinance violated the equal protection clause because it established a classification between households of related and unrelated individuals. This, the students contended, violated their fundamental rights of travel, association, and privacy. Unless the village could show a compelling interest to justify its infringement of these rights, the ordinance must fail. Although the district court upheld the ordinance,[113] the Court of Appeals for the Second Circuit[114] found the ordinance unconstitutional and reversed the district court.

The Supreme Court of the United States reversed, holding the ordinance a valid exercise of local zoning power.[115] The basis for the reversal was a strong reaffirmation of the *Euclid* decision and the presumption of validity principle. The Court quickly dispensed with the equal protection argument by citing a few cases to illustrate that no suspect classification or fundamental right was present which could trigger strict scrutiny review.[116] The Court held that such economic and social legislation should be upheld against an equal protection challenge if the law is

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effectively excluded persons of low and moderate income from living in the town. The Court held that none of the petitioners met the threshold requirement of standing to prosecute the action. Although the question of standing is beyond the scope of this Note, the *Warth* decision is an important one to be considered by those seeking relief from exclusionary zoning practices.

[111]The ordinance defined a family as:

> One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

416 U.S. at 2.

[112]367 F. Supp. 136 (E.D.N.Y. 1972).

[113]*Id.*

[114]476 F.2d 806 (2d Cir. 1973).

[115]416 U.S. 1 (1974).

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> It is not aimed at transients. Cf. *Shapiro v. Thompson*, 394 U.S. 618. It involves no procedural disparity inflicted on some but not on others

reasonable and bears a rational relationship to a permissible state purpose.[117] Then, using the *Euclid* rationale and a standard of low scrutiny review, the Court found that the classification between households that constitute a family, even if two unrelated persons reside within, and households of unrelated individuals, was a reasonable exercise of zoning power in promoting Belle Terre's objective of providing a "quiet place where yards are wide, people few, and motor vehicles restricted . . . in a land-use project addressed to family needs."[118]

It should be noted that in tossing aside the equal protection argument the Court explicitly pointed out that economic classification does not warrant high scrutiny review. Coupled with the *Valtierra* decision, this could portend the demise of the equal protection attack upon an exclusionary ordinance based on wealth, a tactic frequently used to exclude the poor and the minorities. It appears that the Supreme Court may have sanctioned a new form of exclusionary zoning. A municipality need only devise an ordinance which contains a restrictive definition of "family," because the *Belle Terre* Court took the position that it is a legitimate state objective to preserve the character of single-family districts.[119]

Notwithstanding the above interpretation, it is still questionable whether *Belle Terre* has injected new life into the ability of local zoning authorities to utilize exclusionary tactics. *Belle Terre* is distinguishable from most exclusionary cases. The factors present in other cases, which suggested that the *Euclid* principles should be refashioned to conform to modern exigencies, were either not present or not brought into issue in *Belle Terre.* Thus, the Court was not squarely presented with an opportunity to review those principles.

First, Belle Terre consisted of about 220 homes and 700 residents in a total land area of less than one square mile. Whether or not surrounding localities were overpopulated, composed of different racial or economic groups, or zoned in a less restrictive manner than Belle Terre could certainly have been critical in

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such as was presented by *Griffin v. Illinois,* 351 U.S. 12. It involves no "fundamental" right guaranteed by the Constitution, such as voting, *Harper v. Virginia Board,* 383 U.S. 663; the right of association, *NAACP v. Alabama,* 357 U.S. 449; the right of access to the courts, *NAACP v. Button,* 371 U.S. 415; or any rights of privacy, cf. *Griswold v. Connecticut,* 381 U.S. 479; *Eisenstadt v. Baird,* 405 U.S. 438, 453-54.

416 U.S. at 7-8.

[117]416 U.S. at 8.

[118]*Id.* at 9.

[119]*See* 5 CUMBER-SAM. L. REV. 309 (1974).

determining whether a due process argument, based upon the expanding notion of zoning for the regional general welfare, should have been included in the tenant's complaint and subsequently litigated. Any challenge of an exclusionary ordinance should at least take these factors into account. The suit in *Belle Terre* was not presented in this manner. The cases examined in this Note dictate no less.

Second, the *Belle Terre* case can be distinguished from an economically based exclusionary case since the focus of the equal protection dispute in *Belle Terre* did not center around an ordinance designed to discriminate against the poor, as was the instance in *Mount Laurel.* In *Belle Terre,* the issue was narrowly confined to whether the word "family," as defined by the ordinance, created a burdened class in violation of the equal protection clause. Consequently, the Court was never presented with the types of situations that gave rise to the equal protection arguments in *Southern Alameda Spanish Speaking Organization, Valtierra,* and *Mount Laurel.*

E. A Note on Perspective

The cases selected for discussion in this section were used to illustrate an emerging awareness by the judiciary of the discriminatory and injurious effects of exclusionary zoning. They have shown that local zoning powers have been limited by expanding the concept of the general welfare, by greater protection for the poor, not only the racial minorities, under the equal protection clause, and by court-ordered inclusion of low-income housing. However, only a minority of courts have shown a willingness to limit zoning powers. On the whole, courts throughout the country continue to rule on zoning issues according to *Euclidean* principles, and the *Euclidean* concepts of zoning remain relatively sound. It is in the megalopolis between Boston and Washington, D.C., and the urban sprawl regions, such as Los Angeles, where the traditional zoning principles have led to exclusionary zoning and where the new theories are necessarily emerging.

VIII. Alternative Approaches to the Problem of Exclusionary Zoning

There is really no need to await the evolution of a synthesis of case law before an end to exclusionary tactics is realized. Executive action, legislation relief, or administrative remedies might also be used.

A widely acclaimed form of legislative action was taken by the Massachusetts legislature in November of 1969.[120] It has been

[120]Mass. Ann. Laws ch. 40 B, § 20 (1973).

called the anti-snob zoning law. In essence, it allows a developer of low-income and moderate-income housing, turned down by a town zoning board, to appeal to the State Housing Appeals Committee. If the committee finds the zoning denial unreasonable or not "consistent with local needs," the denial is reversed. Local needs are predetermined: low-income and moderate-income housing units must comprise at least ten percent of the total housing units within a community, or such housing must comprise at least 1.5 percent of the land area zoned for residential, commercial, or industrial use. If either of these two standards is met, the community has fulfilled its obligation to provide low-income housing. Similarly, under an Alabama statute,[121] total exclusion of any economic class from a municipality is not permissible. There may be different economic classes, but every class must have some residential district.

An administrative lever that might be used in opening the suburbs to low-income housing is the Department of Housing and Urban Development. For example, HUD could deny or suspend an urban renewal or water and sewer grant to any community with a zoning ordinance which prohibits federally assisted low-income housing projects.

Some states are considering superseding local authority by terminating their enabling acts if local jurisdictions continue exclusionary practices or excessive provincialism.[122]

IX. Conclusion

Exclusionary zoning tactics can be viewed as contemporary efforts to discriminate covertly against certain classes of Americans. The term itself implies such a concept. Exclusionary zoning is the abuse of a legitimate function to achieve illegitimate and often illegal ends. Exactly what constitutes an illegal use of the local zoning power is the controversy that now rages in the courts. As the cases selected for this Note illustrate, the boundaries of illegal use are being redefined. Must a valid exercise of the police powers require regional perspectives as a means to determine the general welfare? In legislating a zoning ordinance, must the needs of the poor be consciously provided for? Presently, the direction of the law is quite uncertain, and definitive answers to these questions are far from available. Yet legal principles cannot be permitted to stagnate while the reason behind their very existence, the welfare of society, is rapidly changing. The judiciary has only begun to take cognizance of this fact. Neverthe-

[121] Ala. Code tit. 37, § 775 (1958).

[122] Elias, *supra* note 31, at 6.

less, we must not rely solely on the courts to resolve these questions of public policy. New federal housing laws, federal and state statutes, and administrative pressures must also be established to avert the undesirable consequences of exclusionary zoning. The preliminary groundwork has been set within the past ten years. Perhaps the next decade will be more fruitful in fashioning laws that will curb the abuse of local power, meet the needs of our times, and remedy a presently deplorable situation.

HOWARD POLSKY