August 2015

Standing of Future Residents in Exclusionary Zoning Cases

David H. Moskowitz

STANDING OF FUTURE RESIDENTS IN EXCLUSIONARY ZONING CASES

DAVID H. MOSKOWITZ*

A. INTRODUCTION

THE PURPOSE OF THIS ARTICLE is to explore the standing of future residents to bring suit in exclusionary-zoning cases. Exclusionary zoning may be defined as zoning and land-use control practices that have the effect of precluding construction of dwelling units that could house low-income and moderate-income persons either by direct exclusion or by raising the price of access.[1] An example of direct exclusion would be the imposition of restrictions upon the number of bedrooms in apartment units, which would have the direct effect of excluding large families. An example of indirect exclusion would be the effect of zoning upon land prices, which would have the effect of raising the price of land, thereby raising the ultimate cost of the home built upon that land or the rent charged for apartments constructed thereon.

The persons who traditionally have standing in zoning litigation include, first, the owners of the land and the potential developers of the land. Since the restrictions apply to them as land owners (the developers usually having equitable ownership), no one disputes that they have standing.

Second, it is generally conceded that neighboring landowners to prospective developments have standing to challenge the validity of the municipal action permitting the development, though it has been suggested that it might be beneficial to deny these persons standing.[2] Generally speaking, the injury suffered by the neighboring landowners is remote and slight. However, these neighbors have been permitted standing since they

---

* B.S., 1957, Pennsylvania State University; LL.B., 1960, Villanova University; D.Phil., 1963, Oxford University; member, Pennsylvania Bar. Mr. Moskowitz is a partner in the firm of Weiss, Nelson, & Moskowitz; Lecturer in Political Science at Rider College, and Chief Litigation Attorney for the Bucks County Legal Aid Society.

1 *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1645-47 (1971).

2 *See* J. KRASNOWIECKI, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT, URBAN LAND INSTITUTE—T.B. 52, 17 (1965). The Supreme Court recently permitted a white tenant in a segregated apartment to challenge the validity of the landlord's policies in regard to selection of tenants. *See* Trafficante v. Metropolitan Life Insurance Co., 93 S. Ct. 364 (1972). This decision would support a claim by a present resident of an exclusionary municipality who desired to challenge the validity of the exclusion of others. It would not necessarily be interpreted to grant standing to the future resident who has been excluded.

represent the interests of the community as a whole, something like private attorneys general. Consequently, if these neighbors are not accorded standing, there is no way for the issue to be framed between the developer (and the municipality which has permitted the development) and the rest of the community which may oppose the development.

The question to be explored is whether future residents, as prospective tenants or homeowners, have standing to challenge zoning restrictions which prevent the construction of dwelling units in which these persons would like to reside.

It could be argued that a property owner or a developer may assert the claims of the future resident.[3] However, the interests of the developers and future residents are not exactly the same. Consequently, assuming that the future residents have constitutional interests at stake in the existence of exclusionary zoning, the argument may be made that future residents should be accorded standing thereby enabling them to raise the issues of exclusionary zoning to protect their interests. The reasons for recognizing this standing are presented below.

There are some recent decisions in which the standing of would-be residents is recognized. First to be considered are the cases in which developers brought suit with future residents as additional plaintiffs. Then, the public-housing cases brought by residents of public housing and persons on the waiting list for public housing will be examined. There are also cases in which standing on the part of persons desiring subsidized housing have been granted so that these persons could challenge regulations or statutes restricting the construction of such housing. In addition, the recent cases brought directly by future residents challenging the validity of exclusionary zoning will be discussed. In conclusion, a discussion of the reasons for allowing standing for future residents will be considered.

B. CASES INVOLVING DEVELOPERS AND FUTURE RESIDENTS

There are many cases in which future residents have joined with developers in order to raise the issues of exclusionary zoning. Five of these cases are herein discussed. In terms of the historical development of the principle that future residents have standing, these cases, in addition to the cases concerning public housing, are the first cases which raise the issue of standing for future residents.

---

[3] *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* the discussion of Park View Heights Corp. v. Black Jack, 467 F.2d 1208 (8th Cir. 1972) [hereinafter cited as P.V.H.C. v. Black Jack] in the text.

In *Kennedy Park Homes Assoviation v. Lackawanna,*[4] a non-profit corporation (hereinafter referred to as KPHA), which had been formed by the Colored People's Civic and Political Organization (hereinafter referred to as CPCPO), agreed to purchase thirty acres of land owned by the Catholic Church. The land was located in the Third Ward of the City of Lackawanna. KPHA intended to act as the subdivider and general contractor of a housing project consisting of moderately priced homes.

The Third Ward was an area predominantly inhabited by white persons, with almost all of the black inhabitants of Lackawanna living literally on the other side of the tracks in the First Ward (clearly the most undesirable part of the town with the highest density of population and the closest proximity to the industrial plants). As the white citizens of Lackawanna became aware of KPHA's intention to construct homes within the Third Ward to which the black citizens of the First Ward could move, opposition to the project increased.

The city council re-zoned a portion of the Third Ward, including the KPHA site, designating it for park and recreational use. A moratorium upon future subdivision approval was also adopted. After suit was instituted in federal court, the city council rescinded the re-zoning and the moratorium.

The Mayor of Lackawanna, however, refused to execute the necessary forms for extension of the sewage system to service the KPHA site. He justified this decision on the basis of the difficulty of expansion of the sewage system to service areas other than those already tied into the system. Suit was again instituted in federal court contesting the validity of the actions of the Mayor which prevented construction of the KPHA project.

The plaintiffs were KPHA, CPCOP, and two individuals who alleged that they intended to purchase homes in the proposed subdivision. The United States intervened in support of the plaintiffs. The district court held that the city officials had acted in response to the discriminatory sentiments of the white community, which wanted to contain the city's low-income, black population in the First Ward.[5]

The Court of Appeals for the Second Circuit, in an opinion written by former Supreme Court Justice Clark, sitting by special designation, affirmed the ruling of the district court. The court of appeals rejected the city's defense of its actions (the city cited its need for additional

---

[4] 436 F.2d 108 (2d Cir. 1970) [hereinafter cited as K.P.H.A. v. Lackawanna], *cert. denied*, 401 U.S. 1010 (1971).

[5] K.P.H.A. v. Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970).

recreational facilities, its inability to afford expansion to the sewage system, and ecological considerations), by referring to the equal-protection rights of the plaintiffs:

> Lackawanna is obligated to deal with its sewer needs without infringing on plaintiffs' rights. Even were we to accept the city's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the city may not escape the responsibility for placing its black citizens under a severe disadvantage which it cannot justify [cases cited]. The city must provide sewerage facilities to the plaintiffs in conformity with the equal-protection clause of the Fourteenth Amendment and provide it as soon as it does for any other applicant.[6]

The district court rejected the claim of the defendants that the plaintiffs lacked standing. The court held that "all the plaintiffs have a personal stake in the outcome of this controversy,"[7] citing *Baker v. Carr*.[8] The court of appeals agreed with the district court.[9] Both the district court and the court of appeals based their decision in favor of the plaintiffs on the constitutional rights of the persons who were seeking, and who needed, adequate housing, rather than on the property rights of the prospective developers.

Another situation in which local officials, as a result of pressure from the white section of the community, prevented a development in which blacks would reside precipitated *Dailey v. City of Lawton*.[10] Columbia Square, Inc., a non-profit corporation, agreed to purchase a parcel of land from the Catholic Church, which contained a parochial school which was no longer being used. The existing zoning of the parcel was PF-Public Facilities. The surrounding area was zoned R-4 Residential, a high-density residential designation. Columbia Square, Inc., suggested a change of zoning to R-4 in order to construct federally assisted apartments for low-income and moderate-income persons. The city denied the change of zoning on the basis that the city could not accommodate the increased demand for public services that the change of zoning would entail.

The district court found, as in the *Kennedy Park Homes* case, that the city officials were acting in response to the desire of their white citizens to "keep a large concentration of the Negroes and other minority groups from living" in the white part of town.[11] The Court of Appeals for

---

6 436 F.2d 108, 114.

7 318 F. Supp. 669, 697.

8 Baker v. Carr, 369 U.S. 186 (1962).

9 436 F.2d 108.

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

11 Dailey v. City of Lawton, 296 F. Supp. 266, 269 (W.D. Okla. 1969).

the Tenth Circuit affirmed the findings of the district court, and inferred the discriminatory intent of the city officials from the following factors: (1) the area involved was predominantly white; (2) the proposed housing project was designed for low-income persons, and (3) the signers of a petition opposing the zoning change were all white. In regard to proof of discriminatory intent, the court of appeals stated: "if proof of a civil-rights 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."[12]

In the *Dailey* case, the plaintiffs were Columbia Square, Inc., the proposed developer, and Willie Mae Dailey, a potential tenant in the project. As in the *Kennedy Park Homes* case, the district court and the court of appeals based their decision in favor of the plaintiffs upon the equal-protection rights of the potential residents.

Development of a multi-family building was also involved in *Sisters of Providence v. City of Evanston*.[13] As in the *Dailey* case, this case involved the refusal of the city officials to change the zoning of a parcel of land so that a federally assisted moderate-income project, commonly referred to as a Section 236 project, could be constructed. The plaintiffs included the following organizations and individuals:

(1) Sisters of Providence—the owners of the nine-acre parcel, upon which was located a high school;

(2) Interaction, Inc., a limited-dividend corporation which agreed to buy the nine-acre parcel, conditioned upon obtaining a zoning change permitting higher-density development;

(3) Evanston Neighbors at Work—a non-profit corporation formed for the purpose of increasing the supply of low- and moderate-income housing in the Evanston area;

(4) Evanston Housing Center—a non-profit corporation with goals similar to those of Evanston Neighbors at Work, and

(5) Four individuals who were black residents of Evanston who lived in substandard housing and were prospective tenants for the apartments to be constructed by Interaction, Inc. They brought suit on behalf of all individuals similarly situated.

In denying the defendants' motion to dismiss the complaint, the district court found that all of the plaintiffs had standing to sue and that the complaint stated a cause of action based on the due process and equal protection clauses and the civil rights and housing statutes. The reasoning of the court was as follows:

Thus simply stated the complaint alleges that the housing history of

---

[12] 425 F.2d at 1039.

[13] 335 F. Supp. 396 (N.D. Ill. 1971).

> Evanston indicates a purpose to perpetuate segregation and that in light of this Evanston cannot deny a petition to rezone by relying on existent zoning, absent a valid land use reason, where the effect of this denial is to further racial discrimination. This is not in any way inferring that a city must be rezoned to accommodate minority groups under circumstances where the subject property undeniably cannot carry a higher density but rather that it cannot use arbitrary land use criteria and refuse to rezone for black projects where under the same circumstances it would have granted a variance to an all-white project.[14]

Once again, the emphasis of the court was placed on the constitutional and statutory rights of the future residents rather than on the property rights of the landowners or developers.

In holding that the individual plaintiffs had standing to sue, the court relied primarily upon *Gautreaux v. Chicago Housing Authority,*[15] which is discussed below. The court, in *Sisters of Providence,* found that the standing of future residents of federally subsidized, privately constructed housing is comparable to that of potential occupants of public-housing projects who challenge the site-selection procedures used for public-housing projects. Moreover, the court allowed the individual plaintiffs to represent the class of persons who would inhabit the proposed project and accepted proof of racial discrimination based upon the high percentage of poor persons who are black.[16]

Park View Heights Corp. v. Black Jack[17] is the most recent example of suits involving developers and future residents. The plaintiffs included the following:

(1) Inter-Religious Center for Urban Affairs, Inc. (hereinafter referred to as ICUA), and Park View Heights Corporation (hereinafter referred to as PVHC), which are both non-profit corporations;

(2) Four persons who reside in urban ghetto housing, and

(3) Four persons who lived in federally subsidized, moderate-income housing.

In regard to the individual plaintiffs, it was alleged that they wanted to live in St. Louis County, that they had been unable to find housing in

---

[14] *Id.* at 404.

[15] 265 F. Supp. 582 (N.D. Ill. 1967) [hereinafter cited as Gautreaux v. C.H.A.]. *See* notes 39 and 40 *infra.*

[16] "We believe that plaintiffs' allegation that 'Black persons . . . represent a substantial percentage of residents of Evanston who have low and moderate incomes' (complaint p. 12) is sufficient to bring this case into the realm of racial rather than economic discrimination." Sisters of Providence v. City of Evanston, 335 F. Supp. 403 (N.D. Ill. 1971).

[17] P.V.H.C. v. Black Jack, 467 F.2d 1208 (8th Cir. 1972). *See* Collier, *Exclusionary Zoning and the Problem in Black Jack—A Denial of Housing to Whom?* 16 ST. LOUIS L. REV. 294 (1971).

St. Louis County which they could afford, that they would qualify to live in the Park View Heights Apartments, and that they would be able to afford to do so, if the apartments were constructed.

ICUA, one of the non-profit corporations, had entered into an agreement of sale to purchase an 11.9-acre tract of land originally located in an unincorporated area of St. Louis County. PVHC, the other non-profit corporation, assumed title to the proposed site as the result of an assignment from ICUA. After an application had been made to the federal government to construct subsidized apartments, the St. Louis County Council incorporated the city of Black Jack, within which the tract of land was located. The city of Black Jack adopted a zoning ordinance which precluded the use of the proposed site for the construction of apartments.

The plaintiffs instituted suit in the district court.[18] The defendants moved to dismiss the complaint asserting that the plaintiffs lacked standing to bring the action and that the controversy was not a justiciable one. The district court held that neither ICUA nor the individual plaintiffs had standing.[19] ICUA lacked standing because it had assigned its interest to PVHC. The individual plaintiffs lacked standing because they were not personally harmed by the rezoning of the property. The district court further held that neither PVHC nor ICUA had standing to raise the issue of the exclusion of low-income and moderate-income persons.[20] Finally, since no building permit had been denied and no request for a zoning change or variance had been denied, the district court concluded that no case or controversy existed.[21] Consequently, the district court granted the defendants' motion to dismiss.

The Court of Appeals for the Eighth Circuit reversed the decision of the district court.[22] The court of appeals held that both ICUA and PVHC had standing to raise the issue of exclusion of low-income and moderate-income persons from Black Jack and that they could assert the constitutional rights of the individuals who desired to move into the apartments. These corporations also acquired standing as a result of

---

[18] P.V.H.C. v. Black Jack, 335 F. Supp. 894 (E.D. Mo. 1972).
[19] *Id.* at 902.
[20] *Id.*
[21] *Id.* at 903.
[22] 467 F.2d 1208.

their economic investment in the project. Their sponsorship of the project, and the opposition of the defendants to it, is adequate to assure the court that the plaintiffs and defendants have sufficiently adverse interests in order to present the issues in an adversary context. The court reasoned that there was an identity of interests between the non-profit corporations and the future residents of the apartments to be constructed. The court of appeals cited the other cases referred to in this section in support of its holding.

As to the individual plaintiffs, the district court concluded that the issues they raised were not ripe for judicial determination.[23] The court of appeals, in reversing this holding, found that the hardship to the parties of withholding judicial consideration compelled an immediate resolution of this controversy.[24] In regard to the individual plaintiffs, the court of appeals concluded that they:

> . . . [H]ave presented a strong case for consideration at this time. They allege that they are subject to the serious consequences of segregation in housing and education, as well as the economic consequences of decreasing access to jobs due to their inability to escape from the inner city.[25]

Consequently, the court's conclusion is clear:

> The statistics cited by the plaintiffs indicate a great need to provide low- and moderate-income housing in the suburban areas, a need which Park View and ICUA are trying to fill. Any attempt to interfere with this program may work a visible and immediate hardship on the class of low- and moderate-income citizens of the City of St. Louis.[26]

Therefore, the individual plaintiffs, the future residents of the apartments, had standing to sue and the issue of the constitutionality of their exclusion is ripe for decision by the court.[27]

One more case in which the plaintiffs included prospective residents

---

[23] 335 F. Supp. at 903.

[24] 467 F.2d 1208.

[25] *Id.* at 1216.

[26] *Id.*

[27] The United States also filed suit against the City of Black Jack in the District Court of the Eastern District of Missouri, Civil Action No. 71C372. This case is also pending and the case discussed above may be consolidated with it for the purpose of trial.

of the projects involved is worthy of discussion.[28] *Crow v. Brown*[29] is especially appropriate to examine at this juncture since it is basically two cases which were consolidated for trial and disposition. Crow and Susman were the plaintiffs in Civil Action No. 14954. They wanted to construct two "turnkey" public-housing projects on two sites which were located in Fulton County, outside of the city limits of Atlanta, Georgia. The two sites were zoned for multi-family development. Similar to the events in the *Kennedy Park Homes* case, county officials refused to issue building permits when they learned that the developers intended to construct public housing, which would be conveyed to the Atlanta Housing Authority. Once again, the district court found that the opposition to the projects was based on the likelihood that the future occupants of the projects would be blacks.[30]

Two prospective residents of the public housing to be constructed by Crow & Susman, Carr and Calhoun, intervened in the developers' action. In addition, Carr and Calhoun also instituted their own action, Civil Action No. 15203, on behalf of all the persons on the waiting list for public housing of the Atlanta Housing Authority.

The district court rejected the challenge to the standing of the individual plaintiffs.[31] The court held that the *Data Processing* case[32] gave the data-processing associations standing because the legislative history

---

[28] We should also mention, though it does not directly involve the standing of future residents, *Southern Alameda Spanish-Speaking Org. (SASSO) v. Union City*, 424 F.2d 291 (9th Cir. 1970). The plaintiffs are SASSO, which had an option to purchase a site for the construction of low- and moderate-income housing, and the officers of SASSO. The city council had granted a change of zoning to SASSO to permit apartment development, but the opponents of the project called for a referendum. The result of the referendum, in accordance with California law, was to nullify the ordinance changing the zoning of the SASSO property. While the Court of Appeals did not invalidate the referendum, the Court did order the city to develop an appropriate plan for the construction of low- and moderate-income housing.

After the decision of the Court of Appeals in the *SASSO* case, the District Court was no longer dealing with a case in which a specific developer was going to be granted permission to build on a specific site and in which potential tenants had joined with this developer in a suit. The specific site owned by the would-be developer was no longer relevant to the case. The plaintiffs were then in the position of asserting the rights of future residents who desired that construction occur somewhere within Union City. They were no longer tied to the prospective developer of a specific site. Consequently, at this stage the *SASSO* case becomes a case comparable to those discussed herein involving future residents in the absence of joinder with a prospective developer.

[29] Crow v. Brown, 457 F.2d 788 (5th Cir. 1972).

[30] Crow v. Brown, 332 F. Supp. 382, 389 (N.D. Ga. 1971).

[31] *Id.* at 394.

[32] Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970).

revealed that Congress had the protection of data processors specifically in mind when it authorized them to engage in data processing for banks. By the same reasoning, the individual plaintiffs in *Crow v. Brown* were arguably within the zone of interest to be protected by the right to non-discriminatory housing established by Congress.

Once again, the district court based its decision for the plaintiffs on the equal protection rights of the future residents.[33] The Court of Appeals for the Fifth Circuit affirmed the findings of the district court in a per curiam opinion.[34] The relief granted included an order directing the issuance of the building permits sought by Crow and Susman as well as the requirement that Fulton County officials, in cooperation with the Atlanta Housing Authority, pursue a program directed toward the construction of public housing in Fulton County, and specifically in the suburban areas of Atlanta.[35]

Consequently, from the point of view of the assertion of the constitutional rights of Carr and Calhoun to be granted access to public-housing projects to be constructed outside the racially concentrated areas of Atlanta, Carr and Calhoun obtained relief comparable to that achieved in cases brought directly by public-housing residents and future public-housing residents who are challenging the site-selection procedures of housing authorities. *Crow v. Brown* does not specifically fall in that category because of the unusual factual context in which the case arose.

C. CASES INVOLVING FUTURE RESIDENTS ALONE

There are three different types of cases which have been instituted involving future residents bringing suit without joining with prospective developers. These are the cases that concern public housing,[36] the cases in which regulations or statutes other than zoning ordinances which prevented the construction of subsidized housing were challenged,[37] and the cases involving the validity of zoning ordinances brought directly by those persons who were excluded by the zoning ordinances.[38]

The leading public housing case is *Gautreaux v. Chicago Housing*

---

[33] 332 F. Supp. at 394.

[34] 457 F.2d 788.

[35] *Id.* at 790.

[36] Gautreaux v. C.H.A., 265 F. Supp. 582 (N.D. Ill. 1967); Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972); Cuyahoga Metropolitan Housing Authority v. Cleveland, 342 F. Supp. 250 (N.D. Ohio 1972).

[37] James v. Valtierra, 402 U.S. 137 (1971); Ranjel v. Lansing, 417 F.2d 321 (6th Cir. 1969); Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D.N.Y. 1972).

[38] Oakwood at Madison, Inc. v. Madison, 117 N.J. Super. 11, 283 A.2d 353 (L. Div. 1971); NAACP v. Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972); Pennsylvania v. Bucks County, 22 Bucks Co. L. Rep. 197 (1972).

Authority.[39] The plaintiffs included tenants in existing public housing projects and applicants for public housing in the city of Chicago. The defendants were the Chicago Housing Authority, and individual government officials.[40]

The complaint alleged that:

> . . . [S]ince 1950 the CHA has selected sites, deliberately or otherwise, for public housing projects almost exclusively within neighborhoods the racial composition of which was all or substantially all Negro at the time the sites were acquired, for the purpose of, or with the result of maintaining existing patterns of urban residential segregation by race in violation of the Fourteenth Amendment.[41]

The plaintiffs were challenging the practices of the Chicago Housing Authority in placing most of the public-housing projects in predominantly black neighborhoods, and in assigning black persons to these projects and white persons to the small number of projects located in white neighborhoods.

The district court held that future residents of housing projects have standing to sue in regard to actions of governmental officials which injure or prevent the construction of needed housing units.[42] The denial of housing by the governmental officials involved violated the constitutional rights of potential residents to non-discriminatory public housing. These potential residents were within the zone of interests protected by the national housing acts and the civil rights statutes, as well as the Equal Protection Clause.

The court granted the plaintiffs the relief they requested in regard to non-discriminatory selection of sites for public housing by the Chicago Housing Authority and the assignment of tenants on a non-discriminatory basis. The court selected at least three different routes to implement this result. First, further construction of public housing by the Chicago Housing Authority on a segregated site-selection basis was permanently

---

[39] Gautreaux v. C.H.A., 265 F. Supp. 582 (N.D. Ill. 1967). *See* 296 F. Supp. 907 (N.D. Ill. 1969); 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd as to program of relief*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 401 U.S. 953 (1970); 342 F. Supp. 827 (N.D. Ill. 1972), *noted in* 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 150 (1970); 118 U. PA. L. REV. 437 (1970); 79 YALE L.J. 712 (1970). *See also Racial Discrimination In Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970).

[40] *See* Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), which has been consolidated with Gautreaux v. C.H.A., in which HUD's role in the financing of the C.H.A.'s discriminatory practices was challenged. Comment, *HUD Must Institutionalize Procedures for Determining Racial and Socioeconomic Effects of Site Location for Federally Assisted Housing Projects*, 46 N.Y.U.L. REV. 560 (1971).

[41] Gautreaux v. C.H.A., 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd as to program of relief*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 401 U.S. 953 (1971).

[42] 265 F. Supp. at 583.

enjoined.[43] Second, the court indicated that even if the plaintiffs were not able to sustain the granting of an injunction, the court would still have jurisdiction on the basis that the court could grant declaratory relief.[44] The declaratory judgment could then be used as a basis for further relief, including an ultimate injunction. Third, the court considered whether or not the plaintiffs should be granted such "other and further relief" as would be necessary, such as a more vigorous utilization of the several different types of housing programs which HUD administers and could use in this situation.[45] The court indicated that it had jurisdiction to consider the possibility of granting such affirmative relief.[46]

The *Gautreaux* case is still being bitterly fought. Public-housing construction has been halted in Chicago for several years. The court has ordered that public housing be dispersed throughout Chicago, and conceivably throughout the entire Chicago metropolitan area, but the orders of Judge Austin have not yet been implemented.

A similar public housing fight worthy of reference is *Banks v. Perk.*[47] Here the plaintiffs were potential residents of public housing who were also challenging site-selection and tenant assignment practices. The district court entertained the action and determined that the plaintiffs had been denied equal, non-discriminatory access to housing. The court stated:

> The revocation of the building permits for the Green Valley Crest Drive sites constitutes a violation of 42 U.S.C. Sections 1981, 1982, 2000D and 3601d, et seq. in that it denies the Negro plaintiffs equal protection of the laws, subjects them to discrimination on grounds of race or color in the federally assisted public housing program and deprives them of the right to equal access to housing on a non-discriminatory basis.[48]

In yet another case, *Cuyahoga Metropolitan Housing Authority v. City of Cleveland,*[49] the district court recognized by way of dictum that the real parties in interest were the poor persons residing in Cleveland who, as a

---

[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] 341 F. Supp. 1175 (N.D. Ohio 1972).
[48] *Id.* at 1179.
[49] 342 F. Supp. 250 (N.D. Ohio 1972).

result of the challenged governmental acts, would be deprived of the opportunity of living in decent, safe, and sanitary homes in Cleveland.[50]

Two cases in which the plaintiffs were potential residents of subsidized housing projects who challenged the validity of restrictions other than zoning ordinances precluding the construction of these projects are *James v. Valtierra*[51] and *Ranjel v. City of Lansing*.[52] In both cases, the plaintiffs were unsuccessful. However, the court acknowledged that the plaintiffs had standing in both cases.

In *Brookhaven Housing Coalition v. Kunzig*,[53] a suit was brought by private citizens of the community of Brookhaven, and joined by several civic associations. They complained that the Government Services Administration (hereinafter GSA), had failed to comply with Executive Order 11512 directing GSA to consider the impact a facility would have on the community where it is to be located. GSA had decided to construct a large Internal Revenue Service (hereinafter IRS) installation in Brookhaven. The plaintiffs were not federal employees. Plaintiffs alleged that they would be affected by the new IRS facility to be constructed by GSA as a result of the increased demand for low-income housing thereby created.

The plaintiffs contended that there already was a great lack of adequate low-income housing facilities in Brookhaven and the nearby area and that the housing required for the future employees of the IRS facility would exacerbate the problem. In regard to the question of the standing of the plaintiffs, the district court declared:

> It is true that none of the plaintiffs are employees of the new IRS facility, but there is no one else at present in a position to represent the prospective employees. Moreover, non-employees may be affected by increased demand for low-income housing and come within the ambit of those affected by "the impact a selection will have on improving social and economic conditions in the area." It is only necessary the plaintiffs be "within the zone of interest to be protected or regulated."[54]

---

[50] On February 22, 1973, in two related cases, Mahaley v. Cuyahoga Metropolitan Housing Authority, Civil Action C 71-251, ... F. Supp. ..... (N.D. Ohio 1973) and Harrison v. Cuyahoga Metropolitan Housing Authority, Civil Action C 72-67, ... F. Supp. ..... (N.D. Ohio 1973), the Cuyahoga Metropolitan Housing Authority was ordered to submit a plan to the court for the construction of public housing throughout the Cleveland Metropolitan Area.

[51] 402 U.S. 137 (1971); *See* Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971); 13 B.C. IND. & COM. L. REV. 603 (1972); 46 TUL. L. REV. 806 (1972); 39 U. CHI. L. REV. 115 (1971); 25 U. MIAMI L. REV. 790 (1971).

[52] 417 F.2d 321 (6th Cir. 1969).

[53] 341 F. Supp. 1026 (E.D.N.Y. 1972).

[54] *Id.* at 1029.

The court also held that the civic associations had standing.

The plaintiffs in the *Brookhaven* case, though motivated by the desire to have low-income housing constructed, were in a position comparable to that of neighbors who had opposed development. They had both contended that a governmental act had violated their rights. The courts readily recognize the existence of a case or controversy when citizens who allege that their rights have been violated are challenging an act of government.[55] The case is presented in an adversary context because there are adverse parties: the citizens *vs.* the government (and usually the developer, or, in *Brookhaven,* GSA and IRS). By the same reasoning, future residents who claim that their constitutional rights have been violated by their exclusion can present the same type of case or controversy in which they are adverse parties to the government. They are citizens (of the state or nation, though not necessarily of the municipality in question) who are challenging an act of government. They base their claims upon constitutional and statutory rights.

Finally, we should discuss two New Jersey cases and one Pennsylvania case in which the plaintiffs are potential residents of subsidized housing which plaintiffs contend has not been constructed and cannot be constructed as a result of invalid zoning restrictions. Plaintiffs do not desire construction upon any particular site. Plaintiffs have not joined with the developer of a particular site. No particular project has been proposed and rejected. No building permits have been requested and denied. Plaintiffs challnge not the zoning ordinance as it applies to a particular site, but the zoning ordinance in general in regard to its restrictions upon future construction. All three cases are now on appeal.[56]

In *Oakwood at Madison Ave. v. Township of Madison,*[57] the plaintiffs represented the class of persons who resided outside Madison Township and wanted to reside within the township but could not do so because the zoning ordinance of the township did not provide for sufficient

---

[55] *Id.*

[56] There are several cases pending in the courts worth mentioning. They are not discussed in the text since they have not yet resulted in opinions.

(1) Fair Housing Development Fund v. Oyster Bay, 71 Civ. 328 (E.D.N.Y.), in which future residents and a non-profit corporation have challenged the zoning practices of Oyster Bay;

(2) Planning for People Coalition v. DuPage County, Civil Action No. 51C 587 (N.D. Ill.). in which future residents, an unincorporated association and non-profit corporation have sued a county, its officials, and several large developers, in an effort to require construction of low-income and moderate-income housing, and

(3) Hispana, Inc., vs. New Canaan, Conn., Civ. No. B 312 (D.C. Conn.), in which potential residents and non-profit corporations have challenged the zoning laws and practices of New Canaan.

See also Molino v. Mayor and Council of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971).

[57] 117 N.J. Super 11, 283 A.2d 353 (L. Div. 1971).

additional construction of multi-family dwelling units to absorb a substantial number of additional residents. In addition to the six low-income potential residents, two landowners also joined as plaintiffs (though the zoning of their particular parcels was not specifically in question).

The plaintiffs contended that the zoning ordinance of the township which had been adopted in September, 1970, was invalid because it failed to promote reasonably the legislative purposes of the enabling legislation in regard to single-unit and multi-family housing for low-income persons. Madison Township already had some low-income housing and some apartment housing, and the township contended that it was seeking housing for relatively wealthy persons in order to have a balanced community. However, most of the vacant and developable 8300 acres within the Township was zoned for large minimum-lot sizes of one and two acres. Consequently, the number of multi-family units that could be constructed was severely limited.

The court held that the ordinance in its entirety was invalid,[58] rejecting the township's justification for its restrictive zoning practices. The court ordered the township to prepare a new zoning ordinance that was not exclusionary, though the standards for a non-exclusionary ordinance were not clearly delineated. Appeal has been filed by the defendants to the Supreme Court of New Jersey.

The second New Jersey decision is *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel.*[59] The plaintiffs included both residents and non-residents of Mount Laurel, as well as civic associations representing residents and non-residents. They sought declaratory and injunctive relief in regards to the municipality's zoning ordinance and practices. All of the individual plaintiffs lived in dilapidated or deteriorating housing. They represented the following classes of persons of low or moderate income who presently reside in substandard housing:

(1) residents of Mount Laurel;

(2) former residents of Mount Laurel who now live elsewhere by reason of the unavailability of adequate housing in Mount Laurel, and

(3) those persons who have never lived in Mount Laurel but would move to Mount Laurel if housing was available in Mount Laurel.

The court viewed the activities of the officials of Mount Laurel in encouraging the construction only of homes for persons of high income. In regard to the role of the judiciary in hearing a case brought by persons who seek adequate housing, Judge Martino indicates that "the

---

[58] *Id.* at 21, 283 A.2d at 358.

[59] 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972).

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."[60] The discriminatory acts of Mount Laurel Township were the zoning practices of the township in permitting construction of homes for persons of high income and restricting such development for persons of low and moderate income.

The court held that the zoning ordinance of Mount Laurel Township is invalid because:

> . . . [T]he patterns and practice clearly indicate that defendant municipality through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing; and has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons.[61]

In addition to this declaratory relief, the court also recognized the need for affirmative municipal action to be required by the court within parameters established by them.[62] As a result, the court ordered Mount Laurel Township to undertake a study to identify the housing needs of persons of low and moderate income who either live or work in the township and to develop a plan for the construction of low-income and moderate-income housing units each year to provide for these needs.[63] Finally, the court retained jurisdiction to ensure implementation of the plan.[64] An appeal has been filed to the Supreme Court of New Jersey by the defendants.

The other case which should be mentioned is *Commonwealth of Pennsylvania v. County of Bucks*.[65] This case was initiated by a complaint in equity filed as a class action by the Commonwealth of Pennsylvania, residents of Bucks County who were seeking housing in Bucks County, non-residents of Bucks County who desired to live and work in Bucks County, black persons and Spanish-speaking persons who desired to live in Bucks County, and non-profit corporations which desired to build housing for low-income and moderate-income persons in Bucks County.

The defendants are the County of Bucks, its Planning Commission and Housing Authority, and all of the municipalities of Bucks County (being fifty-four in number). The defendants filed preliminary objections to the complaint including demurrers and motions to dismiss.

---

[60] *Id.* at 175, 290 A.2d at 471.
[61] *Id.* at 178, 290 A.2d at 473.
[62] *Id.* at 177, 290 A.2d at 472.
[63] *Id.* at 178-79, 290 A.2d at 473-74.
[64] *Id.* at 180, 290 A.2d at 474.
[65] 22 Bucks Co. L. Rep. 179 (1972).

The Court of Common Pleas of Bucks County sustained the preliminary objections of the defendants, dismissed the plaintiffs' complaint and entered judgment in favor of the defendants.[66] Plaintiffs appealed to the Commonwealth Court.

The complaint avers that, during the period from 1950 until the present time, Bucks County has experienced substantial growth in population, dwelling units and job opportunities. However, because of discriminatory zoning and housing practices and procedures, black, Spanish-speaking, and low-income and moderate-income persons have been excluded from the county, confined to segregated enclaves within the county, and have been denied employment and educational opportunities.

During the 1960's and 1970's, according to the complaint, it has been the practice and procedure of the municipalities in the county to permit multi-family and moderate-to-high density development in the county only after a petitioner has filed an application for a change of zoning for a particular project, with the explicit or implicit representation that the project will not be for low-income and moderate-income persons, but only for relatively wealthy persons. The effect of this practice is to restrict housing development to housing for relatively wealthy persons.

At the present time, there is virtually no undeveloped acreage available for multi-family or moderate-to-high density housing development in the county. None of the existing comprehensive plans and zoning ordinances of the municipalities and none of the proposed comprehensive plans and zoning ordinances of the municipalities adequately provide for the development and construction of housing for low-income and moderate-income persons within the respective municipalities. Instead of providing for such housing, it is the prevailing practice and procedure within the county for all municipalities to exclude such housing. No single municipality will accept such housing as long as the neighboring municipalities in the county are not accepting their fair share of such housing.

The plaintiffs in *Commonwealth v. County of Bucks* argue that the effect of restricting the availability of land for multi-family and moderate-to-high density development, and of making such land available for such development only after requests for specific changes of zoning, has been and is to limit the supply of such land, thereby increasing its cost so that it is prohibitively expensive for the development of housing for low-income and moderate-income persons.[67] Consequently,

---

[66] *Id.* at 188.

[67] *Id.* at 180-81. For an extensive discussion of the factual situation that is the basis for the *Bucks County* case *see* Reinstein, *A Case of Exclusionary Zoning,* 46 TEMPLE L.Q. 7 (1972).

the need for such housing in Bucks County is great and persons seeking such housing are unable to find it.

The plaintiffs further contend that the zoning practices are invalid since they fail to promote the general welfare of black, Spanish-speaking, and poor persons, but serve only the interests of the present residents of the municipalities. Furthermore, it is alleged that these zoning practices also violate the equal protection and due process clauses of the Constitution and are contrary to the policies of the Commonwealth of Pennsylvania and the United States in regard to satisfaction of needs for adequate housing.

Since this case is on appeal to the Commonwealth Court, and since the author of this article has prepared the pleadings and briefs in this case and has participated in the argument on appeal, this case will not be discussed in any further detail.

D. REASONS FOR GRANTING STANDING TO FUTURE RESIDENTS

The test for determining the standing of future residents in general is as follows: future residents have standing if (1) they allege that the action challenged has caused them injury in fact, be it economic or otherwise, or (2) if the interest asserted by them is arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question.[68] Standing concerns then "the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[69]

Standing has been considerably liberalized during the 1970's.[70] *Sierra Club v. Morton* is probably the latest word on the subject.[71] While the Supreme Court held that the Sierra Club did not have standing to restrain federal officials from approving a skiing development in the Sequoia National Forest, the court indicated that it was not granting standing

---

[68] Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152 (1970); Barlow v. Collins, 397 U.S. 159 (1970), *applied in* Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F. Supp. 238 (M.D. Pa. 1970).

[69] 397 U.S. at 153.

[70] *See* P.A.M. News Corp. v. Hardin, 440 F.2d 255 (D.C. Cir. 1971), in which standing was granted to an agricultural-data newswire service concerned about a similar service being conducted by the Secretary of Agriculture; Federation of Homemakers v. Hardin, 328 F. Supp. 181 (D.C. 1971), granting standing to a consumer organization concerned about a meat labeling regulation; and National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971), which was a suit concerning the environmental policy act brought by government contractors.

[71] 405 U.S. 727 (1972). *See also* NAACP v. Alabama, 357 U.S. 449 (1958); North City Area-Wide Council, Inc. v. Romney, 428 F.2d 754 (3rd Cir. 1970); Citizens Comm. v. Volpe, 425 F.2d 97 (2d Cir. 1970).

because the Sierra Club had not averred that any harm would be suffered by itself or its members.[72] By inference, there would be standing if the Sierra Club had alleged that its members would be injured by the skiing development and that it brought the action in representation of these members. It is quite clear, and the Supreme Court has not changed the general rule, that associations have been permitted to assert the rights of their members.[73]

Future residents of housing projects should be granted standing to sue in regard to actions of governmental officials which impede or prevent the construction of necessary housing units. Standing was achieved in the cases discussed above because the denial of housing by the government officials involved violated constitutional rights of the potential residents who were within the zones of interest protected by the various statutes.

Future residents are comparable to neighboring landowners, who, as mentioned above, are generally accorded standing so that the issues concerning the legality of the challenged zoning practices may be raised before the court. Future residents are also private attorneys general. Moreover, it is here suggested that it is only the future residents who may raise the issue of exclusionary zoning in a way in which courts are able to cope with it.

It is important to take note that there is not an exact paralleling of interests between the developers and the future residents. Not only are there economic reasons which may make it difficult for developers to initiate the necessary lawsuits, which will be discussed below, but, in many instances, it may be more practical for developers to agree to restrictive practices rather than to contest them. Consider, for example, the situation which arises when the municipality imposes excessive requirements upon a developer which will affect the ultimate price of the house which he sells. So long as the house can be sold at that ultimate price, the developer may conclude that it is easier to agree to the requirements and get the house built rather than institute litigation to challenge the legality of the requirements in order to cut costs for the future buyers of the homes. It is, obviously, the future buyers of the homes who will suffer, since the costs will be passed along to them. That clearly happens in terms of the increase in land prices which result from exclusionary zoning. It is the future buyers who pay this increase via the increase in cost of the homes which they purchase or the rents which they pay.

It is also important to note, that in order to accomplish a change in the prevailing system of zoning practices, those persons whose

---

[72] 405 U.S. at 735.

[73] *Id.*

constitutional rights are most seriously at stake must be accorded standing so that they can assert their constitutional rights and present their arguments to the courts. The future residents, unless they are accorded standing, will be denied the opportunity to contest the legality of actions of municipal officials which have excluded them. They have had no political impact upon these decisions because they are not residents of the municipality. Unless the courts agree to hear their claims, they will be denied the right to participate in all phases of the governmental decision-making process because it is inextricably connected with the residential access which they have been denied.

Recent United States Supreme Court decisions have emphasized the importance of access to the democratic process where the issue to be decided has a direct and substantial bearing on an individual's interests.[74] The excluded persons would be residents if they had not been excluded. They should not be denied standing to challenge their exclusion on the basis that they are not residents.

The objection might be made that the future residents cannot be granted standing to challenge zoning ordinances because these ordinances do not apply to them directly but rather restrict the activities of others, to-wit, the landowners and developers. If this type of objection were accepted, it would have a chilling effect in many situations. For example, once the Equal Rights Amendment is adopted, presumably the statutes limiting the hiring of female employees will be invalid. However, the statutes restrict employers and not employees. But it is the female job seekers who will want to have the statutes invalidated. The employers may not care. Similarly, the abortion statutes apply to doctors and not to the women who may want an abortion. The Supreme Court granted standing in the cases challenging the constitutionality of these statutes to the would-not-be mothers rather than the doctors, even though the criminal penalties would only apply to the latter rather than the former.[75]

This same reasoning would apply to the question of the ripeness of a claim by the potential resident. Obviously, he cannot present a claim that is ripe in the sense of the application for a building permit and the

---

[74] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 336 (1972); Phoenix v. Kolodziezski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Cipriano v. Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

[75] Roe v. Wade, 93 S. Ct. 705 (1973); Doe v. Bolton, 93 S. Ct. 739 (1973).

refusal thereof. His claim would be ripe once he has been excluded, assuming that he has standing to challenge the invalidity of his exclusion.[76]

The basic issue is whether those persons who have been excluded may challenge the basis for their exclusion, in addition to the challenge which may be brought by the landowner who proposes a particular project. The landowner, while he may assert their interests, cannot represent their interests completely. In any event, exclusionary zoning not only involves the denial to a landowner of the right to use his property but also has an impact upon the future residents who are being denied access to a given area. Their rights have been implicitly recognized by the landmark decisions of the Supreme Court of Pennsylvania.[77]

The decision in *In re Girsh*[78] is particularly instructive. Joseph Girsh wanted to construct two luxury apartment houses on a 7.7-acre tract in Nether Providence Township. The tract was zoned R-1 Residential, which required minimum lot sizes of one-half acre. Apartment buildings, although not expressly prohibited, were not provided for in the zoning ordinance.

The Supreme Court of Pennsylvania held that Nether Providence Township could not preclude apartment development throughout the entire township. The township could not prevent future growth. The majority opinion (in which two other justices concurred), per Mr. Justice Roberts, bases the decision upon the rights of those persons who have been excluded.[79] The concurring opinion by Chief Justice Bell bases the finding of unconstitutionality upon private property rights of the landowner.[80] The Supreme Court ordered the township to provide for the development of multi-family units within the township.[81]

---

[76] *See generally,* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). The Supreme Court permitted law students to challenge questions asked for admission to the bar even though "There has been no showing that any applicant for admission to the New York Bar has been denied admission either because of his answers to these or any similar questions, or because of his refusal to answer them." *Id.* at 165.

Similarly, a potential resident should be granted standing on the basis that he has been unconstitutionally excluded, and he should be able to state his claim even though he has never been denied a permit and never even has requested a permit or change of zoning which, since he is not a developer, he would have no occasion to request.

[77] *In re* Kit-Mar Bldrs., 439 Pa. 466, 268 A.2d 765 (1970); *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). *See also* Ayer, *The Punitive Law of Standing in Land Use Disputes: Notes From A Dark Continent,* 55 IOWA L. REV. 344 (1969); Foss, *Interested Third Parties in Zoning,* 12 U. FLA. L. REV. 16 (1959).

[78] *In re* Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

[79] *Id.* at 242, 263 A.2d at 397.

[80] *Id.* at 246, 263 A.2d at 399.

[81] 437 Pa. 237, 263 A.2d 395.

The greatest difficulty in the *Girsh* case is the problem of appropriate relief. When the developer is the plaintiff, the Court is confronted with the necessity of deciding whether or not to grant approval to the developer of the project he proposes. If the Court requires that the project be approved (by ordering that a permit be issued to the developer), then the municipality may be stuck with an undesired project at its most undesirable location. If, on the other hand, the Court invalidates the zoning restriction, and the municipality is ordered to provide for housing at some locations within the municipality, then the municipality will probably not select the developer's parcel (as was the result after the decision in the *Girsh* case).[82] Consequently, the developer will have wasted his time and funds, and his competitors will receive the benefits. The effect will be to discourage exclusionary-zoning cases.

This problem is symptomatic of the entire range of difficulties inherent in judicial consideration of single-development cases. Exclusionary zoning cannot be eliminated, as far as the effect on the persons excluded is concerned, by concentrating on the right of a developer to construct a particular project. The *Girsh* case, then, fails to resolve the problem of exclusionary zoning, for the following reasons:

1. The *Girsh* decision, of which the Supreme Court of Pennsylvania appears to be quite aware, does not cope with the problem of the lack of comprehensive planning. Single-development decision-making cannot provide for a comprehensive system of land development. The court can only act when private litigants bring the case into court, and there are great limitations upon builders doing so.

2. The courts cannot cope with the problems potentially presented by the location at which the developer proposes to build his project. If the municipality is exclusionary, one possible result is to allow construction at whatever location the developer proposes. Since the developer may have purchased the lowest-priced parcel available in the municipality, this may be an undesirable site for apartments (by reason of poor highway access, for example). If the court allows the township to review desirability of particular locations after the finding of exclusivity, then the developer-litigant will probably not be favored with selection of his site (which will discourage future litigation).[83]

3. By focusing on particular projects, the court is not able to consider regional interests and the satisfaction of regional needs. That

---

[82] Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1080 (1972).

[83] *Id.* This actually happened to Joseph Girsh when Nether Providence Township selected sites other than his for multi-family development.

such needs exist will usually be self-evident. That these needs should be satisfied at this particular location will probably be difficult to determine in the context of a particular project.[84]

4. Moreover, in the context of a proposed project and a single municipality, the court is not inclined to focus on the determination of the "fair share" of the regional needs being satisfied by a single municipality.[85] Unless regional planning is pursued, or ordered by the court in an appropriate case, the court can neither determine the propriety of a particular project, nor the necessity of the municipality in question being required to absorb further construction which it does not desire.

5. The *Girsh* case does not deal with the problem of the increase in land costs as a result of the general, extensive restrictions upon development. Housing and apartments become more expensive as a result of the artificial monopoly created by zoning. These expenses are passed on to the future residents, who are thereby adversely affected.

6. If the developer is a large developer, he will be reluctant to institute litigation to build one project when he knows that the municipality may lose that case but will ensure that he does not meet with favorable treatment toward any of his later projects. If the developer is a small developer, he will not be able to afford the loss of time and the expense involved in litigation.

7. Unless developers are certain of the availability of land, it makes no sense for them to spend the time, effort, and money to attempt to work out the financial details for the construction of dwelling units.

8. Consideration of individual developments does not allow the court to weigh appropriately, and, of course, the municipality never has done so in an exclusionary-zoning case, the specific location of the proposed apartment buildings, the number of units, the appropriate amount of land coverage or building height, the setbacks and the other regulations.[86] It might be answered that the township will be able to control these after the decision of the court, but that is exactly the problem. A builder who wins

---

[84] Township of Williston v. Chesterdale Farms, Inc., ... Com. Ct. ....., 300 A.2d 107 (1973). Here three judges were willing to grant the developer a building permit for his particular site and three judges were unwilling to do so. Yet all the judges did appear to agree that the township was exclusionary and that the zoning ordinance was invalid.

[85] The Commonwealth Court also divided on the question of the "fair share" for Williston Township in the *Chesterdale* case. The three judges who concluded that the township was not accepting its fair share, even though the township had vacant ground zoned for apartment construction, did not indicate how the "fair share" is determined.

[86] The disagreement among the judges in the *Chesterdale* case is at least in part a result of the lack of information in regard to the factors mentioned in the text.

a case such as the *Girsh* case cannot expect a friendly reception from the township, even if he is successful in getting his property rezoned.[87]

9. Consideration of the effect of the zoning restriction upon a particular project fails to cope with all the ancillary problems of onerous subdivision regulations and land development controls which have the effect of increasing the ultimate cost to the home buyer or tenant.

10. Even if the developer wins his case, the municipality can harass him in a multitude of ways. The developer will need the municipality's cooperation in review of his development plans, street layout, drainage facilities, sanitary facilities, building location, *etc.* An irate municipality can make life difficult, if not impossible, for the developer. Delay alone, which often can be several months or years, may be enough to kill a proposed project.

11. The *Girsh* decision allows the municipality to designate specific sites. Once these sites are so designated, the cost of acquisition of these sites becomes too high to enable construction of low-income and moderate-income housing. The inflation in value is the direct result of the dearth of sites available for multi-family development.

12. As a corollary to the above, it is precisely in those locations where the present residents would least desire to have future apartment development that, from a planning point of view, this development is most desirable. In other words, it is in the established residential areas that future apartments should be built rather than at the locations where apartments meet with the least resistance, near indusrial or commercial properties. This is especially important from the point of view of economic and racial integration.

13. In summary, consideration of the developer's right to build distorts the real question before the court. It raises the issues of racial and economic discrimination in an oblique fashion. It requires that the excluded wait for a developer to not only propose a project but to also litigate the prohibition upon his constructing such a project. It requires

---

[87] This has been the experience of Crow and Susman in attempting to obtain sewerage service for one of the projects for which a building permit was obtained as a result of the decision in Crow v. Brown, 457 F.2d 788 (5th Cir. 1972). *See* Crow v. Brown, 332 F. Supp. 382 (N.D. Ga., 1971) (Order of the District Court subsequent to Decision of the Court of Appeals).

that the rights of the excluded be dependent upon the fortuity of a claim to be made by a third party. It ignores the general pervasive impact of the overall restrictions in an entire region.

Those who have been excluded have little reason to expect that developers will be responsive to their needs and best interests. They will probably find that projects which are designed for poor persons will not be proposed for the best neighborhoods. They will probably find that projects for black persons will be proposed near existing enclaves of black persons. The consequences of arbitrary selection of sites by developers will be no more beneficial than arbitrary selection of sites by municipalities or by the courts. The interests of the developers are not the same as those of the future residents. The issues which will be raised and the relief requested will be quite distinct.

In any event, is there any reason to suspect that builders familiar with the experience of Joseph Girsh will imitate his example of eight years of litigation, three trips to the Supreme Court of Pennsylvania, three cases pending, all as a means of constructing apartment houses? The conclusion should obviously be that "the real party in interest in the *Girsh* case is the future suburban apartment resident."[88] It is only the future apartment resident who can present to the court a broader point of view that will allow the court to consider all the potential sites. The point of focus in the *Girsh* case is clearly not on the use of a particular piece of real estate but is rather on the effect on potential future residents and their relationship to the municipality. The court notes: "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."[89]

It is access to the housing market, to living on the available vacant real estate, that is involved in the *Girsh* case. In fact, this is involved in almost all of the cases in which the courts have invalidated restrictions upon land use that prevent construction of housing. Regardless of whether the theory is that exclusionary zoning is invalid *per se*, or that exclusionary zoning violates the equal protection clause, or that exclusionary zoning violates the due-process clause, the courts must answer the following questions: Who has been excluded? Who has been denied equal protection? Due process for whom? The answers are clear. It is the rights of the persons who have been excluded which are basically at stake.

---

[88] Washburn, *Apartments in the Suburbs: In re Appeal of Joseph Girsh*, 74 DICK. L. REV. 634, 651 (1970).

[89] *In re* Girsh, 437 Pa. 237, 242, 263 A.2d 395, 397 (1970).

E. CONCLUSION

For the reasons presented above, it appears that the time is ripe for the courts to recognize that the future residents of housing projects which are not being built as a result of invalid governmental restrictions be granted standing by which to challenge the validity of these restrictions. The most effective method in which the validity of exclusionary zoning may be examined by the courts is by a direct challenge brought by the persons who have been most grievously affected by the restrictive zoning practices. To date, most of the exclusionary zoning cases have been brought by developers, who in some cases were joined by future potential residents. However, the trend of the future would seem to be toward granting standing to those persons who have been excluded as a result of invalid governmental actions so that they can institute suit directly and obtain relief that rectifies the violation of their constitutional rights.