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The Age Restricted Residence: Legitimate Exclusionary Zoning for the Future

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I. INTRODUCTION

California law has infused the local zoning power with substantial elasticity. In a landmark zoning decision, the California Supreme Court stated that the zoning power must be based upon "the capacity . . . to meet the reasonable current requirements of time and place and period in history. . . ."[1] A relatively new and increasingly important requirement of our own time, place, and period is the growing desire of adult citizens to seek out, move into, and protect the existence of age restricted residences.

As our population matures and the relative political power of the senior citizen increases, this trend will probably continue unless checked. Adults-only apartments and age restrictive zoning and covenants have been challenged as violating the constitutional rights of another interest group—families with children. The resulting struggle might lead to an unusual legal confrontation between two groups of potential residents both of whom argue that the public health, safety, morals, and welfare would be better promoted by the protection of their interest group.

This article explores the interplay between traditional concepts of exclusionary zoning and current attempts to institute or prevent age restricted zones, covenants, or apartment houses. Recent California legislative and judicial efforts are analyzed, and trends are predicted

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1. Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 522, 370 P.2d 342, 346, 20 Cal. Rptr. 638, 642 (1962).

and evaluated. Our conclusion is that both the United States and California Constitutions permit property owners to restrict use of their property on the basis of age. In the absence of preemption, local governments are free to legislate for or against age restrictions according to their determinations of the requirements of the public interest and the general welfare.

II. THE POWER TO ZONE FOR THE GENERAL WELFARE

The power to zone finds its origins in the legal concept of sovereignty—that is, the right of the sovereign to regulate the affairs of men and things as they come together in the polis.[2] Thus, it is not surprising that contemporary legal interpretations of the zoning power have been expansive. Because government derives from its sovereignty the power to regulate the interaction of men and things, the urban environment is a logical focal point for the application of new land use restrictions designed to shape the character of that environment. On the basis of this historically recognized right of the sovereign to adopt and enforce all laws necessary to conduct and maintain effective government, courts have developed a gradual and progressive expression of approval for innovative applications of the police power, including the zoning power, to address broader social policies.[3]

The police power originates in the sovereign power which enables government to adopt and enforce all laws necessary to protect and further the public health, safety, morals, and general welfare of its citizens.[4] Not surprisingly, as America's commercial and agrarian urban

2. The word "polis" is the Greek term for "city" and is the origin of the word "police."

3. See, for example, 4 W. BLACKSTONE, COMMENTARIES 162 (1778), defining police power as "the due regulation and domestic order of the Kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood and good manners; to be decent, industrious and inoffensive in their respective stations."

For examples of the broadening of this historical concept, see 1 P. ROHAN, ZONING AND LAND USE CONTROLS § 1.03[2] (1978) [hereinafter cited as ROHAN].

4. *See generally* 6 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24, at 412 (3d ed. 1976) for an exhaustive treatment of the development of the police power [hereinafter cited as MCQUILLIN].

In the seminal zoning case of Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925), the California Supreme Court set forth the expansive nature of the police power:

> The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its existence save that it be not unreasonably and arbitrarily invoked and applied. . . . [A]s a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and chang-

centers began to industrialize in the latter part of the nineteenth century, the police power as applied through zoning laws developed into a convenient tool to fight urban deterioration. Municipal power was exercised on an increasing scale during this time to protect the urban citizenry from the perceived negative effects of industrial, commercial, business, and occupational uses intruding upon formerly residential neighborhoods.

The earliest form of zoning regulations were therefore essentially designed to redress improper interference with one type of land use by another. As industry and residential urban concentrations increased, city dwellers found themselves increasingly deprived of quiet, sunlight, clean air, and the other amenities which had been historically associated with the agrarian market town. The nineteenth century English economic pragmatism that fostered this urbanization found its perfect expression in the concept that those activities that do not foster good business do not deserve attention. However, the encouragement of urban industry, commerce, trade, and occupations ultimately had consequences which led to calls for local governmental regulation to protect the urban public.[5]

Although directed to the control or containment of noxious uses of land, early land use regulations were based chiefly on common law nuisance concepts. Such nuisance concepts were inspired by the fact that concentrated groups of persons carrying on a number of commercial, industrial, and residential activities within the confines of a densely populated urban area tended to create public annoyances. These concepts eventually led to regulations that restricted building height, mass, and number of stories to insure that adequate light and air would enter urban dwellings.[6] Because the common law doctrine of nuisance was

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ing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. . . . Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.

Id. at 484-85, 234 P. at 383.

5. At least one critic asserts that the use segregation concepts of early zoning measures actually encouraged urban deterioration. J. AVANGO, THE URBANIZATION OF THE EARTH 73-77 (1970). For an additional criticism of zoning as a land use control, see Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

6. In an early nuisance case, a New York court noted:

It is a well-recognized fact that in large communities, which are closely built up and inhabited by the working class to a large extent, a quantity of smoke dis-

used as one of the principal methods of controlling land use in the early twentieth century, the first zoning ordinances divided land into different districts and permitted only certain uses within each zoning district. Following the lead of the legislatures, courts in turn initially relied on nuisance analogies in reviewing such ordinances and defining the legitimate ends of zoning.[7]

Among the first zoning ordinances enacted in the United States were those of the District of Columbia and the City of New York.[8] The New York Building Zone Resolution, which became the model for several other cities, divided New York City into use, height, and area districts. While there is a close relationship between this early type of

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> charged into the air from factories is most objectionable and offensive; rendering the air disagreeable and injurious to breathe, injuring clothes, textiles, and numerous other articles, and otherwise causing inconvenience and annoyance to those subjected thereto. Ordinances aimed at this evil have frequently been upheld, and there can be no question but what it is the subject of municipal control and regulation.

Department of Health v. Ebling Brewing Co., 38 Misc. 537, 541, 78 N.Y.S. 11, 13 (1902). *See* Gorieb v. Fox, 274 U.S. 603, 609 (1927) (set-back); Welsh v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907). In California, "[a]nything is a nuisance which obstructs the free use of property so as to interfere with its comfortable enjoyment. . . ." Los Angeles Brick & Clay Prods. Co. v. Los Angeles, 60 Cal. App. 2d 478, 486, 141 P.2d 46, 51 (1943).

7. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in which the Supreme Court stated:

> The ordinance now under review, and all similar laws and regulations, must find their jurisdiction in some aspect of the police power, asserted for the public welfare. The line in which this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, [use your own property in such manner as not to injure another], which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or of a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may merely be a right thing in the wrong place—like a pig in a parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. . . .

Id. at 387-88.

8. A zoning resolution was passed by the Board of Estimate and Apportionment of New York City on July 25, 1916, pursuant to ch. 466, law of 1901, as amended by ch. 470 of law of 1914 and as further amended by ch. 497 of law of 1916.

Zoning Regulations of the District of Columbia were adopted under Acts of Congress of March 1, 1920 and June 20, 1938. Code 1940, §§ 5-412 to -425. Wood v. District of Columbia, 39 A.2d 67, 68 n.1 (D.C. 1944).

zoning and laws prohibiting nuisances, the zoning power is not nearly as limited in its purposes today and may deal with many uses of property which are not physically detrimental to surrounding property owners.[9]

Because the power to zone is historically derived from the police power, contemporary articulations of the permissible aims of this police power have assisted courts in broadening interpretations of the legitimate aims of zoning. In California, cities and counties are permitted by the state's constitution to make and enforce within their limits any local police, sanitary, or other regulations not in conflict with general law.[10] This provision has been implemented by state statute to "provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities. . . ."[11] The state legislature in the same section indicates its intent "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."[12]

In the spirit of this authority, California courts have adopted a liberal attitude towards review of local zoning ordinances. The zoning power, just as the police power from which it originated, is viewed in California as a dynamic, progressive, and flexible tool possessing an elasticity of application necessary to meet and seek resolution of new societal problems.

In *Consolidated Rock Products Co. v. City of Los Angeles*,[13] the

9. Typical zoning ordinances today include regulation of walls, fences, landscaping, lot coverage, vehicular and pedestrian access, off-street parking, outdoor living space, trash, and storage areas, recreational facilities and lot size, as well as building height and mass. For examples of two typical zoning ordinances, see Title 17 of the Corona, California, Municipal Code and Article IX, Article 1 of the Orange, California, Municipal Code. *See also* Gignoux v. Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (1950), and Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 30 LAW & CONTEMP. PROB. 218 (1955). For an early judicial leap beyond the traditional limits of the police power when reviewing a zoning ordinance, see Jones v. City of Los Angeles, 211 Cal. 304, 316-17, 295 P. 14, 20 (1930).

10. CAL. CONST. art. XI, § 7.

11. CAL. GOV'T CODE § 65800 (Deering 1979).

12. *Id.*

13. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962). As the court there noted:

> [E]arly zoning cases laid down the broad pattern of the rules by which the constitutionality of such legislation is to be tested in the courts. Thus, in *Euclid v. Ambler Realty Co.*, . . . 272 U.S. at page 387, Mr. Justice Sutherland speaking for that court, said:
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> > Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles

California Supreme Court found the origin of this broad principle of flexibility in the early zoning case of *Euclid v. Ambler Realty Co.*,[14] in which the United States Supreme Court first upheld use classifications as valid police power efforts to protect the public health, safety, morality, and welfare. The broadly articulated principles of furthering the general welfare outlined by the *Consolidated Rock* court are used to delimit the zoning power in California today.[15] Because the zoning power is considered by California courts to be necessary to assure a capacity to "meet existing conditions of modern life," a zoning ordinance is usually upheld if it has "a reasonable relation to the public welfare."[16]

The expanded judicial standards articulated by the California Supreme Court and used to sustain broad general welfare objectives is most recently illustrated in *Associated Home Builders v. City of Livermore*[17] in which the court concluded:

> In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that *such ordinances are presumed to be constitutional*, and come before the court with every intendment in their favor. . . . "The courts may differ with the zoning authorities as to the 'necessity or propriety of an enactment,' but so long as it remains a 'question upon which reasonable minds might differ,' there will be no judicial interference with the municipality's determination of policy."[18]

Because the traditional concept of the general welfare in land use regulation has been given an expansive interpretation by both the

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> and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Id. at 521-22, 370 P.2d at 346, 20 Cal. Rptr. at 642.

The court goes on to quote from the other landmark California zoning case, Miller v. Board of Pub. Works, 195 Cal. 477, 485, 234 P. 381, 383 (1925): "[T]here is nothing known to the law which keeps more in step with human progress than does the exercise of [the police] power." 57 Cal. 2d at 522, 20 P.2d at 346, 20 Cal. Rptr. at 642 (quoting Streitch v. Board of Educ., 34 S.D. 169, 147 N.W. 779 (1914)).

14. 272 U.S. 365, 388 (1926).

15. 8 MCQUILLIN, *supra* note 4, § 25.35 at 87-88.

16. Lockard v. City of Los Angeles, 33 Cal. 2d 453, 461, 202 P.2d 38, 42 (1949).

17. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

18. *Id.* at 604-05, 557 P.2d at 486, 135 Cal. Rptr. at 54 (citations omitted) (emphasis added).

United States Supreme Court and the California Supreme Court, the objectives necessary to sustain a zoning ordinance are no longer limited to the elimination of public nuisances, noxious activities, or dangerous structures.[19] Even the earliest California decisions in this area referred to broad notions of "public interest," "comfort," "convenience," and "prosperity."[20] The California Supreme Court in *Miller v. Board of Public Works*,[21] for example, refers to the "aggregate welfare" of society's constituent members as one reflection of the general welfare.[22]

In more recent years, various judicial decisions have upheld an

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19. Berman v. Parker, 348 U.S. 26, 32-33 (1954). *See also* 8 MCQUILLIN, *supra* note 4, § 25.20 at 52-53:

> The meaning of the term "public welfare" may not be set down with exactitude. The words "comfort, convenience, welfare and prosperity are somewhat speculative; they are not susceptible of precise definition." Indeed, in the context in which they are here considered, these terms necessarily are of uncertain import, since they relate to the broadest purpose of governmental power, upon which any final limitation must be constitutional and not merely by judicial definitions.
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> Generally, however, it appears that under circumstances of particular cases, public welfare includes public convenience, general prosperity, the greatest welfare of the public, all the great public needs, "what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary," whatever is required for the public good, the suppression of all things hurtful to the comfort and welfare of society, and finally all regulations which promote the general interest and prosperity of the public. Thus, for example, providing employment may be regarded as one of the several sociological factors which, for purposes of zoning legislation, collectively comprise the general welfare. Undoubtedly, the term does not embrace any conceivable object that a legislative body might possibly deem to be for the public good.

Id. (footnotes omitted).

20. See cases cited at 8 MCQUILLIN, *supra* note 4, §§ 25.18-.31 at 47-70.

21. 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1926).

22. 195 Cal. at 493, 234 P. at 387. The court in upholding zoning which called for only residential uses noted as follows:

> [W]e think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. It is axiomatic that the welfare, and indeed the very existence, of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship, and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement, not only of community life, but of the life of the nation as a whole.
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> . . . [F]ew persons, if given their choice, would, we think, deliberately prefer to establish their homes and rear their children in an apartment house neighborhood rather than in a single home neighborhood. The general welfare of a community is but the aggregate welfare of its constituent members, and that which tends to promote the welfare of the individual members of society cannot fail to benefit society as a whole.

Id. at 492-93, 234 P. at 386-87.

expanded use of the zoning power to permit local communities to establish and preserve their neighborhood character or community lifestyle.[23] In *Village of Belle Terre v. Boraas*,[24] a village ordinance restricted land use to single-family dwellings, and prohibited occupancy of these dwellings by more than two persons unrelated by blood, adoption, or marriage. The United States Supreme Court found that this ordinance had a proper zoning purpose and upheld its validity against a claim that it violated the equal protection clause. The Court held that the ordinance was in fact reasonable, and did bear a rational relationship to a permissible state objective: the establishment and preservation of a community lifestyle. Justice Douglas, writing for the majority, declared that such zoning could be used to fashion a community characterized as a "quiet place where yards are wide, people few, and motor vehicles restricted," and to establish zones where "family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[25]

One commentator has since suggested that the *Belle Terre* case can be read as setting an important limitation on a community's power to use zoning to preserve community character—that a zoning measure may not rest solely on a judgment that certain sorts of people are incompatible with the character of the community.[26] Where such zoning bears a tangible relationship to land use and does not exclude a traditionally protected suspect class such as a religious or ethnic minority, it remains to be seen whether zoning measures will be upheld despite their exclusion of persons viewed as incompatible with the community's character. Indeed, where such a zoning measure is motivated by a desire to protect a traditional relationship, such as that of the family, it may be that objectives such as community character would justify the exclusion of particular groups, such as the unrelated individuals excluded from Belle Terre.

The *Belle Terre* decision followed historical trends that have greatly broadened permissible ends of the zoning power by refining the

23. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Moviematic Ind. Corp. v. Board of County Comm'rs, 349 So. 2d 667 (1977); Houston v. Board of City Comm'rs, 218 Kan. 323, 543 P.2d 1010 (1975). *See also* National Land & Investment Co. v. Kohn, 419 Pa. 504, 522, 215 A.2d 597 (1965).

24. 416 U.S. 1 (1974).

25. *Id.* at 9.

26. *See* Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1454-55 (1978) [hereinafter cited as *Developments—Zoning*]. This exhaustive student work provides an excellent review of case law in this area.

traditional approach in *Euclid v. Ambler Realty Co.*[27] that zoning aims to protect the character of separate uses by keeping them separate. In *Belle Terre*, the United States Supreme Court sanctioned land use controls which went far beyond allowing a municipality to regulate the type and use of structures to be constructed within it.[28] In *Belle Terre*, the Court found a rational basis for the village ordinance to exist within the concept of general welfare where the zoning promoted the community's desire to preserve a pleasant environment.[29]

In *Ybarra v. City of Los Altos Hills*,[30] a decision subsequent to *Belle Terre*, the Ninth Circuit had an opportunity to review a zoning ordinance of the California town of Los Altos Hills, which provided that a housing lot must be at least one acre in size, and that no such lot could be occupied by more than one primary dwelling unit. The court found that this type of zoning ordinance was rationally related to the legitimate governmental interest of preserving a town's rural environment, and therefore did not violate the equal protection clause of the fourteenth amendment.[31] Similarly, in *Construction Industry Association v. City of Petaluma*,[32] the Ninth Circuit concluded that "the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[33] A New York court has also upheld minimum lot zoning of two acres, reasoning that the power to protect the general welfare included the power to enact zoning measures designed to protect the appearance and environment of a rural residential community.[34]

Decisions such as *Belle Terre, Town of Los Altos Hills*, and *Petaluma* suggest a general judicial willingness to sanction zoning ordi-

27. 272 U.S. 365 (1926).

28. Use separation can rather easily be upheld under the reasoning of *Euclid* and its progeny because commercial and industrial uses are generally thought to be incompatible with residential uses. More recent cases have sustained aesthetics of a more refined nature as a proper basis for exercise of the zoning power. *See, e.g.*, Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971); Suffolk Outdoor Advertising Co. v. Hulse, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978). *See also* Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438; 3 ROHAN, *supra* note 3, at § 16.01.

29. 416 U.S. at 9.

30. 503 F.2d 250 (9th Cir. 1974).

31. *Id.* at 254.

32. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

33. *Id.* at 908-09.

34. Elbert v. Village of North Hills, 28 N.Y.S.2d 317, 318, *rev'd on other grounds*, 262 A.D. 856, 28 N.Y.S.2d 172 (1941). *See also* Hamer v. Town of Ross, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963).

nances which enable a community to enhance and protect its chosen character and desired lifestyle. However, it is equally clear that courts remain concerned about the fact that zoning measures designed to promote community character can have exclusionary effects, even when the general welfare is otherwise promoted through an aesthetically pleasing environment. A number of commentators have recently examined zoning measures which have an exclusionary intent or effect, and have generally concluded that courts are willing to limit the degree to which community character can be used to support a zoning measure, if that measure has an exclusionary impact.[35] For example, a number of courts have recently invalidated zoning measures which exclude lower income and minority groups. However, if such zoning is protective of another judicially favored institution, such as the family, it remains to be seen whether courts will sanction exclusionary zoning measures largely motivated by general welfare objectives such as community character.[36]

III. GENERAL WELFARE ZONING CAN BE BOTH EXCLUSIONARY AND PERMISSIBLE

Exclusionary zoning is land use regulation which has economic, social, or other segregation as its real purpose or as its actual result. As an example, the restriction of land usage to lower population densities can result in the exclusion of less affluent people from a community because they cannot afford the cost of larger lot housing.[37] Zoning

35. *See* Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969); *Developments—Zoning*, *supra* note 26, at 1452-57; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 796-97 (1969). *See also* Comment, *Exclusionary Zoning in California: A Statutory Mechanism for Judicial Nondeference*, 67 CALIF. L. REV. 1154 (1979).

36. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970). *See also* Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?* 1 FLA. ST. U.L. REV. 234 (1973).

37. *See* Barnard v. Zoning Bd. of Appeals, 313 A.2d 741 (Me. 1974), in which the court noted:

> We consider it well-established that, from the community standpoint, there are numerous practical and logical interests legitimately served by restrictive zoning, particularly when the individual restrictions, e.g., minimum lot size, minimum floor space and minimum frontage, are promulgated as part of a comprehensive municipal planning and zoning scheme founded on lawful objectives. Communities cannot be condemned for seeking such ends as preservation of open space and local "beauty," avoidance of heavy traffic congestion and overcrowded housing, maintenance of property values, or even the stabilization of the burdens of spending for municipal services.
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> However, we are mindful that zoning has been used frequently for ends which

measures intended to preserve a community's character by restricting homes to one-acre lots encourage high cost residential development which blocks or limits the influx of persons having low or moderate incomes. These groups are in effect excluded, and the system of local regulation which leads to such a result is called exclusionary zoning.

The purpose of this type of community character exclusionary zoning often is the promotion of the health, safety, morals, or the general welfare of the community. This argument was made by persons of the Village of Belle Terre and the Town of Los Altos Hills, for example, when they wished to adopt ordinances restricting occupancy of single family zones to certain types of "family" units. As stated above, this type of exclusionary zoning has been upheld by the United States Supreme Court.[38]

Legal attacks on zoning laws that have exclusionary effects have been brought under the due process and equal protection clauses of the fifth and fourteenth amendments of the United States Constitution.[39] The United States Supreme Court has developed a two-tier approach to zoning ordinances attacked under these clauses. Where a suspect class (such as a racial minority) or a fundamental interest (such as the vote) is affected, the Court casts the extremely heavy burden of proof upon the government to show both that the law is necessary to the promotion of a compelling state interest and that no less drastic means of protecting that interest are available. Where neither a suspect class nor a fundamental interest is involved, the Court applies a much less onerous test. The party challenging the law bears the burden of showing that it is not rationally related to a legitimate governmental objective, and he "must allege specific, concrete facts demonstrating that the chal-

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while ostensibly within the traditional objectives of zoning—protection of health, safety, morals and general welfare—are in *fact* unrelated to those purposes.

Thus, the zoning power has been exercised, under the guise of community planning, to prevent the construction of low-income housing in suburban, as distinguished from inner-city areas. The undeniable effect of such a restraint is the exclusion of poor and moderate income families (and concomitantly, the exclusion of ethnic and racial minorities) from desirable residential areas.

Id. at 745 (emphasis in original) (footnote omitted).

Frederic Strom calls age restrictive zoning "tantamount to official government policy of segregation by age and to government telling citizens, albeit in a limited way, where they may or may not live on the basis of their age." Strom, *Age Restrictions in Land Use Control*, 2 ZONING & PLANNING L. REP. 146 (1979).

38. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

39. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490 (1975). *See also* Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977).

lenged [zoning] practices harm *him*. . . ."[40]

Traditionally, zoning classifications have been reviewed by courts using the more lenient "rational basis" test. The California Supreme Court recently reaffirmed its intention to continue to apply traditional presumptions of validity to zoning ordinances in the case of *Associated Home Builders v. City of Livermore*.[41] There the court was asked to review a zoning initiative ordinance which barred all residential development pending resolution of community problems relating to educational facilities, sewage, and water supply. The court noted that this zoning ordinance did not directly burden the right to travel (a fundamental interest) since it did not "penalize travel and resettlement but merely [made] it more difficult for the outsider to establish his residence in the place of his choosing."[42]

Any effort to rezone portions of a city for only one age group would also make it difficult for an outsider to locate in that city, but the burden on the right to travel would be similarly indirect and therefore these ordinances would be immune from strict scrutiny unless some other "fundamental interest" or "suspect classification" is affected by this type of exclusionary zoning. Zoning that creates areas reserved for senior citizens or adults is exclusionary, because it involves a classification based upon age. Such zoning also touches upon other individual interests broadly referred to as the need for decent housing. However, no case yet makes this classification suspect.

The New Jersey Supreme Court in *Taxpayers Association v. Weymouth Township*[43] held that age is not a suspect classification and that housing is not a fundamental right protected by the fourteenth amendment,[44] and went on to fashion a theory sustaining such a measure's

40. Warth v. Seldin, 422 U.S. 490, 508 (1975) (emphasis in original). *See* Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373 (1978) [hereinafter cited as Sager].

41. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). The court noted:

> As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning. . . .
>
> Were a court to . . . hold that an inferred right of any group to live wherever it chooses might not be abridged without some compelling state interest, the law of zoning would be literally turned upside down; presumptions of validity would become presumptions of invalidity and traditional police powers of a state would be severely circumscribed. . . .

Id. at 603, 557 P.2d at 485, 135 Cal. Rptr. at 53 (citations omitted).

42. *Id.* at 603, 557 P.2d at 484, 135 Cal. Rptr. at 52.

43. 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977).

44. *Id.* at 281, 364 A.2d at 1034.

relationship to the general welfare and to the regulation of land uses.[45] The *Weymouth* decision suggests that the welfare of senior citizens is a significant enough segment of the general welfare that protective zoning in their behalf can be sustained. In the companion decision of *Shepard v. Woodland Township Committee & Planning Board*,[46] the same court upheld a zoning ordinance permitting senior citizen communities as a special use exception in a residential-agricultural zone.[47]

The nexus between the need for adult housing and legitimate, traditional land use regulation recognized by the *Weymouth* and *Shepard* courts provides precedent for other courts to draw the conclusion that such zoning measures can withstand attack.[48] These two recent New Jersey opinions, as well as the community character decisions in *Belle Terre, Town of Los Altos Hills*, and *Petaluma*, lend considerable authority to the conclusion that a carefully drafted zoning ordinance which provides for an age restricted zone in a retirement community is a valid exercise of the zoning power and is designed to promote the general welfare. Further, it appears that any general, regional, or community plan for an area might itself determine that certain parts of that area should have age restricted zoning. Under recent cases, this type of finding would suggest that such zoning is reasonably related to regional

45. *Id.* at 289, 364 A.2d at 1040.

46. 71 N.J. 230, 364 A.2d 1005 (1976).

47. The *Shepard* court addressed itself specifically to the question of whether zoning ordinances containing age qualifications "bear a real and substantial relationship to regulation of land use," and concluded:

> In asking us to strike these provisions, plaintiff would have us adopt a rigid and inflexible rule invalidating all municipal ordinances which, in any way, transcend regulation of the *physical* and *structural* aspects of land use and which collaterally regulate those who may use the land. We decline to adopt such a narrow view of the zoning power.
>
> . . . [R]egulation of the use of land cannot, as a conceptual matter, be dissociated from regulation of the users of land. . . .
>
> . . . .
>
> . . . It is thus obvious that age restrictions are both rationally related to the concept of planned housing for the elderly and essential to the success of such developments.

Id. at 246-47, 364 A.2d at 1013-14 (emphasis in original).

48. One astute and consistently liberal observer of the Supreme Court's handling of exclusionary zoning challenges so despairs of getting an ordinance overturned that he becomes almost hysterical: "[T]he Court's willingness to evaluate land use policies under the due process clause seems restricted to actual fits of municipal madness; mean and self-serving acts of exclusion are apparently to be received as jeweled exercises of the police power. . . . And majority will—however insular, unjust, or irrational—prevails." Sager, *supra* note 40, at 1421-25.

and therefore general welfare.[49] Moreover, it has been suggested that age restricted communities may be justified because they serve inclusionary as opposed to exclusionary ends.[50] That age restricted communities would, on a larger scale, have a "rational relationship" to the goal of providing adequate housing for senior citizens seems apparent. The empirical data to this effect collected in *Weymouth*[51] and *Shepard*[52] is substantial. Moreover, similar age restrictions on housing occupancy have been upheld in various situations in other jurisdictions.[53]

Age restricted communities, although by their very nature limited in their definition of the family, also foster and protect a traditional American family institution, the retired couple or individual without children. In this sense, such a use of the zoning power is not undercut by the recent United States Supreme Court case of *Moore v. City of East Cleveland*[54] or the more recent New Jersey case of *State v. Baker*.[55] In *Moore*, the Supreme Court determined that there are limits to the expansive interpretation of the zoning power that it had ar-

49. *See* Maldini v. Ambro, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975). As the New York court stated:

> The inclusionary, as distinguished from exclusionary, nature of such land use is made clear by the town board's conclusion (1) that there is a present shortage for housing for people when they get older, (2) that without the creation of the retirement district that need will go unredressed, and (3) that ameliorating the need in this way will impose no particular hardship on other groups of persons who suffer from significant lack of housing. Certainly, when a community is impelled, consistent with such criteria, to move to correct social and historical patterns of housing deprivation, it is acting well within its delegated "general welfare" power.

Id. at 485-86, 330 N.E.2d at 406, 369 N.Y.S.2d at 390. *See* Rose, *Exclusionary Zoning in the Federal Courts*, 2 ZONING & PLANNING L. REP. 137 (1979). *See also* Bailey v. Board of Appeals, 370 Mass. 95, 345 N.E.2d 367 (1976). *But see* Hinman v. Planning & Zoning Comm., 26 Conn. Supp. 125, 214 A.2d 131 (1965).

50. *See* Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 294, 364 A.2d 1016, 1040 (1976); *Developments—Zoning*, *supra* note 26, at 1633. *See also* 1 ROHAN, *supra* note 3, § 3.05[1] at 3-131. *See generally* Note, *Survey of Municipal Corporations—Zoning to Permit Creation of Districts for the Exclusive Use of the Aged*, 30 RUTGERS L. REV. 740 (1977).

51. 71 N.J. at 267-69, 364 A.2d at 1026-27.

52. 71 N.J. at 239-41, 364 A.2d at 1010-12.

53. *See* Riley v. Stoves, 22 Ariz. App. 223, 526 P.2d 747 (1974) (enforcing a restrictive covenant against children in a mobile home subdivision, as "reasonably related to a legitimate purpose" and therefore not a violation of equal protection); Maldini v. Ambro, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385 (1975) (zoning); Parrino v. Lindsay, 29 N.Y.2d 30, 272 N.E.2d 67, 323 N.Y.S.2d 689 (1971) (rent increase exemption for elderly tenants); Marino v. Ramapo, 68 Misc. 2d 44, 326 N.Y.S.2d 162, 183-85 (1971) (federally subsidized housing). *See also* 12 U.S.C. § 1701q(d)(4) (1977) and 42 U.S.C. § 1485(d)(3) (1977), which fix age related occupancy requirements for certain federally subsidized housing programs for the elderly.

54. 431 U.S. 494 (1977). *See* Note, Moore v. City of East Cleveland, Ohio: *The Emergence of the Right of Family Choice in Zoning*, 5 PEPPERDINE L. REV. 547 (1978).

55. 81 N.J. 99, 405 A.2d 368 (1979).

ticulated in *Belle Terre*. In *Moore*, the Court struck down a single family zoning ordinance which so narrowly defined "family" as to prevent close relatives from living together. A grandmother who violated the ordinance was sentenced to jail for living with her grown son and two grandsons. What distinguished *Moore* from the zoning ordinances upheld by New Jersey's Supreme Court in *Weymouth* and *Shepard* was the absence of any compelling justifications serving governmental interests to justify the ordinance. The Court simply concluded that the City of East Cleveland had failed to show a rational or proximate connection between its ordinance and land use regulation.[56]

Moore's limits on the zoning power expansion approved by *Belle Terre, Weymouth*, and *Shepard* do not appear to prevent the age restricted community from intruding upon other forms of family life where the age restriction is intended to serve the important general welfare objectives set out in *Weymouth* and *Shepard*. Moreover, age restricted zoning may be viewed as a means of protecting older persons by permitting them to live in retirement communities or their own homes. This rationale also preserves families, and may therefore be sufficient to justify zoning which has the subsidiary result of excluding children. Age restricted zoning also responds to the special needs of the older family unit by enabling elderly residents to maintain their social homogeneity and chosen style of life. Such restrictions, even though exclusionary, appear to be consistent with the protection afforded by *Moore* to traditional relationships and the social institution of the family.

IV. ZONING CONTROLS LAND USE BETTER THAN COVENANTS, CONDITIONS, AND RESTRICTIONS

There are ways other than zoning to create age restrictions on residential property. For example, such restrictions can be effected by private individuals through the use of covenants, conditions, and restrictions. However, because of the inherent limits on the effective use of covenants, conditions, and restrictions, zoning is a better way to achieve such use restrictions.[57]

Covenants are created by words in a deed or other writing that

56. 431 U.S. at 498-99. A remarkably consistent result occurred in State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979), when the New Jersey Supreme Court also decided under similar circumstances to limit at least indirectly the sweep of its own holdings in *Weymouth* and *Shepard*. *See* note 87 *infra*.

57. *See generally* 8 MCQUILLIN, *supra* note 4, § 25.09 at 26-27.

show agreement by a party to do or refrain from doing a certain thing.[58] A covenant is a promise regarding the use of land[59] which is binding on the covenantor and persons who may assume pursuant to the obligation, and it benefits the covenantee and his assignees. The original parties are in privity of contract,[60] and their rights and obligations arise out of a contractual relationship. If a covenant is breached, the person entitled to enforce the covenant has the legal remedy of damages and under some circumstances an injunction to restrain or abate the violation.[61] Subsequent purchasers of the property are subject to the covenant only if the original covenant meets the requirement of a "covenant running with the land."[62] However, in some instances the covenant that does not "run" can be enforced in equity as an equitable servitude as long as the grantee takes the property with notice.[63] For an age restricted community to be created by the use of covenants, all purchasers of property in the community would have to subscribe to the covenants.

A condition may be used to impose restrictions on the use of the land. The primary difference between a condition and a covenant is that a condition is imposed only as a qualification of an estate when the property is conveyed. Therefore, a breach of a condition often results in forfeiture of the estate with a reversion to the previous owner,[64] while a breach of covenant is remedied by an injunction or damages. As with the use of covenants, all property owners must subscribe to those conditions if an age restricted area is to be established by use of conditions.

Development plan restrictions have been widely used in connection with covenants and conditions. Together, they are often termed "declarations of covenants, conditions and restrictions," or equitable servitudes.[65] They are most often imposed by a developer on land to be

58. O'Sullivan v. Griffith, 153 Cal. 502, 506, 95 P. 873, 875 (1908).

59. RESTATEMENT (SECOND) OF PROPERTY § 16 (1977).

60. Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 569, 194 P. 1024, 1026 (1920); Smith v. Mendonsa, 108 Cal. App. 2d 540, 542, 238 P.2d 1039, 1040 (1952).

61. Joyce v. Krupp, 83 Cal. App. 391, 398, 257 P. 124, 127 (1927); Barrows v. Jackson, 112 Cal. App. 2d 534, 538, 247 P.2d 99, 102 (1952).

62. CAL. CIV. CODE §§ 1461-1468 (Deering 1971); RESTATEMENT (SECOND) OF PROPERTY § 16 (1977).

63. Richardson v. Callahan, 213 Cal. 683, 687, 3 P.2d 927, 929 (1931) (citing several cases).

64. Parry v. Berkeley Hall School Foundation, 10 Cal. 2d 422, 426, 74 P.2d 738, 740 (1937); City of Long Beach v. Marshall, 11 Cal. 2d 609, 613, 82 P.2d 362, 364 (1938); People v. City of Long Beach, 200 Cal. App. 2d 609, 616-17, 19 Cal. Rptr. 585, 589 (1962).

65. Wing v. Forest Lawn Cemetary Ass'n, 15 Cal. 2d 472, 480, 101 P.2d 1099, 1103

subdivided, and as long as it is clear in the original deeds to the tract lots that the grantor intended that the covenants, conditions, and restrictions be for the benefit of all grantees, any lot owner may enforce them. It is possible to use development plan restrictions to create an age restricted area when the original tract is subdivided. However, this method is ineffective in an established community of any size because there is no practical way to assure that all subsequent owners will consent.

Covenants, conditions, and restrictions have historically been viewed as a private tool for use restriction,[66] and as such, their enforcement has proved difficult. Unless an individual or group of property owners cares enough about a breaching neighbor to devote substantial resources toward enjoining such a breach, there is no effective means for redress. Further, as a subdivision matures, more and more residents may slide into enough violations of the original covenants, conditions, and restrictions that strict enforcement of each provision would become impossible, even if one party wished to force the issue. The original purposes of the neighborhood's founders are then lost beyond the practical ability of our legal system to recall.[67] On the other hand,

(1940); Warner v. Graham, 181 Cal. 174, 183, 183 P. 945, 949 (1919); Martin v. Ray, 76 Cal. App. 2d 471, 474, 173 P.2d 573, 575 (1946).

66. *See* 8 MCQUILLIN, *supra* note 4, at § 26.

67. There have been attempts recently in California to solve this enforcement problem by making the public an express third party beneficiary to private covenants, conditions, and restrictions. This is either done at the time of subdivision approval as a condition of the tract or parcel map, or by separate agreement between the developer and the public agency. In the latter instance, the following language may be added to the covenants, conditions, and restrictions as recorded:

> Pursuant to an agreement dated ————, the Association has agreed with the City to (maintain common areas, enforce building materials restrictions, etc.) of the Project in accordance with specified standards. If, in the opinion of the City Manager, the Association at any time fails to perform in accordance with the terms of the above-referenced Agreement, the City shall give written notice to the Association specifying the exact nature of such deficiency. Such written notice of deficiency from the City shall be addressed to the Association and shall require that the Association take appropriate corrective action within —— days of receipt of such written notice, unless there exists a hazardous condition creating an immediate possibility of serious injury to persons or property, in which case the time for correction may be reduced to a minimum of —— days. The Association shall have the right, within —— days of receipt of such written notice of deficiency, to file an appeal before the City's Council for a public hearing concerning the reasonableness of the City's requirements as set forth in the written notice of deficiency. The decision of the City Council on such appeal shall be binding upon all parties but may be appealed by the Association through an appropriate action in any court having jurisdiction. If the Association, within the time set forth in the Notice of Deficiency (subject to extension for such time as may be required to appeal the notice of deficiency to the City Council), does not undertake and complete the corrective work required in the Notice, the City may undertake and complete such

enforcement of zoning ordinances is usually accomplished by a public agency,[68] and may result in criminal penalties.[69] Upon conviction, the court may suspend or temper the sentence upon condition that the violation be cured, thus, in effect imposing a mandatory injunction on the offender.

Even though zoning affects the entire populace, whereas covenants, conditions, and restrictions may not, they all have contractual overtones. The California Supreme Court recently commented on this contractual aspect of zoning: "zoning . . . is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare."[70] In communities which decide to impose age restrictions on themselves, it is imperative for the success of the venture that all residents be parties. If there are residents who do not meet the minimum age requirements, it is quite possible that the value of living in such a community is decreased and may even be destroyed for many residents who choose to live in the area because of its age restrictions.

Neither covenants nor conditions are legally binding on individuals who are not parties to the establishing agreement. For these methods to be effective, virtually all community members would have to

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corrective measures as are set forth in the Notice and assess the costs thereof against the Association as a lien in the same manner as set forth herein for the establishment of liens against Association property. The written notice of deficiency from the City shall state the anticipated costs that the City would assess against the Association for the corrective work to be accomplished, which costs shall be no more than those charged by competitive private industry for similar work.

While there is no specific California statute or case law authorizing public enforcement of private restrictions, the authors believe that such enforcement, if challenged, would probably be sustained on the same police power/general welfare basis discussed above.

68. A private party may sometimes enforce a zoning ordinance upon a showing of greater injury than that suffered by the public generally. Hopkins v. McCullough, 35 Cal. App. 2d 442, 454, 95 P.2d 950, 956 (1939); Kappadahl v. Alcan Pac. Co., 222 Cal. App. 2d 626, 643, 35 Cal. Rptr. 354, 365 (1963).

69. Violation of city or county zoning ordinances is traditionally a misdemeanor, although in recent years in California a trend reducing such violations to infractions has developed. This trend is occurring to expedite enforcement. The penalty for an infraction can only be a fine, and therefore no trial by jury or public defender is available to the defendant. CAL. PENAL CODE § 19c (Deering 1980). Experience shows courts are more willing to convict and fine zoning ordinance violators than are juries, and city and county prosecutors are willing to trade the lesser penalty for the greater certainty of conviction.

70. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 517, 522 P.2d 12, 19, 113 Cal. Rptr. 836, 843 (1974).

agree. Again, this is not practical in a large, established community. Restrictions in the form of equitable servitudes would be effective, but only in new developments where a common grantor can include restrictions in all the deeds. If an existing community desired to impose age restrictions, equitable servitudes would be useless. Thus, the only alternative for an existing community is zoning. The local legislative body could determine that the populace desired such restrictions and then pass appropriate ordinances which would bind the entire community.

As stated above, zoning is also preferable due to the relative ease of enforcement. Usually a local enforcement agency such as a district attorney or city attorney prosecutes violations. Enforcement can be brought about on an informal basis before filing a complaint. If this proves unsuccessful, criminal penalties can be sought. Other alternatives require private enforcement and resources in almost all cases, and have usually proved impractical over time for that reason alone.

Zoning also provides a method by which exceptions can be granted in unusual cases. A frequent criticism of age restrictive zoning is that the residents would not be permitted to have their grandchildren live with them should the parents of the grandchildren die. When the zoning ordinance is drafted, it can contain provisions for such contingencies by including a method by which variances can be granted in these special circumstances. Absent any such provision, variances can still be granted as the need arises.[71] Exceptions, when needed, would be harder to obtain if any of the alternative methods were chosen to create an age restricted community. All are private agreements, and all parties would have to consent to such exceptions. If one owner in a tract governed by an equitable servitude refused to cooperate, it is likely the person needing the exception would be unable to obtain it, at least without incurring substantial litigation expense.

Finally, if after a period of time, the community decides that it no longer desires age restrictions, a zoning ordinance can be easily repealed or amended. Equitable servitudes in the form of covenants, conditions, and restrictions are not as easy to rescind, because agreement must be unanimous. Amending covenants, conditions, and restrictions would be virtually impossible if there is a large population in the area affected. Zoning would permit a majority of an area's popula-

71. State law requires that variances to zoning ordinances be available under certain, closely delineated circumstances. CAL. GOV'T CODE § 65906 (Deering 1980). *See* Essick v. City of Los Angeles, 34 Cal. 2d 614, 213 P.2d 492 (1950); *Cf.* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

tion to determine the character of their community, while the use of the alternatives may permit a small minority to dictate their concepts of restricted uses to the rest of the community.

V. AGE RESTRICTED ZONING IN PRACTICE

As a society we are maturing, and as a people we are aging.[72] While the trend has slowed somewhat in recent years, planners must still face projections that twenty years hence the number of people in the United States aged sixty years and older will be about forty-one million, an increase of more than one-quarter since 1975.[73] As their numbers grow, older Americans will demand and receive an increasing amount of governmental attention. Land use decisions to protect and preserve the chosen lifestyle of senior citizens are already being sought and debated, and the law appears to be moving in the direction of allowing protective planning such as senior citizen zoning and adults-only apartments to be put into effect by cities and counties.

As discussed briefly above,[74] the state of New Jersey is in the forefront of this debate. The advocates of open and reasonably priced housing have faced off against local governmental and senior citizens groups seeking to protect their rights to live in special areas responsive

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72. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, DEMOGRAPHIC ASPECTS OF AGING AND THE OLDER POPULATION IN THE UNITED STATES 3-11 (rev. January 1978).

73. The population 60 and over numbered 4.9 million in 1900. By 1930, the group had more than doubled in size to 10.5 million. It approximately tripled again to 31.6 million in 1975. In the year 2000, the number is expected to be about 41 million, or over one-quarter greater than in 1975. Decennial growth rates for the population 60 and over approximate 30 percent between 1920 and 1960, but then they began a declining trend which is expected to bring the figure down to about 4 percent in the decade 1990-2000.

Id. at 3. Our older population continues to grow as a share of total population:

> From 1900 to 1975 the proportion of the population 60 years and older more than doubled. . . . Whether this group's share will decline, remain about the same, or continue to increase in the future depends principally on the future course of fertility. The proportion is now expected to fall between 14.1 percent and 16.6 percent at the end of this century.

Id. at 6. This decline is due to the rapid drop in the number of births during the '20's and the Depression, and the fact that this smaller number is now moving into senior citizen status. *Id.* at 4. While the absolute number of older persons is still rapidly increasing, it is interesting to note this caveat by the Census Bureau based on its projections:

> Obviously, statements sometimes made in the press and elsewhere that over one-third of the population of the United States will be over 65 years of age in another quarter to half century are unfounded. This would be "possible" only if fertility continued at replacement or subreplacement levels and death rates at the higher ages were reduced to zero or near zero in the next few years.

Id. at 10.

74. *See* notes 43-47 *supra* and accompanying text.

to their special needs. In two 1976 companion cases, the Supreme Court of New Jersey provided a useful and detailed analysis and defense of the legitimacy of age restricted zoning.

In *Shepard v. Woodland Township Committee & Planning Board*,[75] the court upheld zoning for planned unit developments for the elderly as a constitutional exercise of the police power. The court in a unanimous decision stated that the zoning ordinance "serves the peculiar housing needs of the elderly by authorizing the construction of specially-designed housing for this segment of the population. In so doing, it clearly promotes the general welfare of both the township and the region at large."[76]

The Woodland Township ordinance restricted permanent residency in senior citizen communities to persons at least fifty-two years old, except that one child above the age of nineteen could reside with his parents or guardians. It further limited full time occupancy of any dwelling unit to no more than three individuals.[77] These age and occupancy qualifications were specifically validated by the court. In declining to adopt a narrow view of the zoning power which would prevent municipalities from regulating, at least collaterally, "those who may use the land" as well as the more traditional regulation of "the *physical* and *structural* aspects of land use," the court concluded that "ordinances which regulate use by regulating the identified user are not inherently objectionable so long as the distinctions which they draw are reasonable and the conditions they impose bear a real and substantial relationship to regulation of land use."[78]

As a final display of its willingness to practice judicial restraint and avoid the essentially political questions which underlie age restric-

75. 71 N.J. 230, 364 A.2d 1005 (1976).

76. *Id.* at 243, 364 A.2d at 1012-13. The ordinance enacted by Woodland Township contained "height and bedroom restrictions" to "assure the construction of small, easily manageable, single-level units with a minimum of stairs. . . ." *Id.* at 240, 364 A.2d at 1011. Recreation facilities such as clubhouses, shuffleboard courts and swimming pools were also mandatory under the ordinance. These special design and improvement requirements were important to the New Jersey Supreme Court in sustaining the zoning. The court quoted at unusual length from sociological and demographic works regarding the specific needs of the elderly and the retired, apparently as part of its examination of the rational relationship between the restrictions in the ordinance and the appropriate state interest furthered thereby. *Id.* at 247, 364 A.2d at 1015. The opinion provides excellent sources for cities and counties seeking factual material on which to base an age restriction ordinance. *Id.* at 239-40 n.7, 240-41 n.8, 241-42 nn.9 & 10, 364 A.2d at 1010 n.7, 1011 n.8, 1012 nn.9 & 10.

77. *Id.* at 244, 364 A.2d at 1013.

78. *Id.* at 244-45, 364 A.2d at 1013 (citing Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 278-79, 364 A.2d 1016, 1032 (1976)).

tion ordinances, the court quoted at length from Norman Williams' treatise on American land planning law:

> [L]and use decisions often have major social consequences, and these latter are often quite as important as their physical impact; they may in fact be more important. It is completely unrealistic, and in fact a little absurd, to try to insist that, in making such decisions, public officials should ignore such consequences; they will quite reasonably point out that it is their responsibility to take them into account. . . . *Again, it is a major question to decide whether the aged should live in special segregated areas, or scattered among the general population; a decision on this is likely to be phrased in terms of a land-use decision. Why should the courts invoke judge-made policy to preclude responsible local officials from implementing such policies?*[79]

In a unanimous companion decision, the New Jersey Supreme Court upheld a Weymouth Township ordinance creating a zoning district permitting mobile home parks for the exclusive use of the elderly.[80] The court again reviewed demographics,[81] sociology,[82] and the special needs of the elderly,[83] and found that the ordinance promoted

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79. *Id.* at 248, 364 A.2d at 1015-16 (emphasis in original) (quoting 1 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 1.11, at 22 (1974)).

80. Taxpayers Ass'n v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976).

81. *See id.* at 266-67, 364 A.2d at 1025-26.

82. The court commented on the special social and psychological needs of the elderly:

> The elderly are apt to be less mobile than younger persons. They may have lost friends and relatives of comparable age and background. As a result, readily accessible companionship becomes increasingly important to them. In addition, the fact that children may have moved away sometimes causes elderly persons to seek an age-homogeneous environment to replace broken family ties. . . . Such an environment also helps older citizens to adjust to the social and psychological effects of retirement. . . . If the retiree decides to move, he may seek an adjustment not only in his housing consumption but also in his residential or community environment. He may well seek out a community where leisure is not denigrated and where peer contact is maximized. The importance of the psychological aspects of retirement suggests that retired adults may consider the environmental aspects of housing as much if not more than structural aspects. Thus, leisure oriented, age-defined housing environments are particularly attractive to the retired and elderly. . . .
>
> In addition, age-homogeneous communities afford a sense of security to their residents and thereby reduce the fear of criminal victimization. . . . Finally, these communities facilitate social relations and increase opportunities for the peer contact which many older persons need and desire. . . .

Id. at 270-71, 364 A.2d at 1027-28 (citations omitted).

83. The court recognized that there are special economic and physical needs in providing housing for the elderly:

the general welfare[84] on a rational basis.[85] In addition, the court expressed its concern about the relationship between age restricted zoning and the type of exclusionary zoning it struck down a year earlier in its *Mount Laurel* decision,[86] but concluded that the needs and desires of the elderly are as appropriate a consideration for municipal land planners as are the needs of younger families with children.[87]

> In part the need of the elderly for specialized housing results from the fixed and limited incomes upon which many older persons are dependent. . . . Because many of the elderly derive their incomes from pensions, social security or other government benefit programs, or from interest on savings or income-producing securities, they are among those hardest hit by inflation and the current statewide housing shortage. . . . Consequently, many of the elderly cannot afford housing specifically designed for their needs, and in many cases are actually obliged to live in substandard housing. . . . Many others must devote a disproportionate amount of their available resources to housing costs. . . . Moreover, those who are homeowners must often forego proper maintenance and upkeep of their homes. . . .
>
> In part, though, the need for specialized housing transcends economic status and results from the particular physical and social problems of the elderly. The desirability of housing to meet the special physical needs of the elderly is summarized in a report by the New Jersey Office on Aging:
>
> > The needs of the elderly differ from those of the rest of the general populace; muscles and skin become less pliable with increased age, bones become more brittle, and hearing and sight begin to fail. The older person has difficulty in performing normal home maintenance tasks.
>
> To the elderly, accidents in the home are a real danger. Falls, for example, are the leading cause of accidental death for those 65 and over. Throw rugs, stairs and many other objects can cause serious accidents. Older people have different needs, and housing is one area where special consideration must be given. Plans should include more and wider walkways with fewer stairs, an interior and exterior designed to permit easy social contact, provision for common rooms, short distances between buildings, easy refuse collection, little maintenance, and well-lighted walkways and halls.
>
> In addition, housing designed for the elderly should include such facilities as a central dining room, health care facilities and recreational facilities. . . .

Id. at 268-69, 364 A.2d at 1026-27 (citations omitted).

84. *Id.* at 275, 364 A.2d at 1030.

85. Relying on Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), for the proposition that housing is not one of the fundamental rights protected by the fourteenth amendment, the court concluded that "neither 'fundamental' rights nor 'suspect' criteria for classification are implicated in the present matter." Therefore, "plaintiffs have the burden of demonstrating herein that the classification lacks a rational basis." *Id.* at 283, 364 A.2d at 1034. The court goes on to review state and federal authorities and to determine that age restrictions on housing occupancy can have a rational basis. *Id.* at 284-87, 364 A.2d at 1035-37.

86. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975). In *Mount Laurel*, the court concluded that a zoning ordinance that permitted only single-family detached dwellings with restrictions on lot size was contrary to the general welfare. *Id.* at 185, 336 A.2d at 730. A municipality may not exclude low and moderate income housing by such a system of land use regulation. *Id.* at 174, 336 A.2d at 724.

87. The court in *Weymouth* distinguished *Mount Laurel*'s invalid single-family ordinance:

California case law has not developed the extensive authority for age restricted zoning that New Jersey has, perhaps because the concept has been implemented so infrequently in California that no court tests have yet reached the appellate level. However, there is no reason why the New Jersey authorities are inappropriate. The basic constitutional and statutory structure enabling local governments to zone for the general welfare is similar in both states. The judiciary of both states has taken a similarly broad approach to the review of local zoning ordinances. Therefore, it appears that in California, land use restrictions based on age are permissible if due process and equal protection concerns are met. In the absence of preemption, a legislative body is free to serve its own particular view of the public interest, and, within the

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> Our decision in *Mt. Laurel* requires developing municipalities to provide, by their land use regulations, the opportunity for an appropriate variety and choice of housing for all categories of persons who may desire to live there. . . .
>
> This task would be impossible if the municipality could not design its land use regulations to provide for the unsatisfied housing needs of specific, narrowly defined categories of people. While we were specifically concerned in *Mt. Laurel* with the needs of younger families with children, the elderly are also a segment of the population whose needs and desires are appropriate considerations for municipal land use planning. Therefore, to the extent that such needs exist, planning housing developments for the elderly may serve an inclusionary, rather than exclusionary function. . . .

71 N.J. at 293-94, 364 A.2d at 1040 (citations omitted).

It is important to note that plaintiffs in *Weymouth* apparently did not attack the ordinance on *Mount Laurel*-type exclusionary grounds. In spite of this, the New Jersey Supreme Court reconciled its *Weymouth*, *Shepard*, and *Mount Laurel* holdings and at the same time "reemphasize[d] [its] concern about the exclusionary potential which zoning for senior citizen housing possesses." *Id.* at 295, 364 A.2d at 1040-41. Another New Jersey plaintiff may feel invited by this language to test an age restricted zone on exclusionary grounds.

In a more recent New Jersey test of a local zoning ordinance, State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979), an ordinance which restricted housing occupancy to no more than four unrelated individuals was struck down by the same court as a violation of due process under the New Jersey Constitution. By using the state's due process clause, the court was able to disregard the United States Supreme Court's validation of a somewhat similar ordinance in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In *Baker*, the court found that an ordinance requiring set biological or legal relationships among occupants of one household infringes unnecessarily upon freedom and privacy, while at the same time there are more effective traditional methods of controlling congestion and overcrowding, the ostensible purposes of the ordinance. 81 N.J. at 110, 114, 405 A.2d at 373, 375. In the *Baker* opinion, *Weymouth* is mentioned only in passing and *Shepard* not at all. Thus, it is probably fair to say that the New Jersey Supreme Court does not consider age zoning as a restriction "based upon legal or biological relationships" permissible within a home, but instead as a milder restriction on those who may use land for a home in a certain area. *Id.* at 111, 405 A.2d at 373. Once the family unit is established in such an area pursuant to such age restriction, the government cannot intrude into the biological or legal relationships between members of that family, at least in New Jersey. Whether swinging senior singles or fertile octogenarians are free to heed this implied invitation to establish their own communes within age restricted communities will depend on subsequent case law or statutory developments.

limits that have been discussed, legislate in the area of age restricted land use.

Two recent California developments in this area are of interest in reviewing the nature and extent of this broad authority. First, a zoning ordinance has been successfully utilized to insure an age restricted retirement community for senior citizens in Sun City, California. Second, local legislation regulating adults-only apartments has been adopted and state legislation prohibiting such apartments has been defeated.

A. Sun City, California

In the early 1960's, the Del Webb Corporation began the development and sale of homes and lots in a proposed new retirement community in western Riverside County. Called "Sun City" and patterned after similar senior citizen developments in Arizona and Florida, the concept proved successful. From a population in the area of well under 1,000 in 1960, the community had grown to almost 8,000 by early 1978.[88] Residents support a full range of recreational activities traditionally enjoyed by retired persons, such as golf, swimming, shuffleboard, bowling, whist drives, and bridge and bingo tournaments as well as many other similar events organized under the auspices of the local community center. The electric cart and the three-wheeled cycle are common sights on the long, winding residential streets of single-family homes and duplexes with minimum maintenance landscaping. A quiet, relaxed atmosphere prevails.

Residents realized their haven was threatened in 1976 when they discovered that they had no legal means to assure that Sun City would continue as a retirement community populated by senior citizens. The original developers, apparently because of legal concerns,[89] had sold

88. 1978 Riverside County Special Census Report, at 15; Interview with Mark Bayls, Supervising Planner, Riverside County Planning Department, in Riverside, March 19, 1980. According to the same Special Report, in 1978 there were 4,949 dwelling units in the Sun City area, with a resulting population per dwelling unit of 1.59 persons. This is one of the lowest ratios in Riverside County and demonstrates a typical characteristic of a senior citizen community.

89. Lazzareschi, *It Isn't that Sun City Folks Hate Children. . .*, Riverside Press-Enterprise, May 15, 1977, at C-1, col. 2. Such concern has been widely shared among developers of retirement communities. See, for example, the covenants, conditions, and restrictions on Woodburn Senior Estates No. 7, a community for older persons in Woodburn, Oregon, as recorded on May 11, 1966, at v. 616, p. 456, Deed Records, Marion County, Oregon, along with the letter from Henry Dobson, Director of Senior Estates Golf & Country Club, to Melville Hirschi, Esq., January 14, 1977 (on file at the office of the Loyola Law Review); the covenants, conditions, and restrictions in 1966 contained no age restrictions, and Mr. Dob-

the original lots and homes without deed restrictions covering age or children. Subsequent purchasers had continued the practice, and even though all concerned had shared the concept of Sun City as a senior citizen community, there were no enforceable guaranties that this would continue. As residents began to read of housing shortages and housing prices for young families in the Los Angeles metropolitan area just over an hour's drive to the west, and as they began to see children and teenagers in residential areas of town, they became increasingly concerned about their ability to protect the quality and style of life they thought they had bought and assured.

These concerns were translated into political action. Despite its name, Sun City is not a city under California law; instead, it is an unincorporated area of the County of Riverside. As such, the County Board of Supervisors makes land use policy and zoning decisions for the area. In 1977, hundreds of Sun City residents petitioned the county for the establishment of an age restricted zone and the imposition of that zone on the residential areas of their community. Over the opposition of the Planning Commission, its staff, and the County Counsel,[90] the Board of Supervisors in early 1978 enacted an ordinance zoning Sun City's residential areas to require occupancy by residents at least one of whom is fifty years of age or older. Further, the ordinance prevents persons under eighteen years of age from residing permanently in the area. The ordinance was enacted as a traditional zoning regulation pursuant to the police power, and applies the zone text set forth as Section 18.7 of Ordinance 348, the Land Use Ordinance of the County of Riverside, California.[91]

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son eleven years later cited continuing concerns on the part of counsel and stated that no protective amendments had yet been made. The authors hope that this article will assist in allaying such fears.

90. This opposition was centered on objections to "social zoning" and enforcement concerns by the Planning Department (Letter from Riverside County Planning Department to Riverside County Board of Supervisors, July 6, 1977) and on doubts as to legal validity, predictions of enforcement problems, concerns about a "proliferation of requests" from other groups, and on the fact that Sun City already existed, would have to be rezoned, and that allegations by existing landowners of an unlawful taking without just compensation could then be made (Letter from Office of Riverside County Counsel to Riverside County Board of Supervisors, July 7, 1977) (both letters on file at the office of the Loyola Law Review).

91. The new zone text allowing zoning for senior citizen developments follows an overlay concept and reads:

> Whenever a planned residential development for senior citizens has been constructed . . . , or, whenever the Board [of Supervisors] determines that an area should be considered for senior citizen zoning, the area may be set for hearing . . . to consider zoning that would limit the occupancy of dwelling units . . . to the

The ordinance has not been challenged, and no prosecutions for its violation have occurred.[92] The streets of Sun City remain quiet, and the overwhelming majority of residents appear to be pleased with the new security afforded to the chosen uses of their land.[93]

B. Adults-only apartments

Accepting the legal premise that local California governments can legislate in the area of age restricted land use can have major implications for residential land uses other than retirement communities. Just as the Sun City property owner can have his expectations regarding the age of his neighbors and his successors in title protected by a Riverside County ordinance, so can a Los Angeles property owner have his expectations for occupancy of his apartment house by adult tenants thwarted by a local ordinance. The same legal basis which allows age restricted zoning in Sun City would allow adults-only apartments to be prohibited by ordinance in the city of Los Angeles.

There is of course a real difference between a traditional zoning ordinance which permits only certain uses of land within a given geographic area, and an anti-discrimination ordinance which prohibits restrictions on the use of a particular parcel of land. However, both are grounded in the police power, and both as enacted will probably contain remarkably similar provisions regarding the need for the law in question to protect the public welfare as the particular city council or county board of supervisors views it.[94]

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hereinafter listed minimum ages. Whenever the zoning symbol in a zone classification . . . is followed by the initials "S.C.D." (Example: R-1-S.C.D.), each dwelling unit in the area so zoned, that is occupied, shall be occupied by at least one person not less than 50 years of age and no person under 18 years of age shall permanently reside in any dwelling unit in the zoned area.

It was added to the Land Use Ordinance by Ordinance No. 348.1626, which went into effect March 13, 1978. The rezoning of Sun City was effected by Ordinance No. 348.1670, which went into effect October 10, 1978.

92. Interview with The Hon. Clayton Record, Riverside County Supervisor representing Sun City, in Riverside (January 10, 1980).

93. *Id.*

94. In *Consolidated Rock*, the California Supreme Court stated that the "primary purpose of comprehensive zoning is to protect others, and the general public, from uses of property which will, if permitted, prove injurious to them." 57 Cal. 2d at 524, 370 P.2d at 348, 20 Cal. Rptr. at 644.

Further, both the police power and the protection of others from uses of property which would prove injurious underpin the local ordinances now being considered and adopted to prevent adults-only apartments. See, for example, the typical findings made by the Santa Monica City Council in its Ordinance 1139, entitled "To Regulate Discrimination in Housing Based on Age" (the existence of "arbitrary discrimination against tenants with minor children poses a substantial threat to the public health and welfare of a large segment of the

Legislation over the past twenty years has greatly limited landlords' discretion in choosing tenants. Discrimination between and among tenants based upon their sex, color, religion, ancestry, or national origin is illegal in California.[95] One of the remaining legitimate grounds for choice is age.[96]

Many landlords[97] have decided that they can obtain either lower

community, namely, families with children"). SANTA MONICA MUNICIPAL CODE § 4700(a) & 4700(b). *See also* CITY OF DAVIS CODE § 12A-17, CITY OF LOS ANGELES MUNICIPAL CODE § 45.50; SAN FRANCISCO MUNICIPAL CODE (POLICE CODE) art. 1.2, § 100; and CITY OF BERKELEY MUNICIPAL CODE § 13.24.010. This language owes as much to *Miller* and to *Consolidated Rock* as does the typical recital in a zoning ordinance.

95. CAL. CIV. CODE § 51 (West 1979), often cited as the Unruh Civil Rights Act, states that:

> All persons are free and equal, and no matter what their sex, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, privileges, or services in all business establishments of every kind whatsoever.
>
> This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin.

CAL. HEALTH & SAFETY CODE §§ 35700-35745 (West 1979), now called the Fair Housing Law and formerly known as the Rumford Fair Housing Act, prevents discrimination in housing on the basis of race, color, religion, sex, marital status, national origin, or ancestry.

96. Neither the Unruh Civil Rights Act nor the Fair Housing Law prohibit landlord-tenant discrimination on the basis of age. CAL. CIV. CODE § 51; CAL. HEALTH & SAFETY CODE § 35742; Marina Point, Ltd. v. Wolfson, 97 Cal. App. 3d 278, 285-89 (1979), *hearing granted*, Dec. 6, 1979. *See* Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 703, 98 Cal. Rptr. 644, 645 (1971) (regulation of tenants' ages is apparently still viable). For an amplification of the kinds of discrimination permitted and prohibited by the Unruh Act, *compare* Newby v. Alto Riviera Apts., 60 Cal. App. 3d 288, 131 Cal. Rptr. 547 (1976) (serving a tenant with a notice to quit because of her activities in organizing tenants to protest a rent increase not prohibited) *with In re* Cox, 3 Cal. 3d 205, 216-18, 474 P.2d 999-1000, 90 Cal. Rptr. 24, 31-32 (1970) (exclusion of prospective customer because of his long hair and unconventional dress "arbitrary" and therefore prohibited).

97. There is a shortage of rental housing available in California to tenants with children. A 1977 study by the staff of the Southern California Association of Governments (SCAG) concludes that more than half of all renter families with children are inadequately housed, and that this housing problem affects nearly one-fourth of *all* families with children. SCAG INADEQUATELY HOUSED FAMILIES WITH CHILDREN 1-8 (Sept. 1977) (a supplemental staff report to SCAG's Regional Housing Allocation Model). A group known as the Fair Housing for Children Coalition has reported that 71% of the City of Los Angeles' apartment units are "off limits to families with children. . . ." The Apartment Association of Los Angeles disputes this statistic; its spokesman puts the figure at 35%. Los Angeles Times, Jan. 15, 1980, at 1, col. 1. Findings by the City Councils of Davis and Berkeley and the County Board of Supervisors of San Francisco indicate similar shortages in Northern California. CODE OF THE CITY OF DAVIS § 12A-17; BERKELEY MUNICIPAL CODE § 13.24.101; SAN FRANCISCO MUNICIPAL CODE (POLICE CODE) pt. II, ch. VII, art. 1.2, § 100.

The shortage of rental housing apparently extends nationwide and faces all tenants, not just those with children. "The nation's inventory of rental housing is declining. Michael Sumichrast, chief economist of the National Association of Home Builders, has calculated that the supply is diminishing at a rate of 2% a year." ROBERT A. MCNEIL CORP., THE

vacancy rates or higher tenant satisfaction and rents by restricting their apartments to occupancy by adults.[98] At the same time, the number of families with children seeking "to find adequate shelter at reasonable cost in a community of their choice"[99] has increased dramatically, and the two competing interests are leading to repeated political confrontations.[100]

The cities of Los Angeles, Santa Monica, Berkeley, and Davis, the City and County of San Francisco, and the County of Santa Clara have enacted ordinances prohibiting adults-only apartments.[101] The County of Los Angeles has considered and rejected such an ordinance, thereby at least by implication allowing whatever landlord-tenant age discrimination exists in that jurisdiction to continue. At least two other jurisdictions, the County of Riverside and the State of Arizona, have enacted laws expressly allowing landowners to discriminate on the basis of age.[102]

AMERICAN HOUSING MARKET: A NATIONAL VIEW 5 (1979). As an example of this decline, the McNeil report states that the "increase in non-subsidized, privately owned rental units in 1978 was less than the number of units lost through conversion to condominiums and by other changes in the available supply of rental housing." *Id.* The reason for this decline is apparently found in the greater financial benefits which can be realized by developing new single-family homes instead of apartments. The median sales price of new homes has increased from $18,000 in 1963 to $62,400 in April of 1979. This increase was greater than the rise in construction costs, cost of living, or median income during the same period. Conversely, rents have increased more slowly, and have fallen behind the rate of inflation. *Id.* at 5-8. With the dual spectres of rent control and record high interest rates, it is not difficult to predict which form of housing the self-interested developer will choose to build.

98. Such exclusion of children is generally accomplished in the lease document either by indirection (i.e., "The premises are to be used as a private residence for not more than —— adults and for no other purpose without the written consent of the landlord") or by bold assertion (i.e., "No children or pets"). Compare the lease provision used by the parties in Marina Point Ltd. v. Wolfson, 97 Cal. App. 3d at 281, with Section 7 of the 1978 Revised Form Lease and Section 7 of the 1977 Revised Form Rental Agreement promulgated by the California Association of Realtors, 505 Shatto Place, Los Angeles, California 90020.

99. Senate Bill 440 *as amended*, Reg. Sess. 2 (1979-80).

100. Packard, *The Graying of America: Beyond the Baby Boom*, Los Angeles Times, Dec. 4, 1979, part V, at 1, col. 4. *See also Campaign Against Adults-Only Housing Growing in California*, Los Angeles Times, Oct. 14, 1979, part I, at 3.

101. Los Angeles Times, Mar. 9, 1980, at 2, col. 1.

102. Section 18.7, Ordinance 348, County of Riverside, California; ARIZ. REV. STATS. § 33-303B (1975). The Arizona statute states:

> No person shall rent or lease his property to another in violation of a valid restrictive covenant against the sale of such property to persons who have a child or children living with them nor shall a person rent or lease his property to persons who have a child or children living with them when his property lies within a subdivision which subdivision is presently designed, advertised and used as an exclusive adult subdivision. A person who rents his property in violation of the provisions of this subsection is guilty of a petty offense.

In order to enact a uniform rule statewide and to protect tenants with children, seven California state legislators with urban constituencies introduced Senate Bill 440 on February 22, 1979.[103] The legislation attempted to amend the state's Unruh Act to add discrimination against tenants with minor children to the list of prohibited choices by landlords. Similar bills had failed several times previously,[104] and Senate Bill 440 proved no more successful. Despite limiting amendments designed to improve its political palatability, the bill languished in the State Senate's inactive file for several months while its author attempted to marshall support. Finally, when time was about to run out for 1979 bills to pass their house of origin, Senator Roberti brought the bill before the Senate as a special order of business on January 25, 1980. This red carpet treatment failed to impress suburban and rural legislators, and the bill failed to pass. Despite subsequent efforts to resuscitate the bill, it later died for another session.[105] Therefore, local ordinances remain the only means in California to prohibit residential age restrictions, just as they are the only practical means of enforcing residential age restrictions.

VI. CONCLUSION

There is ample legal authority for a local or state legislative body either to enact residential age restrictions or to prohibit such restrictions. For reasons of political accountability and economy of enforcement, local zoning ordinances appear to be the best means to achieve or block these restrictions. Courts so far have shown a willingness to uphold such ordinances when they are properly enacted and supported.

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103. The principal author of this legislation is Senator David Roberti (D-Los Angeles).

104. Senate Bills 359 and 1688 of the 1977-78 California Legislative Session and Assembly Bill 1954 of the 1975-76 Session.

105. The state Senate vote on S.B. 440 was 18 ayes and 17 noes. Senate Weekly History, Jan. 31, 1980, at 260. Twenty-one votes, a simple majority of the Senate, are needed to pass out a bill.

The findings set forth in the bill are similar to the findings made by California cities and counties in their own ordinances prohibiting age restrictions on apartments. Family stability, protection against arbitrary discrimination, and preservation of natural community diversity are the stated goals of the bill. It is hard to believe that a majority of the members of the California State Senate does not support these goals. Therefore, it is at least possible that some of the senators not supporting S.B. 440 felt the matter better handled at the local level by zoning authorities closer to individual neighborhoods and community concerns. It is also possible that these senators read the Field Research Corporation poll which was conducted for the California Apartment Association and was disseminated one week before the vote on S.B. 440. Mervin Field stated therein that 75% of the Californians polled opposed the prohibition of adults-only apartments, and 85% supported the rights of adults to live in such apartments. Los Angeles Times, Jan. 17, 1980, part I, at 28, col. 1-2.

While all prohibitions of adults-only housing to date in California have contained recitals against discrimination and therefore do not appear similar to zoning ordinances, they must be grounded in the police power in order to stand. Therefore, they are permitted forms of local regulation on the same basis as is zoning. Such ordinances may prove more viable when attacked if they have been expressly enacted as zoning ordinances.