

Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 1971

January 1971

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Recommended Citation

Samuel C. Jackson, *Attacking the Affluent Islands: A Legal Strategy for the 70's*, 1971 URB. L. ANN. 3 (1971)

Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol1971/iss1/2

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ATTACKING THE AFFLUENT ISLANDS: A LEGAL STRATEGY FOR THE 70's

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[Editor's Note: The legal strategies employed in the attack on racial and economic exclusionary zoning, as set forth in Mr. Jackson's article, are further examined in the succeeding article by Messrs. Aloï and Goldberg.]

Within the past 25 years, almost as much land has been converted to urban use in the United States as in the preceding 175 years of our country's history. By the end of the 70's, suburban islands are expected to hold 50 per cent more people than the central cities.¹ While millions of Americans have benefited from this pattern of urban growth, thousands have not. These individuals have been locked into our central cities which are rapidly becoming peninsulas for the poor. With the rising cost of housing, more and more Middle Americans will also be trapped on the fringes of these ghettos.

The problems which beset the residents of these peninsulas are not limited to the housing arena. They are frequently victims of arbitrary police practices, unethical tactics by private merchants, and an inequitable distribution of financial aid to the public schools. Moreover, they frequently fall prey to gerrymandering techniques used to dilute the effectiveness of their ballots. In addition, because of inadequate transportation, ghetto residents do not have access to employment opportunities in the suburbs—opportunities which might

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1. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 136 (1968).

enable them to join their former neighbors who have migrated to the affluent islands of suburbia.

Why have so many of our citizens been marooned on these peninsulas and what strategy can be used to help them row to the affluent islands? These are questions which confront us in the 70's.

One primary device has been used by suburban governments to bar low and moderate-income families from the affluent islands: that device is zoning. The terms "large lot zoning," "restrictive codes," and "exclusionary zoning" have become catch phrases symbolizing the problem.²

The forum for attacking the problem has been the courts'. One of the first challenges to exclusionary zoning was *Buchanan v. Warley*.³ In Louisville, Kentucky, a black majority formula was used for segregating residential areas. The Supreme Court invalidated the zoning ordinance establishing this formula and said:

[C]an a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color intending to occupy the premises as a place of residence? . . .

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.⁴

While a modern court would have been concerned with the fourteenth amendment rights of the buyer rather than those of the seller, this decision is important as it serves to illustrate that discriminatory zoning hurt not only the black or Puerto Rican-American who wanted to move into a better neighborhood, but also the Polish-American or Italian-American who wanted to sell his home and move to another neighborhood.

Despite the implications of zoning for civil rights groups, most of the early attacks on exclusionary zoning were launched by developers who wanted to build multiple family housing units in suburbia. These developers were subject to constant frustration by regulations that

2. Brooks, Exclusionary Zoning (American Society of Planning Officials Rpt. No. 254, 1970) [hereinafter cited as Brooks].

3. 245 U.S. 60 (1917).

4. *Id.* at 78, 82.

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zoned large quantities of undeveloped land for large lots. The most successful of these attacks occurred in the Pennsylvania Supreme Court. In the case of *National Land and Investment Co. v. Kohn*,⁵ a four acre minimum lot requirement was held unconstitutional. The court refused to accept the township's argument that the requirement was necessary to prevent an unreasonable burden on the sewage disposal and drainage systems and the local road network or to preserve the "area's character."⁶

In recent years a new legal strategy has emerged, based not on restrictions of a builder's right to the intensive development of land, but on the broad social implications of exclusion. Mary Brooks in "Exclusionary Zoning"⁷ cites several reasons for the development of the new strategy. First, organizations representing the poor and minority groups have become deeply concerned about the inability of the poor, the black, and the Spanish-surnamed to obtain housing in desirable locations. Second, the housing crisis has assumed alarming proportions. The gap between the need for low and moderate-income housing and the production of such housing is widening. Access to suburban and outlying areas appears to be necessary to a viable solution to the housing shortage. Third, from a legal standpoint large-lot zoning cannot be attacked as the sole factor underlying discriminatory land-use practices, as other factors are contributing elements in the exclusion of low-income and minority families from residential areas.

The earliest case which reflects the new thrust in the battle against exclusionary zoning is *Ranjel v. City of Lansing*.⁸ In *Ranjel* the court enjoined the holding of a referendum which could have reversed a rezoning action taken by the Lansing, Michigan, City Council. The council's action enabled the construction of a federally supported low-income housing project in an all-white single-family neighborhood. While there was no recognition of a constitutional right to low-cost housing, the court ruled that discriminatory local tactics could not be used to deprive individuals of the benefits of federal programs.

On appeal, the Court of Appeals for the Sixth Circuit reversed the lower court ruling,⁹ objecting to the district court's consideration

5. 419 Pa. 504, 215 A.2d 597 (1965).

6. *Id.* at —, 215 A.2d at 608-11.

7. Brooks, note 2 *supra*.

8. 293 F. Supp. 301 (W.D. Mich. 1969), *rev'd*, 417 F.2d 321 (6th Cir. 1969).

9. 417 F.2d 321 (1969).

of the racial motivation of those who sought the referendum. The court stated that "if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial."¹⁰ The Supreme Court has been asked to review the appellate decision.

In two recent decisions, the Supreme Court of Pennsylvania launched an attack on exclusionary zoning practices. The court, in *Kit-Mar Builders, Inc. v. Zoning Board of Adjustment*,¹¹ ruled unconstitutional a township ordinance limiting residential developments to lots of no less than two or three acres. In discussing the role of the local governing units of the Philadelphia suburb, the court declared: "Neither Concord Township . . . nor any other local governing unit may retreat behind a cover of exclusive zoning."¹²

The battle against the establishment of islands for the affluent continued in *Appeal of Girsh*.¹³ In *Girsh*, the court held that it was unconstitutional for a community not to provide for apartments in its zoning ordinance. The rationale advanced in this case was that a community cannot use zoning to avoid its responsibility to provide a reasonable share of housing for families with low and moderate incomes who cannot afford single-family housing. The court asserted:

Perhaps in an ideal world, planning and zoning would be done on a *regional* basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city.¹⁴

The onslaught against exclusionary zoning has not been limited to the courts of Pennsylvania. In Union City, California, SASSO, a non-profit corporation, together with individual, low-income Mexican-American citizens, filed a suit against the city and its officials to compel them to take all steps necessary, including multi-family dwelling rezoning, to permit the building of a federal low and moderate-income housing project.¹⁵ The Union City Council had adopted a rezoning ordinance providing for a variance permitting multi-family

10. *Id.* at 324.

11. — Pa. —, 268 A.2d 765 (1970).

12. *Id.* at —, 268 A.2d at 769.

13. 437 Pa. 237, 263 A.2d 395 (1970).

14. *Id.* at — n. 4, 263 A.2d at 399 n. 4 (emphasis by the court).

15. Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970).

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residential use. However, the voters rejected the council's ordinance through a referendum. The Court of Appeals for the Ninth Circuit found that the referendum did not result in discrimination. Nevertheless, the court reasoned:

[I]t may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low income families, who usually—if not always—are members of minority groups.¹⁶

Even in the absence of a finding of racial discrimination, the city was ordered to attempt to fill its low-income housing needs by May 1, 1970, and to submit to the court every three months a report on steps taken to fulfill this need.

The most recent stage in the battle against exclusionary zoning took place in the courts of New Jersey. The New Jersey Supreme Court ruled that public housing constitutes grounds for a special variance. In *De Simone v. Greater Englewood Housing Corporation No. 1*,¹⁷ the court held that the establishment of public or semi-public housing accommodations designed to replace substandard living conditions or to furnish housing for minority or under-privileged segments of the population outside the ghetto area is a "special reason" within the authorizing statute for granting a variance.

Where will the courts go after *De Simone*? What, in fact, will be the legal strategy for the 70's?

Lawrence Sager¹⁸ believes that a "new equal protection" doctrine may emerge in the zoning field. Such a doctrine will have its basis in cases like *Griffin v. Illinois*,¹⁹ in which the Supreme Court held that an indigent defendant is entitled to a free transcript at the state's expense, if such transcript is essential for appellate review of a criminal conviction. In *Harper v. Virginia Board of Elections*²⁰ the doctrine introduced in *Griffin* was extended to the voting rights field.

While housing may not be considered an area on a par with criminal justice or voting rights, the courts may well meet the problems posed by exclusionary zoning by embracing a new concept of equal protection.

16. *Id.* at 295-96.

17. 267 A.2d 31 (1970).

18. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as Sager].

19. 351 U.S. 12 (1956).

20. 383 U.S. 663 (1966).

If the interest of the poor and lower-middle class to access to the affluent islands is recognized as one of constitutional importance, it can be argued that the poor, on a neighborhood, organizational, or ombudsman basis should be provided with expert planning and advocative assistance.²¹ Other solutions might well entail a legal strategy based on the fourteenth amendment attacking not only zoning restrictions but standards established in building codes.

The question at this point is what weapons will be utilized.

21. Sager at 800.