Boston College Law Review

Volume 12
Issue 5 *Number 5*

Article 7

4-1-1971

Suburban Apartment Zoning: Legality and Technique

Bernard J. Cooney

SUBURBAN APARTMENT ZONING: LEGALITY AND TECHNIQUE

I. INTRODUCTION

In the recent decision of *In re Girsh*,[1] the Supreme Court of Pennsylvania held that a township zoning ordinance which failed to provide for apartments was unconstitutional. Although not explicitly prohibited by the ordinance, apartments were not a permitted use in any of the zoning use districts, and, on petition, the township had refused to amend the ordinance. The court noted that although permission to build apartments could be granted by the zoning board of appeals upon special request for a variance of the zoning ordinance, such a variance would be allowed only on narrow grounds.[2] By refusing to allow apartment development as part of the zoing scheme, the township was, in effect, zoning out everyone who could live in the township if apartments were available. In striking down the ordinance, the court emphasized the intent to exclude apartment dwellers. The decision departed from prior case law by stressing the motive and effect of the ordinance, rather than attempting to discern whether the ordinance was a proper exercise of the police power. The purpose of the ordinance—the exclusion of apartment dwellers—was unconstitutional. Therefore, the argument that this exclusionary zoning technique protected the character of the municipality was not recognized by the court to be sufficient justification for the zoning ordinance.[3]

The rationale of the *Girsh* decision contrasts sharply with the language in the case of *Village of Euclid v. Ambler Realty Co.*,[4] in which the Supreme Court of the United States, for the first time, upheld the exercise of the police power by a local government in the area of zoning. In that case, the Court held that the segregation of residential, business and industrial land uses by zoning would promote the general welfare:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.[5]

Fears similar to those expressed by Justice Sutherland in *Euclid* continue to find expression in local suburban zoning ordinances. As a result, many suburban towns are "underzoned" for multi-family units,

---

1 437 Pa. 237, 263 A.2d 395 (1970).
2 Id. at 240-41, 263 A.2d at 396-97.
3 Id. at 242, 263 A.2d at 398.
4 272 U.S. 365 (1926).
5 Id. at 394.

that is, they either have no permitted use for apartments in their ordinance or they zone a very small percentage of the available land for multi-family units.

The decision of the Pennsylvania court in *Girsh* raises serious questions concerning the continuing validity of exclusionary zoning ordinances and implies that courts should, and will, look beyond the boundary lines of the particular municipality in evaluating the effect of a zoning ordinance. This decision also indicates that the equal protection clause of the Fourteenth Amendment may be applied to zoning ordinances.

It is the purpose of this comment, therefore, to examine the historical and legal development of zoning as a technique to control land use, the constitutional limits imposed on zoning by the courts, the various zoning methods employed by municipalities to provide for multi-unit dwellings, the treatment of these techniques by the courts and their adaptability for present and future use in a suburban setting.

II. Historical and Legal Development of Zoning

A. *Pre-Euclid*

In the early 1900's, the laissez-faire legislative attitude toward business was reflected in the courts in cases involving zoning ordinances. Any ordinance that interfered with the use of private property was considered outside the police power of the state and, therefore, invalid, provided that the use of the property did not "produce injurious consequences, or infringe the lawful rights of others."[6] The police power, which derived from the necessity for effective state and local government, and not from a specific constitutional provision,[7] was limited to regulating only those uses of land or buildings which were found to be detrimental to the public health, safety, morals or material welfare.[8] If the police power exceeded this limit, the ordinance was struck down as a violation of the due process clause of the Fourteenth Amendment.[9] What was detrimental to the public welfare depended upon the particular court's view of the necessity for, or desirability of, planning by the local community for its physical growth. Some courts, for example, held that zoning ordinances restricting businesses to specified districts were enacted solely in furtherance of aesthetic considerations and, therefore, did not fall within the exercise of the police power;[10] other courts found that zoning restrictions secured the public

[6] State ex rel. Lachtman v. Houghton, 134 Minn. 226, 237, 158 N.W. 1017, 1021 (1916); See also Willison v. Cooke, 54 Colo. 320, 328, 130 P. 828, 831 (1913).

[7] State ex rel. Penrose Investment Co. v. McKelvey, 301 Mo. 1, 16, 256 S.W. 474, 476 (1923).

[8] Id. at 20-21, 256 S.W. at 477.

[9] Calvo v. City of New Orleans, 136 La. 480, 67 So. 338 (1915); People ex rel. Friend v. City of Chicago, 261 Ill. 16, 103 N.E. 609 (1913).

[10] 136 La. at 482, 67 So. at 339; 261 Ill. at 21, 103 N.E. at 612.

welfare, with any aesthetic benefit being merely incidental, and, therefore, upheld the ordinance.[11]

As more zoning ordinances were adopted by local governments, courts faced with this *fait accompli* were reluctant to invalidate the ordinances since they appeared to be successful and were gaining public support.[12] Indicative of the trend away from the early laissez-faire attitude, was a decision in 1925 by one state court which had before it a challenge to a city ordinance that prohibited the erection of multi-unit dwellings. The court noted that the expanding concept of general welfare now included economic welfare, public convenience and general prosperity, and concluded that the police power must also be expanded to meet this evolving notion of public welfare.[13] In upholding the city ordinance, the court construed the police power, as expressed in zoning regulations, as a constructive and affirmative force in promoting the general welfare, and not merely as a negative power to suppress offensive or harmful uses of property.[14]

Another state court in 1925[15] stated that

> [t]he orderly and advantageous development of the City . . . and the welfare of its citizens would be promoted by a fundamental division of the city into districts devoted respectively to business and residential purposes . . . .[16]

This same court went on to justify the exclusion of apartments from residential districts by stating that they might overtax the sewage and water systems, increase traffic hazards, create a greater possibility of fire and epidemics, and thereby impair the advantage and value of private residents.[17] This case presents a typical example of the problem faced by the courts in determining what is public welfare and what is private advantage. In other words, it is unclear whether the court was concerned with the effect of apartments on the public health, safety

---

11 Pritz v. Messer, 112 Ohio St. 628, 638, 149 N.E. 30, 35 (1925).

12 Miller v. Board of Pub. Works, 195 Cal. 477, 485, 234 P. 381, 384 (1925). The court stated:

> There can be no question but that there is a prevailing and preponderating sentiment in favor of necessary and reasonable zoning. The growth of this sentiment has been rapid and widespread. The first comprehensive zoning ordinance was that of New York City enacted in 1916. According to a recent bulletin of the United States Department of Commerce, 35 states and the District of Columbia have adopted this form of regulation; 221 municipalities have been zoned and over 22,000,000 inhabitants, aggregating 40 per cent of the urban population of this country, are living in zoned territory. The rapidity of the growth of the sentiment in favor of comprehensive zoning, coupled with the extensive and successful application of the idea, are evidence of its present and potential value for the promotion and perpetuation, along broader and better lines, of the moral and material welfare of a people.

13 Id. at 484, 234 P. at 383.

14 Id. at 488, 234 P. at 384.

15 In re Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

16 Id. at 297, 150 N.E. at 122.

17 Id.

and welfare or their effect on the value of private property. Possibly the court was attempting to show how the public welfare is harmed by pointing to the impairment in value of private residences. This confusion as to what is indicative of an impairment or promotion of public welfare continues to present difficulty in zoning litigation.[18]

In *Buchanan v. Warley*,[19] the Supreme Court of the United States invalidated racial zoning as an illegitimate exercise of the police power and as a violation of rights protected by the Fourteenth Amendment. The challenged ordinance made it unlawful for any black person to move into any residence on a block were the majority of residences were occupied by white people, and also made it unlawful for a white person to move into a block occupied by a majority of blacks.[20] An attempt was made to justify the ordinance as a proper exercise of the police power because it promoted public peace and racial purity, and prevented the deterioration of property owned and occupied by whites.[21] The Court held that the ordinance was an invalid exercise of the police power, noting that the white person's property may be acquired by an undesirable white neighbor or put to disagreeable, though lawful, uses and still deteriorate in value.[22] The Court thus implied that since property value could suffer a decrease in a variety of ways, to exercise the police power to maintain property value by excluding certain purchasers from the block would be invalid. The Court also stated that the ordinance interfered with the rights to dispose of and purchase property without due process of law in contravention of the Fourteenth Amendment. The Court stated:

> The Fourteenth Amendment and [the] statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.[23]

Until 1926 then, zoning was widespread in urban areas and was upheld by many state courts; however, it had not been upheld by the Supreme Court as a valid exercise of the police power.

B. *Euclid: The Police Power*

In 1926, in *Euclid v. Ambler Reality Co.*,[24] the Supreme Court, for the first time, upheld a zoning ordinance as a valid exercise of the

---

[18] National Land & Inv. Co. v. Easttown Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). The court stated that the private desires of many residents to keep the area unchanged did not rise to the level of public welfare, and that the zoning power may not be used to avoid the increased expenses of natural growth. It did say that the zoning power may be used to regulate the providing of municipal services.

[19] 245 U.S. 60 (1917).

[20] Id. at 70-71.

[21] Id. at 73-74.

[22] Id. at 82.

[23] Id. at 79.

[24] 272 U.S. 365 (1926).

police power. The case involved a zoning ordinance in the Village of Euclid, Ohio, which restricted the use of land, the minimum size of lots, and the height of buildings in certain designated zones or districts. This method of controlling land use by establishing designated districts with specified boundaries and regulating the use and minimum size of the lots within these boundaries is commonly referred to as "Euclidean Zoning."[25] Since the primary objective of zoning prior to *Euclid* was to protect certain uses from interference by other discordant uses, certain land uses were excluded from residential districts (considered the "highest" districts) which were not excluded from commercial districts (considered a "lower" district), while other uses were excluded from commercial districts yet were not excluded from industrial districts. Consequently, the lowest use district allowed all authorized uses. The Supreme Court indicated in *Euclid* that these restrictions were upheld because if the discordant uses were not excluded, injury to the public would occur,[26] and the convenience resulting from the prevention of this mixture of uses was in the general public interest.[27] Two years later, the Supreme Court, in its latest decision[28] involving the constitutionality of zoning, held that the zoning of one person's land for residential use by a municipality, when the adjoining lands were used for industrial and railroad purposes, and the locus was of comparatively little value for residential purposes, constituted a violation of the Fourteenth Amendment, since the restriction imposed did not bear a substantial relationship to the public health, safety, morals or general welfare.[29]

The legal effect of the two Supreme Court cases was that zoning became a valid exercise of the police power provided it had a *substantial* relationship to the public welfare. Whether an ordinance has a sufficient relationship to the general welfare is the test that has become entitled "substantive due process."[30] Due process includes a requirement that any ordinance regulating or controlling private property must have as its objective the general welfare, since the police power can be exercised only in furtherance of this public purpose. Since 1928, the highest court in each state has applied and interpreted this doctrine for their local communities without further guidance from the Supreme Court.

Although zoning as a concept has thus gained judicial approval, the validity of specific zoning ordinances has continually been tested

---

[25] Reno, Non-Euclidean Zoning: The Use of The Floating Zone, 23 Maryland L. Rev. 105 (1963).

[26] 272 U.S. at 394-95. The injury that would result would be the general detrimental effects that apartment buildings would have on single family homes and their residents.

[27] Id.

[28] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[29] Id. at 188.

[30] See Schwartz, Exclusionary Zoning—Suggested Constitutional Attacks, 4 Clearinghouse Rev. 345 (1970).

in the state courts. In *Simon v. Town of Needham*,[31] the constitutionality of a one-acre minimum lot size for a residential district was upheld as a fair and reasonable restriction. The court considered the minimum acreage of similar districts in neighboring towns, yet neglected to analyze whether a one-acre lot size was necessary for public health or safety. In 1952, the Supreme Court of New Jersey upheld a township ordinance in a rural area requiring a minimum lot size of five acres for construction of a residence.[32] Without distinguishing among or relying upon any particular grounds, the court stated that the ordinance was justified on grounds of preserving the character of the community, maintaining the value of the property therein, and devoting the land to its most appropriate use. The court stated, in addition, that the owner contesting the application of the ordinance must show an abuse of discretion by the zoning authority resulting in an unreasonable exercise of the zoning power before the court would declare the ordinance invalid.[33] It appears, therefore, that the court granted to the ordinance a presumption of validity, yet failed to say what would be necessary to rebut the presumption, that is, what an unreasonable exercise of zoning power might be.

In contrast to the holding in the New Jersey case, the Supreme Court of Pennsylvania has stated that "[a]t some point along the spectrum . . . the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference."[34] The court struck down an ordinance requiring a four-acre minimum for residential purposes,[35] holding that this minimum lot size was not a reasonable method of preserving open spaces, since alternative methods for that purpose were available, and that a zoning ordinance may not be used to avoid increasing responsibilities and economic burdens.[36] Thus, case law indicates that zoning is a planning instrument which can be used to control population density, and insure that municipal services are supplied in a rational manner, but that zoning which is designed to be exclusionary does not foster or promote the general welfare and is, therefore, unconstitutional.[37]

In addition to restrictions on lot size, zoning ordinances often restrict the size of buildings as well. A requirement of 1,300 square feet of usable floor space, in view of undisputed evidence that a house containing 980 square feet of usable floor space could meet requirements of public safety, health and welfare, was struck down as unreasonable in a Michigan case.[38] A 1,800 square foot minimum habit-

[31] 311 Mass. 560, 42 N.E.2d 516 (1942).

[32] Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952).

[33] Id. at 206, 93 A.2d at 384.

[34] National Land & Inv. Co. v. Easttown Bd. of Adjustment, 419 Pa. 507, 524, 215 A.2d 597, 608 (1965).

[35] Id. at 533, 215 A.2d at 613.

[36] Id. at 529, 215 A.2d at 610.

[37] Id. at 523-33, 215 A.2d at 607-13.

[38] Senefsky v. City of Huntington Woods, 307 Mich. 728, 738-39, 12 N.W.2d 387, 389 (1943).

able floor space requirement was declared unconstitutional in a Pennsylvania case[39] wherein the court stated that neither aesthetic reasons nor conservation of property values, singly or combined, provides a sufficient basis for a valid ordinance. Nevertheless, a court in New Jersey, in *Lionshead Lake Inc. v. Township of Wayne*,[40] seemed very concerned with the effect the size of dwellings would have upon the character of the community. It upheld a minimum living floor space requirement of 768 square feet for a one-story building, and a 1,000 or 1,200 square foot minimum for a two-story building, despite the fact that the two-story minimum was less than twice the minimum for a one-story building.[41] If living floor space is substantially related to the public welfare by virtue of the fact that a certain minimum is necessary for the health and safety of the persons using the dwelling, it seems incongruous to vary that minimum according to the number of stories rather than the number of people or families. Where the courts draw the line to limit minimum lot size and floor space requirements seems to be that point at which *no* relationship to the general public welfare can be found rather than where no *substantial* relationship can be found. In other words, a zoning ordinance which serves one or possibly two public purposes, but which at the same time tends to enforce racial, social and status attitudes will be upheld by a court using the substantive due process test because there is a sufficient nexus with the public welfare. The private values and objectives which are given effect by a zoning ordinance are neglected in this analysis.

In zoning litigation, which indirectly involves fundamental property rights, it is submitted that a substantial relationship between public welfare and the zoning restriction should be required, and only that which is necessary for the public good should be allowed to be promoted by a local ordinance. But being overly concerned with finding a sufficient relationship with public welfare in terms of health, safety and convenience can have a confining effect upon the courts' view. The inquiry should be broadened. The effect a minimum lot or building size has on land value, and consequently on who purchases the land and what is built on the land, generally has been disregarded by the courts. High minimums tend to inflate land values and increase the cost of construction, thereby resulting in economic exclusion. Multifamily dwellings built in a town with inflated land values because of an exclusionary ordinance cannot be rented to low or moderate income families because of the high developmental costs. Towns with inflated land values usually have stringent requirements in their ordinances for landscaping, parking, light and noise abatement and setback. These additional restrictions also increase building and maintenance costs.

It appears then, that what is needed, in addition to requiring that a substantial relationship exist between the ordinance and the general

[39] In re Medinger, 377 Pa. 217, 226, 104 A.2d 118, 122 (1954).
[40] 10 N.J. 165, 174, 89 A.2d 693, 697 (1952).
[41] Id. at 174, 89 A.2d at 698.

welfare, and that the objective of the ordinance be necessary for the public welfare, is a redefining of the public welfare to include all people affected by the ordinance, either by inclusion or exclusion. The traditional approach under the police power rationale has been to define the general public welfare as the welfare of the community whose zoning ordinance is being tested. If the general public welfare concept is expanded to include those excluded by zoning ordinances, the rationale of maintaining the character of the community and enhancing property values within the community as support for zoning ordinances would no longer have validity. This rationale for maintaining the status quo would become under-inclusive, that is, it would not encompass everyone affected by the ordinance.

In addition to satisfying the public welfare requirement, zoning also must be accomplished in accordance with a comprehensive plan. This standard is imposed upon local communities by zoning enabling statutes enacted by the state legislature. The Standard State Zoning Enabling Act[42] requirement that zoning "regulations shall be made in accordance with a comprehensive plan"[43] is found in all state enabling acts although the requirement is not interpreted uniformly by each state.[44]

When a village in New York passed a zoning ordinance that did not allow any use "by right" in a planned residential district, but authorized use by issuing special permits, the court invalidated the ordinance as a device to permit lot-by-lot zoning rather than zoning in accordance with a comprehensive plan.[45] A comprehensive plan requires that rezoning be accomplished in consonance with the fundamental land use policies and development plans of a community.[46] A comprehensive plan is similar to a land use plan which has been defined as

> simply a basic scheme generally outlining planning and zoning objectives in an extensive area. It is in no sense a final plan and is continually subject to modification in light of actual land use development. It serves as a guide rather than a straightjacket.[47]

The land use plan in most communities is incorporated into the specific sections of the zoning ordinance itself. Thus, the requirement that a zoning change be in accordance with a comprehensive plan means

---

[42] Reprinted in 3 A. Rathkopf, The Law of Zoning and Planning 100-1 et seq. (3d ed. 1962).

[43] Id. at 100-1 Sec. 3.

[44] See Haar, In Accordance With a Comprehensive Plan, 68 Harv. L. Rev. 1154 (1955), for a full discussion of the various interpretations of this requirement.

[45] Marshall v. Village of Wappingers Falls, 28 App. Div.2d 542, 279 N.Y.S.2d 654, 656 (Sup. Ct. 1967).

[46] Mazzara v. Town of Pittsford, 34 App. Div.2d 90, 93, 310 N.Y.S.2d 865, 867 (Sup. Ct. 1970).

[47] Ward v. Knippenberg, 416 S.W.2d 746, 748 (Ky. 1967).

that the change must be a reasonable extension of the land use plan reflected in the ordinance.[48] A more liberal interpretation of this requirement is that the zoning change merely be considered carefully by the legislative body with respect to the community at large.[49]

The application of the standard that zoning must be in accordance with a comprehensive plan becomes particularly crucial when a small tract of land is rezoned by an amendment to the zoning ordinance. This is generally referred to as "spot zoning" and may be valid or invalid. When spot zoning is done in contradiction to or in disregard of the comprehensive plan, it is held invalid. Invalid spot zoning has been defined as

> [the] process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. . . .[50]

If, however, the rezoning of a small parcel of land creates a different use within a larger district zoned otherwise, it may be a valid amendment if enacted in accordance with the comprehensive plan.[51] The size of the rezoned parcel alone, although not solely determinative in a court finding of invalid spot zoning, may be solely determinative in a court finding of valid spot zoning.[52] That is, if a large parcel is rezoned for a use discordant with the surrounding use, it is more likely that the rezoning was done with the interests of the community in mind and with the purpose of affecting a large segment of the community and, consequently, a presumption arises that the rezoning was done in accordance with the comprehensive plan. The rezoning of a small parcel, however, since it is more susceptible to attack on the grounds that it was done for a particular property owner, must be shown to have been done in accordance with the comprehensive plan in order to be valid.

An example of the court's reaction to the spot zoning problem is found in an Illinois case[53] in which a municipality attempted to amend a zoning ordinance, in order to maintain a block as a residential area, by changing the zone from multi-family to two family use. The court held the change invalid since there were already eight apartments on the block, and the adjoining block had been zoned for multi-family use. The comprehensive plan for this section of the village, as evidenced by the existing uses which were permitted on the block and by the zoning of the adjoining block, indicated that this amendment was in

---

[48] Reno, supra note 25, at 112.

[49] Id.

[50] Rodgers v. Village of Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951).

[51] Id. at 124, 96 N.E.2d at 735.

[52] Thomas v. Town of Bedford, 11 N.Y.2d 428, 435, 184 N.E.2d 285, 288, 230 N.Y.S.2d 684, 689 (1962).

[53] Lancaster Dev., Ltd. v. Village of River Forest, 84 Ill. App.2d 395, 401, 228 N.E.2d 526, 529 (1967).

contradiction of the plan and was, therefore, invalid. In a recent New York case,[54] where the local legislature's sole consideration for rezoning the locus from single to multi-family use was found to be the benefit of the petitioner, who planned to contruct a multi-family facility on the locus, the court found this rezoning to be prohibited spot zoning. The court stated that the requirement that zoning changes be in accordance with a comprehensive plan was legislative recognition that piecemeal and haphazard zoning did not satisfy the need for promoting the general welfare.[55] This desire to prevent indiscriminate piecemeal zoning is based upon the premise that the inhabitants of zoning districts rely upon a degree of stability in use classification and should not be subject to rapid or unsuspected zoning changes.

Some courts have held that the location of, and the limitations placed upon, newly created or changed zoning districts are indicative of a change made in accordance with the comprehensive plan.[56] The detailed planning and regulations in the new enactment, and the selection of a site well suited for the new use, are evidence that before the change was passed considerable study had taken place. For those courts which have adopted a liberal view of the comprehensive plan requirement, the pre-enactment analysis satisfies that requirement, whereas other courts would require more indicia that the new zoning districts are in accordance with the comprehensive plan.

When a legislative body on its own initiative seeks to amend a zoning ordinance, the courts limit the power of amendment to cases where either the original zoning classification can be shown to be unreasonable or arbitrary, or the conditions and character of the neighborhood have changed sufficiently to make the original classification unreasonable.[57] For example, when the legislative body of Kansas City rezoned a tract from single family duplex residence to multi-story apartment or hotel use, the court upheld the change because it was "in accordance with the growth and changing conditions in the area involved and encouraged the most appropriate use of the land."[58] Changed conditions give jurisdiction for the legislative action and prevent zoning amendments from being purely arbitrary or capricious, thereby protecting the inhabitants from uncontrollable power in the hands of the local legislature.

Once the authority has itself encroached upon its own comprehensive plan by allowing deviations, and an owner seeks a rezoning for a use compatible with the use already permitted, the authority cannot

---

[54] Mazzara v. Town of Pittsford, 34 App. Div.2d 90, 310 N.Y.S.2d 865 (Sup. Ct. 1970).

[55] Id. at 92, 310 N.Y.S.2d at 868.

[56] Hermann v. Village of East Hills, 104 N.Y.S.2d 592 (Sup. Ct.), aff'd, 279 App. Div. 753, 109 N.Y.S.2d 182 (1951); See also Thomas v. Town of Bedford, 11 N.Y.2d 428, 434, 184 N.E.2d 285, 288, 230 N.Y.S.2d 684, 688 (1962).

[57] Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953); Andrew C. Petersen, Inc. v. Town Plan. & Zoning Comm'n, 154 Conn. 638, 228 A.2d 126 (1967).

[58] Standberg v. Kansas City, 415 S.W.2d 737, 747 (Mo. 1967).

deny the request for rezoning.[59] This is a type of "constructive" rezoning which takes place when the authority allows deviations from its own comprehensive plan, thereby creating the changed conditions necessary for a rezoning.

It is important to note that local legislatures are allowed to consider changed conditions outside of their jurisdictional limits as a basis for rezoning within their zoning districts.[60] Since changed conditions in a neighboring community can be the basis for a zoning change, the courts in upholding this principle are, in effect, recognizing that the public welfare for a municipality may be defined in terms of conditions outside its boundary lines due to an interaction between neighboring communities. If a town may consider outside factors that have a discernible bearing on the town's general welfare, it can be argued, conversely, that the courts should not allow towns to ignore the effect of their ordinances on other communities. Once factors outside the community are required to be considered in enacting an ordinance, the invocation of a local comprehensive plan as an obstruction to a requested change or amendment would not be allowed[61] since this plan would no longer be co-extensive with the general welfare and, therefore, would not be a valid test for the legitimate use of the police power.

Unfortunately, the courts in using the police power approach have limited their inquiry to the general welfare as defined in terms of the local community. The comprehensive plan requirement is used as a test to determine if a zoning change reflects some relationship to the general welfare of the local community, rather than the general public welfare of that area affected by the zoning ordinance within and without the boundaries of the local community. It is in this respect that the use of the police power rationale and test to challenge zoning ordinances is subject to severe limitation.

C. *Beyond Euclid: Equal Protection*

While it is important to evaluate the techniques of zoning to ensure that they are not used in a manner inconsistent with the police power, it is also important to evaluate them in terms of equal protection of the law to ensure that techniques which, when disguised as principles of zoning, tend to assume an aura of validity, do not in fact result in a deprivation of opportunity in violation of the Fourteenth Amendment.[62] Since modern zoning ordinances maintain and enhance property value by requiring minimum lot sizes, minimum floor space requirements, and a minimum of discordant uses within a municipality, they effectively exclude certain purchasers from the community because of insufficient income. Essentially, the lack of opportunity to live in the suburbs is due to the lack of low and moderate-income housing, in-

[59] Metropolitan Dade Co. v. Pierce, 236 So.2d 202, 204 (Fla. 1970).
[60] Central Ky. Dev. Co. v. Bryan, 416 S.W.2d 743, 744 (Ky. 1967).
[61] R. Babcock, The Zoning Game 134 (1969).
[62] Id. at 136-37.

cluding both single unit dwellings and apartments. Those apartments that are built in the suburbs cannot be rented to low-income groups without rent subsidies because the zoning ordinance requirements drive units costs up and force higher maintenance and auxiliary costs. This economic segregation[63] may result in de facto racial segregation if a sufficient correlation can be established between low-income groups unable to "buy into" the community and racial minorities.[64] Whether this lack of opportunity resulting from the exclusionary effect of the zoning ordinance is a violation of the equal protection clause can be analyzed in four different ways.

1. *Equal Application of the Law*

The equal protection clause is an expression that the law itself must reach an equitable result.[65] The issue thus presented is whether persons similarly situated receive equal treatment under a particular law.[66] Although suburban zoning ordinances presumably treat those persons within the community who are landowners with a reasonable amount of uniformity, it can be argued that this classification of people is under-inclusive; that is, the ordinance affects more people than the local landowners, namely, those seeking to buy or rent in the community. It affects all those seeking entrance to the community and discriminates against those of low and moderate income by erecting economic barriers to their entrance.

Moreover, the effect of local zoning restrictions can have regional or metropolitan ramifications. Suburban towns have a virtual monopoly on vacant land.[67] They may restrict or prohibit the development of land within their boundaries by the use of zoning restrictions. These restrictions lead to inflated land values within the community and this inflation does not stop at the town boundary. Neighboring towns are induced to impose similar restrictions. If they do not establish the same general restrictions, disparities in land values will become evident and developers will be encouraged to buy in and develop the land in those towns with less stringent restrictions. Consequently, towns that have fewer restrictions, smaller lot sizes and more flexible zoning techniques eventually provide an inequitable share of metropolitan housing and associated services. When suburban towns act in concert in restricting land development, the effect is to increase the density of urban population, especially among lower income groups.[68] Because of these extraterritorial effects of local zoning, the local general welfare

[63] See Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767 (1969); See also Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning, 15 Syracuse L. Rev. 507 (1964).

[64] Schwartz, supra note 30, at 362.

[65] Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 342 (1949).

[66] Id. at 344.

[67] Note, The Constitutionality of Local Zoning, 79 Yale L.J. 896, 908 (1970)

[68] Note, Large Lot Zoning, 78 Yale L.J. 1418, 1427 (1969).

criterion, which traditionally has been applied to test the validity of a zoning ordinance, is no longer valid. In *Girsh*,[69] the court, in effect, found that local criteria was unreasonable. It held that protecting the character of the municipality was not a sufficient justification for an exclusionary zoning technique.[70] The court also recognized the regional implications of local zoning when it stated:

> Perhaps in an ideal world, planning and zoning would be done on a *regional* basis. . . . But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central cities.[71]

Local zoning ordinances, if exclusionary, may result in unequal treatment for those persons excluded because the criteria of municipal general welfare and a comprehensive plan are not valid indicators of a welfare that is truly general.[72]

2. *Equal Protection and Discriminatory Legislation*

The equal protection clause also prohibits discriminatory legislation.[73] The imposition of burdens or the granting of benefits must always be justified on the grounds that they are necessary either to eliminate some social evil or to achieve some public good.[74] When the motives behind the legislation do not comport with these public purposes, then the legislation becomes discriminatory and invalid.[75] Motives, however, are very difficult to evaluate and substantiate. Nevertheless, a recent decision by the Court of Appeals for the Tenth Circuit, *Dailey v. City of Lawton*,[76] upheld the findings of the district court that the Planning Commission and City Council were racially motivated and sought to exclude blacks and other minorities from the area by denying an application for a zoning change to permit the construction of a low-cost housing project.[77] Although there was no direct proof of motive, the court inferred the motive to discriminate from the following factors: (1) the area involved was predominantly white; (2) the proposed housing project was designed for low-income groups; and (3) the signers of the petition opposing the proposed zoning change were all white. In holding that an inference of motive was proper, the court stated that "[i]f proof of a civil right violation depends on an open statement by an official of an intent to discriminate the Four-

[69] 437 Pa. 237, 263 A.2d 395 (1970).
[70] Id. at 244, 263 A.2d at 398.
[71] Id. at 245, 263 A.2d at 399.
[72] R. Babcock, supra note 61, at 148.
[73] Tussman and ten Broek, supra note 65, at 342.
[74] Id. at 358.
[75] Id. at 359.
[76] 425 F.2d 1037 (10th Cir. 1970).
[77] Id. at 1039.

teenth Amendment offers little solace to those seeking its protection."[78] Motive may be distinguished form legislative intent in that the motive refers to the subjective state of mind of legislators while enacting an ordinance or denying a permit, whereas intent refers to the objective purposes of the ordinance or by-law. An equal protection violation results from a discriminatory motive, even though the intent may be non-discriminatory. For example, large minimum lot sizes indicate an intent to enhance property values. If this intent is motivated by a desire to ensure a return from an investment in real estate, the motive woud be non-discriminatory, whereas if it were motivated by a desire to exclude buyers on racial or economic grounds, the motive would be discriminatory.

Since motives are usually confined to the individual legislator's thinking, it is more difficult to show discriminatory motive when challenging the validity of a minimum lot size than it is when challenging the denial of a zoning change or amendment. Before a petition for a zoning change can be denied, there must be a public hearing at which all interested persons can be heard, and the deciding body must state its reasons for denial. This procedure creates the necessary confrontation that brings legislative motive into the public view, whereas the enactment of a restrictive or exclusionary zoning ordinance is a more passive legislative action subject to less public scrutiny. This makes it difficult to single out discriminatory motives. If, however, the reasons given in support of the exclusionary ordinance can be shown to be neither a legitimate exercise of the police power nor the true rationale behind the ordinance, then it might be possible to uncover a discriminatory motive. For example, when a community argues that the increased cost of municipal services justifies a particular zoning restriction it begs the question; it assumes that local communities possess the power to exclude in order to curb municipal spending. This rationale was recently invalidated in *In re Kit-Mar Builders Inc.*,[79] where the court struck down two and three-acre minimum lot requirements by uncovering their exclusionary purpose. The court said it would not allow the township to keep people out rather than make community improvements.[80] The court implicitly recognized the equal protection argument by stating:

> [while] this problem in general, is postured as involving the constitutional due process rights of the land-owner whose property has been zoned adversely to his best interests, it cannot realistically be detached from the rights of other people desirous of moving into the area "in search of a comfortable place to live."[81]

---

[78] Id.

[79] 439 Pa. 466, 268 A.2d 765 (1970).

[80] Id. at 472, 268 A.2d at 768.

[81] Id.

From the preceding cases it is apparent that the exclusionary motive need not be expressed, but may be inferred from either the events surrounding the enactment, change or petition for change of an ordinance, or from the results brought about by the ordinance. As the housing needs of the low and moderate-income groups increase, it will become more difficult to justify the imposition of a financial barrier in the form of exclusionary zoning as promoting the public welfare in the face of attacks on its discriminatory results.

3. *Substantive Equal Protection*

Probably the most fruitful use of the equal protection clause in challenging the validity of exclusionary zoning will be by framing the issue as one of "substantive equal protection."[82] The equal protection clause shares with the due process clause the power to place "substantive limits upon the exercise of the police power."[83] In other words, certain rights are embodied in the equal protection clause which, although similar to substantive due process rights, may more easily be defined in the context of equal protection. When one of these rights is violated by an extension of the police power, the result is a violation of both equal protection and due process. The police power has exceeded its limits, thereby violating due process, and has violated equal protection by infringing upon a substantive right protected by the equal protection clause.[84]

In *Buchanan*,[85] a racial zoning ordinance was struck down because it interfered with the property rights of white sellers and black purchasers. These rights were guaranteed by the Fourteenth Amendment. The Court implied that they were guaranteed by the equal protection clause by interpreting the statutes enacted in furtherance of the Amendment's purpose as entitling a black man to acquire property without state legislation discriminating against him.[86] The statute the Court mentioned was the Civil Rights Act of 1866[87] which was reenacted in 1870 subsequent to the adoption of the Fourteenth Amendment. The statute provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold and convey real and personal property."[88] The legislative history of this statute indicates a desire to implant in the Fourteenth Amendment equal property rights for all citizens. Further, in *Shelley v. Kramer*,[89] the

82 Tussman and ten Broek, supra note 65, at 342-43.

83 Id.

84 Id. at 364.

85 245 U.S. 60 (1917).

86 Id. at 79.

87 42 U.S.C. § 1982 (1964). This statute was originally enacted on April 9, 1866 as 14 Stat. 27, ch. 31, 8 U.S.C. § 42. It was reenacted in § 18 of the Act of May 31, 1870 subsequent to the adoption of the Fourteenth Amendment.

88 Id.

89 334 U.S. 1 (1948).

Supreme Court made it clear that the right to acquire, own and dispose of property was among those civil rights that the framers of the Fourteenth Amendment wanted to protect from discriminatory state action.[90] The *Shelley* Court, in refusing judicial enforcement of a private racially restrictive covenant, found that a denial of equal protection would have resulted if the covenant was enforced because the covenant would have denied Negroes the equal opportunity to exercise their property rights.[91] From this rationale it can be concluded that an unburdened right to purchase property, free from discriminatory state action, is basic to the equal protection clause. The court in *Girsh* was not unmindful of these considerations when it said:

> This case deals with the right of people to live on land, a very different problem than whether [a municipality] must allow certain industrial uses within its borders. Apartment living is a fact of life that communities . . . must learn to accept.[92]

Since local municipalities derive their zoning authority from state zoning enabling acts they are, in effect, agents of the state.[93] For a state agent to burden the right to live on land in such a manner as to preclude the exercise of this right by low-income groups or racial minorities is a denial of equal protection; and unless these burdens imposed by zoning can find justification in the implementation of public goals of overriding importance,[94] they should not be allowed to stand.

4. *Right to Travel*

It is possible to argue that exclusionary zoning ordinances burden the fundamental right to travel and are, therefore, subject to the "compelling state interest" test, as set forth in *Shapiro v. Thompson*.[95] In that case, the Supreme Court recognized the fundamental right to travel from state to state and held that residency requirements for welfare recipients would be upheld only if they found their justification in a "*compelling* governmental interest" because they burdened that right to travel.[96] In *Edwards v. California*,[97] the Supreme Court, basing its decision on the commerce clause, held that California could not exclude indigents from the state. Whether this right to travel, as espoused in *Shapiro* and *Edwards*, necessarily implies a right to travel about one's own state, or whether this right is so basic to state citizenship as to make reliance upon the *Shapiro* and *Edwards* rationales unnecessary, has not yet been decided. There should, at least, be

90 Id. at 20.
91 Id. at 20-21.
92 437 Pa. at 246, 263 A.2d at 399.
93 Note, Large Lot Zoning, supra note 68, at 1434.
94 See Sager, supra note 63, at 784, 794.
95 394 U.S. 618 (1969).
96 Id. at 634.
97 314 U.S. 160 (1941).

recognition of one's right to move about or settle in a new area in a state where he resides. If this right to intrastate travel has the same constitutional safeguards as the right to interstate travel, and if the state imposes a burden on the exercise of this right, then it should have to show a "compelling governmental interest" to justify the burden.

The Court in *Edwards*, recognizing that the problems of the poor were national problems, held that arbitrary exclusion of indigents as a class from a state would infringe upon the indigent's right to travel, and thereby become a denial of equal protection.[98] One possible fundamental distinction between the exclusion in *Edwards* and the exclusion from suburban communities is that California's exclusion of indigents was de jure while the exclusionary zoning ordinance is de facto in nature. This distinction may not in fact validate an ordinance, however, since the zoning ordinance operates indirectly to bring about an exclusion that may be de jure, although appearing to be de facto at first glance. By not providing any zoning use districts for apartments, a community is not specifically stipulating that no apartments will be built, but is, by omission, not allowing any to be built. Indirect means of accomplishing an effect which could not validly be accomplished directly should not be allowed if the result is discriminatory exclusion.

The courts have been reluctant to apply the equal protection analysis to local zoning ordinances. This failure has prevented a proper examination of the effect of zoning on people other than individual local landowners. It is submitted that in a new and different perspective resulting from the application of the equal protection clause, the equities involved in zoning will shift, and a fuller realization of the property rights of all persons affected by local zoning will result.

III. Methods of Zoning for Multiple Family Use

The Massachusetts legislature recently enacted a statute[99] designed to increase the supply and improve the regional distribution of low and moderate-income housing. This statute applies only to housing built under state and federal assistance programs and, consequently, is limited in use to public agencies and non-profit or limited dividend corporations.[100] Under this statute, a developer may obtain one comprehensive permit from the local zoning board of appeals which would, if granted, give him authority to begin construction. This provision is an attempt to eliminate the morass of administrative delays which result from the necessity for a developer to procure several different permits.

The appellate machinery established by this new statute is interesting and unique. The State Department of Community Affairs has established a committee which can review local zoning decisions with

---

[98] Id. at 173-77.

[99] Mass. Acts and Resolves of 1969, ch. 774 Amending Mass. Gen. Laws, ch. 40B and ch. 23B.

[100] See Huber, Land Use Law, 16 Ann. Surv. of Mass. Law 360 (1969).

a minimum of delay.[101] This committee has authority to determine whether a decision against the developer by the local zoning board of appeals was reasonable and "consistent with local needs." What is "consistent with local needs" is a standard which requires consideration of local and regional housing needs as well as local general welfare factors.

Although there are administrative and practical difficulties with the application of some provisions of this law,[102] its enactment is a clear indication from the state legislature that if suburban towns do not provide adequate zoning provisions for low and moderate-income housing within their jurisdictions, they may be coerced into doing so on terms other than their own. It thus behooves local communities to establish local zoning provisions for this type of housing while they are still able to use their own discretion in providing adequate safeguards for planned development.

Other states have taken or contemplate similar action to encourage suburban communities to provide multi-family apartments within their boundaries since the nation's housing needs mandate that action be taken to increase the rate of construction of this type of housing.[103] For example, New York State has recently established the New York Urban Development Corporation which has the power to override local zoning ordinances where private enterprise has failed to fill the need for safe and sanitary housing accomodations for low-income families.[104]

While these developments indicate possible improvement in the multi-unit housing shortage in the future, the fact remains, as previously noted, that many municipalities are presently "underzoned" for multi-family units. In the absence of specific provisions in a local zoning ordinance permitting the construction of multi-family dwellings, a developer or landowner who wishes to build apartments can petition either the local legislative body for a zone change by amendment or the zoning board of appeals for a variance to the zoning ordinance. Petitioning often results in litigation, initiated either by the petitioner who was turned down by the local board, or by neighbors, abutters, or other interested parties seeking to maintain the zoning status quo.

A. *The Variance of the Zoning Ordinance*

A variance may be obtained by an owner or developer of land who wishes to build a multi-family complex upon petition to the local

101 Id.

102 Id. at 362. The local planning commission is probably in a more advantageous position than the zoning board of appeals to issue a comprehensive permit because it has the responsibility to develop long-range plans for community zoning and development and to recommend zoning changes to the local legislature, whereas the board of appeals has traditionally had authority only to issue variances and exceptions to the zoning ordinances.

103 See Huber, supra note 100.

104 N.Y. Unconsol. Laws §§ 6251-285 (McKinney 1969). See Sherer, Snob Zoning: Developments in Massachusetts and New Jersey, 7 Harv. J.L. 246 (1970).

zoning board of appeals. It is a limited device in that the local community cannot initiate the action and the granting of a variance is regulated by very stringent standards. In most states, in order to obtain a variance it is necessary to show that (1) the land cannot yield a reasonable return if used for the purpose specified in the zoning ordinance or that "special reasons" exist "in particular cases,"[105] (2) the plight of the owner is due to unique circumstances and not due to a general condition of the neighborhood,[106] and (3) the use sought will not alter the essential character of the neighborhood.[107]

The requirement of proving undue hardship is very difficult to meet. The fact that a zoning change would increase the value of a plot of land does not mean that the owner is suffering undue hardship under the present zoning use. In *Scobie v. Idarola*,[108] the court held that a variance was not justified on the grounds that the varied use was the best use of land or that it would enhance the character of the neighborhood. Hardship must be shown, and since the owner failed to show it, the variance was invalid.[109]

To satisfy the requirement for hardship, the owner is required to show that the application of the zoning ordinance, as written, would be "confiscatory or would effectively destroy the economic utility" of his property.[110] When a special reason is required, however, factors other than that of the economic detriment of the landowner may be considered. In *DeSimone v. Greater Englewood Housing Corp. No. 1*,[111] a recent case decided in New Jersey where the landowner had to establish a "special reason," the granting of a use variance to a non-profit housing corporation was upheld on the grounds that the need for low-income housing constituted a special reason. The court was explicit in stating that the special reason for the variance had no relationship to the hardship of the owner. The court stated that

> semi-public housing accomodations to provide safe, sanitary

---

[105] E.g., N.J.S.A. § 40:55-39(d) (1967) provides:

> The [zoning] board of adjustment shall have the power to: . . . (d) Recommend in particular cases and for special reasons to the governing body of the municipality the granting of a variance to allow a structure or use [in the district restricted against such structure or use].

[106] In Shacka v. Board of Appeals, 341 Mass. 593, 171 N.E.2d 167 (1961), the Supreme Judicial Court of Massachusetts reversed the decision of the Superior Court which had allowed the issuance of a variance to permit erection of an automobile service station in a general residence district because "[n]o hardship to the intervener is shown which is 'owing to conditions especially affecting' his property and 'not affecting generally the zoning district in which it is located.'" Id. at 594, 171 N.E.2d at 168. The court went on to state that an amendment to the statute, authorizing variances when "'substantial hardship *financial or otherwise*'" existed, did not lessen the requirement that the hardship be due to conditions "'especially affecting such parcel. . . .'" Id.

[107] Taxpayer's Ass'n v. Board of Zoning Appeals, 301 N.Y. 215, 93 N.E.2d 645 (1950).

[108] 155 Conn. 22, 229 A.2d 361 (1967).

[109] Id.

[110] Clapp v. Zoning Bd. of Appeals, 29 Conn. Supp. 4, 9, 268 A.2d 919, 921 (1970).

[111] 56 N.J. 428, 267 A.2d 31 (1970).

> and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason. . . .[112]

It appears, therefore, that some variance requirements would allow for consideration of the community's housing needs, whereas others require a hardship to arise from the locus in question and would thereby eliminate housing needs as a basis for a variance.

If a landowner is required to show that his hardship results from circumstances unique to his property, and the incompatibility of the zoning ordinance and the reasonably profitable use of land extends over a large area encompassing land not owned by the petitioner, then the variance will be denied. The rationale behind the denial is that grounds exist for a rezoning rather than for a variance.

Also, if there exist in the area of the locus several non-conforming uses similar to the one the petitioner is applying for, then the chances of the variances being granted are greatly reduced. There is a point where one additional variance in a neighborhood amounts to a "rezoning" in contradiction to the declared policy in the ordinance.[113]

Provided undue hardship due to unique circumstances can be shown, there is a strong possibility that a zoning board of appeals would find that the erection of a large multi-family complex, especially if it is low or moderate-income housing, in a single residence zone would alter the essential character of the neighborhood.[114] Implied in the requirement that a variance must not result in an altering of the essential character of the neighborhood is the concept of the protection of the public welfare. This assumes that the present zoning ordinance and allowed uses adequately promote the general welfare, and that a use which would substantially alter the neighborhood would necessarily be injurious to the public welfare and, therefore, invalid. The fact that many communities are presently using mixed zoning techniques in which light industrial uses are combined with single residence use would tend to indicate that an alteration of the character of the neighborhood does not, per se, mean that the public welfare would be harmed. Variances can be issued with accompanying conditions of compliance so that the newly authorized uses can be made more compatible with the primary use. By stipulating conditions which would alleviate some of the "harmful" effects of apartments, it would be possible to combine single use and multi-family use. Although the new use might alter the essential character, it would not be harmful to the public welfare. In fact, this technique might promote the public welfare if there is a housing shortage in the area.

---

[112] Id. at 442, 267 A.2d at 38-39.

[113] Delaney v. Zoning Bd. of Appeals, 134 Conn. 240, 245, 56 A.2d 647, 650 (1947).

[114] See Grossman, Apartments in Community Planning: A Suburban Area Case Study, 25 Urban Land 3, 4 (1966). There certainly would be strong local opposition claiming that it would have this effect.

Even if the requirements for the granting of a variance are met, and the board does in fact grant the variance, the landowner is not assured of the right to use his property in accordance with the variance. Since the power to rezone is vested in the legislature, any encroachment upon that power will be invalidated. Any variance which, by itself or jointly with previous variances, creates a serious alteration in the characteristics of the zoning district will be invalid because the board of appeals has exceeded its authority in allowing an alteration of a zoning district. A variance, although properly granted by the board of appeals, may be attacked on the grounds that it was based upon an invalid delegation of the legislature's authority, or that inadequate standards were established to guide the administrative board's decision making.[115] The potential vulnerability of a board of appeal's decision gives rise to costly and time-consuming litigation.[116] This makes the variance procedure even more unattractive to one seeking to build multi-family housing.

The essential nature of a variance makes the granting of one appear to other landowners in the same district as a favor, thus tending to alienate them toward the housing to be erected. This tends to cause local opposition to organize and resist further attempts to get multi-family housing in the community.[117]

B. *Amendment of the Zoning Ordinance*

An amendment to a zoning ordinance must satisfy the same requirements as the ordinance itself;[118] it must be enacted to promote the general welfare and be in accordance with the comprehensive plan. An amendment will be upheld unless there is no substantial relationship between the amendment and the expressed purposes of the ordinances it amends,[119] or unless it unreasonably or arbitrarily discriminates rather than furthers the public welfare.[120] An application for reclassification of property use " 'must serve the public interest in the zoning development of the community.' "[121] An amendment, of course, must be approved and adopted by the local legislative body, which, in some smaller towns, meets only once or twice a year, and often the vote required for adoption of an amendment is more than that necessary for original adoption of the zoning ordinance or by-law.[122] Before an amendment is submitted to the legislature for adoption, a public

[115] Smith v. Board of Appeals, 319 Mass. 341, 344-45, 65 N.E.2d 547, 549 (1946).

[116] Comment, The Effect of the Housing Shortage on the Single-Family Residential Zone, 46 Nw. U.L. Rev. 745, 750 (1951).

[117] Id.

[118] Schertzer v. City of Somerville, 345 Mass. 747, 750, 189 N.E.2d 555, 558 (1963).

[119] Id. at 751, 189 N.E.2d at 558.

[120] Freeman v. City of Yonkers, 205 Misc. 947, 955, 129 N.Y.S.2d 703, 708 (Sup. Ct. 1954); Soule v. Town of Perinton, 152 N.Y.S.2d 734, 738 (Sup. Ct. 1956).

[121] Suburban Dev. Corp. v. Town Council, 158 Conn. 301, 303, 259 A.2d 634, 636 (1969).

[122] See, e.g., Mass. Gen. Laws ch. 40A, § 6, the original adoption, requires a simple majority, whereas § 7, an amendment, requires a two-thirds majority.

hearing will be held to provide interested persons an opportunity to object to or support the amendment. These procedural requirements are time consuming and cumbersome.

An amendment eliminates some of the objections raised against variances since legislative adoption dispels the charges of abuse of discretion and unlawful delegation of authority. Amendments, however, are often attacked on the grounds that they result in illegal spot zoning. An amendment can result in the rezoning of a certain area or the addition of a permitted use in previously zoned districts. When an area is rezoned the change must be part of a well-considered and comprehensive plan.[123] Many courts have found that a housing shortage or a population increase in a community is important in showing that a rezoning for multi-family use is not arbitrary or unreasonable, but rather is designed to promote the general welfare.[124] In *DeSena v. Gulde*,[125] however, the court limited the use of zoning to accomplish objectives related to the use of the land. The basis for the amendment in that case, which changed the use from light manufacturing to single residence, was a fear of disorder and a resultant economic loss due to the threat of picketing and demonstrations. The court said: "If safety factors or health measures require zoning controls, they must involve safety and health characteristics which relate to the land under the regulation."[126] If housing needs require zoning amendments, therefore, it will be important to relate those needs to the specific zoning change. The more pronounced the relationship is between the zoning change and the housing market, the greater the chances are of supporting the amendment on these grounds.

An amendment may be contested on the basis that the change was made when grounds existed for a variance and not an amendment.[127] This problem usually arises when a landowner greatly benefits from a recent zoning amendment. Again, in this situation, it is crucial to relate the zoning change to the overall welfare of the community either by showing how the housing shortage will be alleviated by the amendment or how changes in land use indicate the new use will be more beneficial for the community at large.

---

[123] Greenberg v. City of New Rochelle, 206 Misc. 28, 32, 129 N.Y.S.2d 691, 695 (Sup. Ct. 1954).

[124] Lamarre v. Commissioner of Pub. Works, 324 Mass. 542, 547, 87 N.E.2d 211, 214 (1949); People ex rel. Miller v. Gill, 389 Ill. 394, 403, 59 N.E.2d 671, 674 (1945); Greenberg v. Town of New Rochelle, 206 Misc. 28, 34, 129 N.Y.S.2d 691, 696 (Sup. Ct. 1954); Malafronte v. Planning & Zoning Bd., 155 Conn. 205, 210, 230 A.2d 606, 609 (1967). In *Malafronte*, the court stated:

> The purpose of zoning is to serve the interest of the community as a whole, and one of those interests is to provide adequate housing. A change of zone predicated on such an interest, if otherwise consistent with the accepted principles of zoning, is a reasonable exercise of the board's discretionary powers.

Id. at 212, 230 A.2d at 610.

[125] 24 App. Div.2d 165, 265 N.Y.S.2d 239 (1965).

[126] Id. at 171, 265 N.Y.S.2d at 246.

[127] Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 251, 104 A.2d 441, 448 (1954); see also People ex rel. Miller v. Gill, 389 Ill. 394, 400, 59 N.E.2d 671, 673 (1945).

C. *Creation of New Zoning Districts*

Both the variance and the amendment process may result in the haphazard placement of apartments inconveniently located in relation to shopping centers, public transportation and schools.[128] To remedy this situation and to provide more adequate planning, communities have adopted zoning ordinances which provide for apartment construction "by right" within certain districts.[129] These districts might be multiple-use districts, or special districts which permit apartments and related convenience commercial establishments, for example, shopping centers or apartments with office buildings in a single architectural unit.[130] By providing for a multi-family use by right, specific restrictions and regulations can be stipulated beforehand in the zoning ordinance to provide for adequate parking space, play area, landscaping, noise and light abatement, traffic controls and density requirements. These restrictions tend to appease the local landowners and placate their fears about multi-family units. Some communities provide a "permissive use" for multi-family dwellings. This use requires legislative permission before it can be implemented and, consequently, adequate safeguards can be provided beforehand when establishing the restrictions on permissive uses. It also forewarns property owners of the possible uses they may encounter in each district. A legislature can limit the number of multi-family dwellings with this type of zoning technique, and can maintain a proper balance between municipal services and the number of families in the community.

A recent attempt by a town in Massachusetts to provide in its by-laws, by amendment, an additional use for public housing in all the existing use districts, except industrial, was attacked on the grounds that it was discriminating against private multi-family housing which had only a permissive use in all the districts except industrial.[131] In other words, a private developer would have to obtain legislative approval before he could erect a complex, whereas public housing could be built as a matter of right. In upholding the amendment, the court said that the zoning by-law applied uniformly to all public housing, thereby meeting the charge of non-uniformity, and then went on to say that public housing is sufficiently different so as to be placed in a separate category for zoning purposes.[132] The court side-stepped the spot zoning issue and condoned the multiple-use district created by the amendment allowing public housing in the residential and agricultural districts. Evidently, the court felt that the town was acting reasonably and with the public interest in mind in providing this advantage to public housing. In light of this development, and the

128 Siegel, Relation of Planning and Zoning to Housing Policy and Law, 20 Law & Contemp. Prob. 419, 422 (1955).

129 Grossman, supra note 114, at 5.

130 Id.

131 Cameron v. Zoning Agent, 1970 Mass. Adv. Sh. 1081, 260 N.E.2d 143 (1970).

132 Id. at 1085, 260 N.E.2d at 146.

attempt by subsidized private developers to provide more low and moderate-income multi-family dwellings, it might be possible for subsidized housing to be treated separately because of its semi-public nature and function. If this were allowed, then suburban communities could make special provisions in their zoning ordinances, either by amendment or addition, to make it financially feasible and procedurally less cumbersome for subsidized housing to be built in heretofore exclusionary communities. Separate treatment for zoning purposes of subsidized housing would allow the local community to provide, yet adequately control, housing for low and moderate-income families without fearing a boom of other apartments.

D. *The Floating Zone*

Some communities that are completely zoned and do not have adequate provisions for multi-family dwellings may adopt a zone which has specified uses and restrictions yet does not have any specified boundaries until it is located by an interested party who can satisfy the minimum requisites of qualification for use. This type of zone has become known as a "floating zone." Since its boundaries are not specified on a zoning map until an interested party obtains a rezoning of his property, and since it generally disregards the principle of segregation of uses, it is non-Euclidean in concept. The impetus behind the use of this zone has been the amelioration of the detrimental effects of discordant uses which were the basis of Euclidean zoning. Since World War II, with the rush into the suburban towns, light industries, which can operate in a residential area without creating excessive noise, smoke or odor, have been lured by these suburbs in order to reduce the tax burden on property owners.[183] Apartments and shopping malls are essential for suburbs seeking to retain light industries, and they have become both architecturally and aesthetically less obtrusive. Consequently, some communities have been willing to use the floating zone concept for these uses, rather than completely rezone the community which might meet strenuous opposition from existing residential property owners. The floating zone technique, because it must be adopted by the local legislature, will be in accordance with the comprehensive plan if the requirement for the comprehensive plan in that state is that the legislature carefully consider and adopt a reasonable zoning change. However, since this technique allows the developer or industry to choose the most advantageous location rather than having a municipality rezone an area for a specified use and later find that industry or developers are not interested in that location, it can be argued that there is no comprehensive plan, or even if there is one, it is being carried on by a private party. The latter argument is the basic objection to this type of zoning.

[183] Reno, Non-Euclidean Zoning: The Use of the Floating Zone, 23 Maryland L. Rev. 105, 106 (1963).

Some states[184] specifically prohibit floating zones in their zoning enabling act; where there is no express prohibition, the courts have reached different conclusions as to the validity of the floating zone concept. Pennsylvania has determined that the use of a floating zone is not within the power of municipalities under the Pennsylvania State Zoning Enabling Act.[185] In contrast, in *Rodgers v. Village of Tarrytown*,[186] the New York court held that since the local legislature could have amended the zoning ordinance to allow multi-family dwellings in residential zones as a matter of right, then it was authorized to accomplish the same effect by the use of floating zones. The court bolstered its finding by stressing the changed conditions that brought this technique into operation, and the fact that the local legislature ratified the zoning change when it amended the zoning map. The village planning board had authority to approve the amendment upon application from an interested party and, if its approval was not forthcoming, then the board of trustees of the village could grant the amendment. If the zone is considered to "exist" upon the original enactment creating the zones, then the planning board, by giving its approval, is actually fixing the location of the zone, and its action is subject to attack as an unauthorized delegation of authority. If, however, the zone does not come into "existence" until the zoning map is amended, then, since the legislature's approval is necessary for this amendment, it is more difficult to find an abuse of authority. The requirement for any zoning change to be in accordance with the comprehensive plan is met by the fact that the legislature determined the need for this type of zoning device and put any necessary limitations on it when it was enacted. However, if zoning is viewed as a more positive technique which requires continual attention to ensure compliance with the comprehensive plan, then the legislature's abdication of drawing zoning boundaries is not a valid approach and should be invalidated. The question remains, however, whether it can even be called a plan for community zoning when private interests determine the location of zoning boundaries.[187] The court in *Rodgers* dismissed the objection that adjacent landowners would not have adequate notice of a zoning change since all areas were potential sites for the floating zone by stating that no more warning would be given if multi-family dwelling use was a permitted use in residential districts, this method of zoning being clearly within the authority of the legislature.

---

184 See, e.g., Mass. Gen. Laws ch. 40A, the Mass. Zoning Enabling Act. Section 6 provides:

> No provision of a zoning ordinance or by-law shall be valid which sets apart zoning districts or zones by establishing between them a boundary line which may subsequently be changed without the adoption of an amendment to a zoning ordinance or by-law so changing such line.

185 Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960).

186 302 N.Y. 115, 122, 96 N.E.2d 731, 734 (1951).

187 See Reno, supra note 133, at 116.

The floating zone has great potential for multi-family unit construction particularly now that apartments have become both physically more attractive and economically essential for suburban communities attempting to house employees of light industries residing in their community. The procedural framework of the floating zone process will be the crucial factor in determining its validity. A recent attempt in Massachusetts[188] to allow the zoning board of appeals to issue a permit for the construction of apartments anywhere in the community was struck down as an improper delegation of power to the board of appeals.[189] If the by-law that was changed in this case had provided that an amendment be made to bring about a zoning change in compliance with the permit granted by the board of appeals, it could be argued that this was a proper delegation of authority since the permit was not effective until the legislature ratified the zoning change. This Massachusetts town, however, was apparently attempting to grant a permit for apartment construction without any change in zoning classification. This technique was an attempt to skirt the delegation of zoning authority and spot zoning issues by retaining the original zoning classification. Since the court felt the effective result was the same as spot zoning, it invalidated the procedure, not because zoning was established in contradiction to the comprehensive plan, but because the "zoning" was done by an unauthorized board. If the court had been willing to accept a permitted use within a district essentially different in nature from the primary use, as the court did in *Cameron v. Zoning Agent*,[140] another Massachusetts case, then it might have been possible to argue that this procedure did not result, even constructively, in spot zoning. This is particularly evident in light of the many multiple-use districts presently considered valid. If the court concludes that rezoning did not take place, then there is no further objection to an administrative board issuing permits. The floating zone, then, while it in some respects has the disadvantages of both the variance and the amendment, does allow for greater flexibility in the planning of apartment location.

IV. Conclusion

Whether suburban zoning ordinances are adapted to provide for multi-family units by an amendment or a variance to the zoning ordinance or by a basic change in the ordinance to create floating zones or multiple-use districts, the result is a movement away from the segregation of uses concept of Euclidean zoning and its inherent limitations for flexibility and change. Once the breach is sufficiently widened, it will be necessary to formulate new standards for zoning validity since all present standards are derived from Euclidean assumptions about land use and planning.

188 Senkarik v. Attorney Gen., 1970 Mass. Adv. Sh. 457, 257 N.E.2d 470 (1970).

189 Id. at 458, 257 N.E.2d at 472; See also Smith v. Board of Appeals, 319 Mass. 341, 65 N.E.2d 547 (1946).

140 1970 Mass. Adv. Sh. 1081, 260 N.E.2d 143, 144 (1970).

Zoning is "by no means static."[141] With the expansion of business into the suburbs and the need for multi-family dwellings, especially low and moderate-income housing, it is important to re-examine these basic assumptions upon which zoning law developed, and retest their applicability and validity today. As more pressure is exerted by state and federal governments on local communities to bear more of the burdens of the housing shortage, zoning concepts will be tested under new notions of community welfare to include regional welfare[142] and the right of each person to adequate housing.[143] To alleviate the housing shortage, some groups have recommended the preemption of local zoning.[144] This should cause communities to seek more flexible zoning techniques to ensure both more multi-family dwellings and also adequate safeguards for the existing landowner and resident.

BERNARD J. COONEY

---

141 Thomas v. Town of Bedford, 11 N.Y.2d 428, 434, 184 N.E.2d 285, 287, 230 N.Y.S.2d 684, 687 (1962).

142 See Comment, Regional Impact of Zoning: A Suggested Approach, 114 U. Pa. L. Rev. 1251 (1966).

143 In re Girsh, 437 Pa. 237, 245-46, 263 A.2d 395, 399.

144 Note, Suburban Zoning Ordinances and Building Codes: Their Effect on Low and Moderate Income Housing, 45 Notre Dame Law. 123, 131 (1969).