University of Michigan Journal of Law Reform

Volume 5

1972

The Interrelationship Between Exclusionary Zoning and Exclusionary Subdivision Control

Robert E. Hirshon
University of Michigan Law School

THE INTERRELATIONSHIP BETWEEN EXCLUSIONARY ZONING AND EXCLUSIONARY SUBDIVISION CONTROL

I. INTRODUCTION

A considerable number of American communities have adopted zoning laws which have had the effect of preventing ethnic and racial minorities as well as the poor from moving into a suburb or a particular section of a city.[1] Yet it is becoming increasingly clear that exclusionary zoning is not the only means available to achieve this end. A second, but less well-known exclusionary practice is subdivision control.

In a city which has enacted both zoning and subdivision control ordinances, a developer of a proposed low-income housing project faces two barriers before his project will be approved. First, he must meet the generally well-defined requirements of the city's zoning law. Second, he must comply with the ill-defined and often completely discretionary requirements of a subdivision control ordinance. For example, although the developer's project might meet the height, minimum lot size, and locational requirements of the zoning law, the planning board or commission which administers the subdivision control ordinance might find that the project will overtax the sewage and drainage capabilities of the area or cause too great an increase in the flow of traffic – highly subjective determinations.

This article will examine both exclusionary zoning and subdivision control with a view toward analyzing the assumptions common to both types of laws. The operative differences between exclusionary zoning and subdivision control may be non-existent. If this is truly the case, the judicial response to each practice should be the same.

II. THE PROBLEM

Only the areas outside major cities remain available for the construction of low and moderate income housing on a large

[1] For discussions of exclusionary zoning, *see* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); *Symposium – Exclusionary Zoning*, 22 SYRACUSE L. REV. 465 (1971); Legislative Development, *Snob Zoning: Developments in Massachusetts and New Jersey*, 7 HARV. J. LEGIS. 246 (1970).

scale. The supply of vacant land in cities has greatly diminished,[2] and the cost of purchasing land and removing existing structures often raises the cost of housing beyond the means of many persons.[3] Urban renewal, once considered the savior of our inner cities,[4] has forced many city residents to attempt to move away from the central area.[5] Yet, data indicate that only wealthier Whites are able to take full advantage of opportunities in the suburbs,[6] while low-income Whites and Blacks have concentrated in ever-increasing numbers in the city. For example in 1950, 34 percent of all Whites and 43 percent of all non-Whites lived in cities;[7] by 1968 the percentage of Whites living in cities had declined to 26 percent and the number of non-Whites had increased to 55 percent. In 1978, it has been projected that 22 percent of all Whites and 61 percent of all Blacks will be living in the city.[8]

The migration of industry to the suburbs has compounded this problem. Job opportunities have moved to suburban areas beyond the reach of poorer inner city inhabitants.[9] Moreover, because of the resulting decrease in the tax base, cities have been forced to reduce the amount and quality of public services.[10]

In order to solve these problems, state and local governments must insure that low-income groups have the opportunity to move into the suburbs and must at the same time discontinue the practice of concentrating low-income housing projects within the already overcrowded and poor core cities. This idea is by no means novel; it has been referred to as "dispersal" or "scattered-site" housing[11] and has recently received favorable comment from the

---

[2] THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 139 (The Kaiser Report, 1969) [hereinafter cited as KAISER REPORT].

For example, in 1940, 64 percent of the land was vacant in Los Angeles; by 1960 that figure had dropped to 31 percent. Statistics show that in 1955, only 4 percent of all the land in Washington, D.C. was vacant, while in 1954, that figure for Detroit was only 8 percent.

[3] *Id.* at 140-42.

[4] S. GRIER, URBAN RENEWAL AND AMERICAN CITIES 13-34 (1965).

[5] H. GAUS, THE FAILURE OF URBAN RENEWAL 4 (American Jewish Committee Commentary Report, 1965).

[6] The median income of those Whites living in the central city is approximately $2,000 less than the median income of Whites living in the suburbs. BUREAU OF LABOR STATISTICS U.S. DEP'T OF LABOR, STATISTICAL ABSTRACT 318 (1971).

[7] KAISER REPORT, *supra* note 2, at 40.

[8] *Id.* at 40.

[9] An example of the extent of this burden was reported in the New York Times, Jan. 29, 1971, at 1, col. 1. In the Ford assembly plant in Mahwah, New Jersey, the average worker who commutes to work must travel approximately thirty miles to reach the factory. This represents a cost of about $1,000 per year for each commuter, a significant financial burden.

[10] New York Times, Jan. 23, 1971, at 1, col. 7.

[11] New York Times, Sept. 23, 1971, at 1, col. 6.

federal government.[12] Nevertheless, exclusionary zoning and subdivision control may be used to impede the use of this approach.

III. THE HISTORY AND NATURE OF ZONING AND SUBDIVISION CONTROL

Public restrictions on the use of private property originated with the failure of private contractual restrictions to prevent industry from encroaching upon residential sections of our cities.[13] Although these private covenants were incorporated in the contracts of some landowners to satisfy their desire to keep the property residential, it is improbable that restrictive covenants were ever meant to provide a system of comprehensive land use control.[14] In any event, by the early 1900's industrial development had led to instability of property values in many areas and to urban decay,[15] and it had become apparent that public land use control was the only way to preserve the integrity of residential areas.[16]

When zoning, the first means of public land use control,[17] began to receive widespread attention, most legal commentators argued that it was merely an extension of the common law doctrine of nuisance.[18] The only appreciable difference, they argued, was that zoning is a means for the municipality, not the court, to declare that certain land uses are nuisances.[19] The United States Supreme Court formally adopted the extension of the common law nuisance argument in 1926, when it upheld the constitutionality of zoning in *Villge of Euclid v. Ambler Realty Co.*,[20] a landmark

---

[12] *Id.* Scattered site housing received an unexpected boost when the Department of Housing and Urban Development (HUD) recently ruled that a subsidized housing project in Philadelphia which had previously been approved should have been rejected. HUD claimed that the project would increase segregation and compound existing social problems within the city. HUD's ruling was understood to have been based upon new guidelines just formulated within the department.

[13] E. BASSETT, ZONING 317 (National Municipal League Technical Pamphlet Series No. 5, 1922).

[14] *Id.*

[15] R. BABCOCK, THE ZONING GAME 3 (1966). It has been suggested that the impetus for modern zoning regulations emanated from New York City's Fifth Avenue merchants, who were afraid that the garment industry would further encroach upon their elegant shopping district.

[16] *Id.* at 3-18.

[17] E. BASSETT, *supra* note 13, at 318-26.

[18] R. BABCOCK, *supra* note 15, at 4. *Contra*, E. BASSETT, ZONING 93 (Russell Sage Foundation, 1940).

[19] R. BABCOCK, *supra* note 15, at 3-18.

[20] 272 U.S. 365 (1926).

The Supreme Court pointed out per Justice Sutherland:

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether

case which cleared the way for massive acceptance of zoning regulations by municipalities.[21]

While the historical setting from which zoning first evolved is drastically different from the present setting, the nature of zoning has remained unchanged: it is still a tool for selective inclusion and exclusion of certain land use practices. In recent years, however, zoning has been examined in a new light—a light which focuses on its exclusionary effects.[22] Exclusionary zoning may be defined as that practice which results in closing the suburban housing market to low and moderate income families. Although exclusionary zoning takes many forms, it is most often exemplified in minimum lot[23] and floor area[24] requirements and prohibitions against certain types or all forms of multi-family dwellings.[25] Although not discriminatory on their face, these requirements and prohibitions may have discriminatory effects.[26]

From the beginning, then, zoning has been considered a means to promote orderly land use and stabilize property values. Subdivision control on the other hand has different roots. Early laws regarding subdivisions simply called for the recording of plats to prevent uncertainty with respect to land titles.[27] Subdivision control, as we know it today, did not get its major impetus until 1924 when Secretary of Commerce Hoover appointed a committee on city planning and zoning. One of the primary purposes of this

---

> a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. [Citations omitted]. A nuisance may be the right thing in the wrong place—like a pig in the parlor instead of the barnyard. [*Id.* at 388.]

[21] Blair, *Is Zoning a Mistake,* 14 ZONING DIGEST 249, 249-50 (1962).

[22] *See* authorities cited in note 1 *supra.*

[23] *See* Becker, *Police Power and Minimum Lot Size Zoning—Part I—Method of Analysis,* WASH. U. L. Q. 263 (1969); Note, *Large Lot Zoning,* 78 YALE L.J. 1418 (1969).

[24] *See* Note, *Building Size, Shape and Placement Regulations: Bulk Control Zoning Reexamined,* 60 YALE L.J. 506 (1951).

[25] *See, e.g.,* Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925) (upholding validity of ordinance prohibiting construction of multi-family dwellings); Babcock & Bosselman, *Suburban Zoning and the Apartment Boom,* 111 U. PA. L. REV. 1040 (1963).

[26] *See, e.g.,* Davidoff & Davidoff, *Opening the Suburbs Toward Inclusionary Land Use Controls,* 22 SYRACUSE L. REV. 509, 520-22 (1971), for a brief discussion of discriminatory effects of various exclusionary devices.

[27] Reps. *Control of Land Subdivision by Municipal Planning Boards,* 40 CORNELL L. Q. 258 (1955).

An example of early subdivision legislation is 1 Terr. Laws 816 (1821) which was enacted in the Michigan Territory in 1821. For an excellent examination of public control of land subdivisions in Michigan, *see* Cunningham, *Public Control of Land Subdivision in Michigan: Description and Critique,* 66 MICH. L. REV. 3 (1968). Municipalities have also attempted to use subdivision ordinances to shift part of the cost of developing new public facilities necessitated by residential growth to land developers and ultimately the home purchaser. Johnston, *Developments in Land Use Control,* 45 NOTRE DAME LAW. 399 (1970).

committee was to draft a model city planning enabling act which was to embody a comprehensive approach to subdivision control.[28] Four years later this model act was published, and soon was enacted by a large number of municipalities.[29]

The model act designates the city's planning commission as the subdivision control agency.[30] The first task of that agency is to adopt regulations establishing standards of subdivision control,[31] which may provide for the proper arrangement of streets and sewer and water facilities, as well as adequate space for utilities, recreation, light and air, and traffic.[32] Only after these regulations have been adopted may the agency begin approving subdivision plats.[33] Today, most subdivision control agencies still operate under enabling acts similar to the model drafted by the Hoover committee,[34] although each state has attempted to tailor the model to its own particular needs.[35]

Thus, the purpose of subdivision control acts today is no longer limited to an attempt to assure good land titles; rather, like zoning, the acts are concerned with the development of standards for ordered land use. Concommitantly, in deciding whether a subdivision plat meets established standards, the subdivision control agency may have a great deal of discretion—a discretion that can be easily used for exclusionary purposes and that is not easy to reverse.[36]

IV. ZONING OR SUBDIVISION CONTROL: HEADS OR TAILS?

Although both subdivision regulations and zoning ordinances

[28] Reps. *supra* note 27, at 259.

[29] A survey taken in 1934 points out that 269 boards in 29 states were given power to regulate subdivisions. NATIONAL PLANNING BOARD, FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, STATUS OF CITY AND REGIONAL PLANNING IN THE UNITED STATES, APPENDIX H (Eleventh Circular Letter, May 15, 1934), cited in Reps, *supra* note 27, at 259.

[30] ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMECE, A STANDARD CITY PLANNING ENABLING ACT tit. II., § 12 (1928).

[31] *Id.* § 14.

[32] *Id.* § 14.

[33] *Id.* § 12.

[34] Reps, *supra* note 27, at 259.

[35] Some states require the municipal planning board to submit its regulations and standards to a legislative body for approval. Other states, *e.g.*, Maine, require only that approval be given by the town's planning board, an administrative agency, and that this approval be based upon a subdivision's "compliance with municipal ordinances and its general reasonableness." ME. REV. STAT. ANN. tit. 30, § 4956 (1964).

[36] Those states which have statutes similar to Maine's allow a planning board to disapprove a plat either because it does not meet good land use requirements or it is generally unreasonable. Because of a lack of a definitive standard as to what constitutes good land use and what is reasonable, a plaintiff is apt to have a difficult time proving that the board abused its discretion.

may at times embrace a common goal, they involve two distinct statutory systems.[37] A municipality's subdivision and zoning ordinances frequently differ with respect to the timing of their application to a propsed subdivision. Many city ordinances require that a proposed subdivision meet all zoning regulations before the subdivision control agency is legally bound to decide whether a particular use conforms to subdivision standards.[38] If the proposed subdivision has not met the city's zoning requirements, further inquiry as to whether the plat should be approved by the subdivision control agency is unnecessary. A second difference between zoning and subdivision control is that zoning ordinances are aimed at controlling the type of building or use intended for the property; subdivision control is aimed at controlling the manner in which land is divided and made ready for a building or a particular use.[39]

Nevertheless, upon closer analysis these distinctions tend to disappear. Before an area is *zoned* for a particular use, the zoning board must first ascertain whether that area is physically suited for that use and whether the present or reasonably anticipated level of public services (that is, streets, utilities, fire and police protection, etc.) is adequate to meet successfully the additional demands that full use of the area might entail.[40] Therefore, when an area is originally zoned, the zoning board will thoroughly consider most if not all of the factors later examined by a subdivision control agency. Although it is arguable that subdivision control agencies serve a distinct function in applying these standards to the current state of affairs and therefore in considering changes that may have occurred since the zoning ordinance was adopted, the frequent practice of amending zoning ordinances and granting variances should serve to rebut these arguments.[41]

If, therefore, there are no viable distinctions between zoning and subdivision control, the judicial response to the use of subdivision control for exclusionary purposes should be the same as the judicial response to the exclusionary use of zoning ordinances. One of the earliest challenges to local land use practices involved the application of a municipality's zoning regulations. In *Village of Euclid v. Ambler Realty Co.*[42] the United States Supreme Court relying upon a due process analysis held that zoning ordi-

[37] For a textual discussion of zoning and subdivision control systems, *see* D. WEBSTER, URBAN PLANNING AND MUNICIPAL PUBLIC POLICY 362-488 (1958).

[38] *See, e.g.*, Maine's enabling statute, ME. REV. STAT. ANN. tit. 30, § 4956 (1964).

[39] D. WEBSTER, *supra* note 37, at 437-38.

[40] 1 R. ANDERSON, AMERICAN LAW OF ZONING 478-80 (1968).

[41] 3 R. ANDERSON, *supra* note 40, at 590-92.

[42] 272 U.S. 365 (1926).

nances were constitutional unless shown to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[43] Two basic assumptions were necessarily vital to this holding: (1) zoning is a rational means to effect land use control; and (2) local governments are equipped to judge the appropriateness of such regulations. Since *Euclid,* the Supreme Court has generally refrained from ruling on the constitutionality of zoning ordinances.[44] State and lower federal courts have adopted a similar "hands-off" approach.[45]

Recently, however, challenges to local exclusionary land use practices based upon the equal protection clause of the fourteenth amendment, have become more numerous.[46] Courts have refused to hold that all exclusionary land use practices are unconstitutional.[47] Indeed, the courts have refused to take even the more limited step of striking down exclusionary zoning ordinances that are aimed solely at the poor.[48] These same courts may however, invalidate zoning ordinances which have the effect or purpose of excluding racial minorities.

In *Dailey v. City of Lawton*[49] a nonprofit housing sponsor challenged the Lawton City Council's refusal to rezone a tract of land in a White neighborhood where the sponsor wanted to build a multi-family residential housing project. The district court found for the plaintiff-sponsor, rejecting the city's claim that its refusal to grant a zoning change had been based upon findings which indicated that the change would place an undue burden upon public services.[50] Rather, the court found that the reason for the city's refusal to rezone the area was the opposition of White

[43] *Id.* at 395.

[44] Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767, 783 (1969).

[45] *Id.* at 783-84. An exception to this "hands off" approach has been that taken by the Pennsylvania judiciary. *See, e.g.,* Appeal of Kit Mar. Builders, 439 Pa. 466, 268 A.2d 765 (1970) (township zoning ordinance requiring lots no less than two acres along existing roads and no less than three acres in the interior was unconstitutional); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (township zoning ordinance not providing for apartments was unconstitutional) and 32 U. PITT. L. REV. 83 (1970).

[46] One author has concluded that "exclusionary zoning ordinances seem ripe for close consideration in terms of modern equal protection doctrine, and in many instances, may well fail to meet the burden of justification imposed by that doctrine." Sager, *supra* note 44, at 798. Sager forcefully presents the arguments for and against an equal protection approach to exclusionary zoning, *id.* at 785-800.

[47] *Id.* at 784-85.

[48] For an examination of exclusionary zoning and the poor, *see* Cutler, *Legality of Zoning to Exclude the Poor: A Preliminary Analysis of Evolving Law,* 37 BROOK. L. REV. 483 (1971).

In James v. Valtierra, 402 U.S. 137 (1971), the United States Supreme Court refused to strike down on equal protection grounds article XXXIV of the California Constitution, which required a majority community vote before low-rent housing could be constructed.

[49] 425 F.2d 1037 (10th Cir. 1970).

[50] 296 F.Supp. 266, 267-68 (W.D.Okla. 1969).

residents. The court held that the city could not use zoning procedures to effectuate the discriminatory goals of its residents and ordered the rezoning to take place.[51]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed, stating:

> The appellants argue that a finding of discriminatory intent is barred because the project was opposed on the grounds of overcrowding of the neighborhood, the local schools, and the recreational facilities and the overburdening of the local fire fighting capabilities. The testimony in this regard was vague and general. No school, fire, recreational, traffic, or other official testified in support of the appellant's claims. The racial prejudice alleged and established by the plaintiffs must be met by something more than bald, conclusory assertions that the action was taken for other than discriminatory reasons.[52]

In *Lawton* the city relied on the alleged burden upon public facilities and services which the low income housing project would create as the grounds for denying the requested zoning charge, not upon a contention that existing statutes did not permit the construction of the housing. Thus, the rationale in this case would be equally applicable to a subdivision control agency's decision as to whether a plat should be authorized, since the factors the city relied upon for rejecting the request to rezone are the same as those which a subdivision control agency would examine.

Southern Alameda Spanish Speaking Organization v. City of Union City (SASSO)[53] is a major breakthrough in exclusionary land use litigation. Here the Organization had succeeded in getting the Union City Planning Commission and City Council to pass an ordinance rezoning a tract of land to accommodate a 280-unit medium density housing project. Immediately thereafter the citizens of Union City rejected the ordinance in a referendum. The Organization then brought suit alleging among other things that their right to equal protection of the laws had been violated. The Ninth Circuit held that the Organization, while it could not inquire into the motives of persons voting in the referendum, could state a sufficient claim for relief if it could show that the the referendum was discriminatory:

> If the voters' purpose is to be found here, then, it would seem to require far more than a simple application of objective standards. If the true motive is to be ascertained not

[51] *Id.* at 269.
[52] 425 F.2d 1037, 1039-40 (10th Cir. 1970).
[53] 424 F.2d 291 (9th Cir. 1970).

> through speculation but through a probing of the private attitudes of the voters, the inquiry would entail an intolerable invasion of the privacy that must protect an exercise of the franchise. [Citation omitted].
>
> Appellants' equal protection contentions, however, reach beyond purpose. They assert that the effect of the referendum is to deny decent housing and an integrated environment to low-income residents of Union City. If, apart from voter motive, the result of this zoning by referendum is discriminatory in this fashion, in our view a substantial constitutional question is presented.[54]

The importance of *SASSO* is its acceptance of a "discrimination by effect" standard; the court did not focus on zoning but on the effect of this zoning—discrimination. Once a court's attention is directed toward the problem of discrimination, then whether discrimination is caused by zoning or subdivision control practices will become an issue of secondary importance.

In *Kennedy Park Homes Association, Inc. v. City of Lackawanna*[55] the city planning board's refusal to approve a subdivision plat was overturned by the courts. The local Roman Catholic diocese had agreed to sell a tract of land to the Kennedy Park Homes Association, Inc., so that a low-income housing project could be developed. When this agreement became known to the public, a campaign was initiated to prevent the sale from taking place,[56] and a petition carrying the name of the Mayor and President of the City Council was circulated opposing the sale "due to the lack of schools and inadequate sewage facilities." Subsequently, the Lackawanna Zoning Board of Appeals and the Planning and Development Board recommended to the City Council a moratorium on all new subdivisions until such time as the sewage problem was solved. There was also a rezoning of the area to provide for open space and park area.

Lackawanna did have a sewage problem. The city could trace the minutes of its City Council meetings for over a decade to show numerous references to its concern over the sewage problem. Indeed, Lackawanna argued that it was trying to rectify an urgent problem which affected the health and welfare of its citizens. Nevertheless, both the federal district court[57] and the United States Court of Appeals for the Second Circuit rejected

---

[54] *Id.* at 295.

[55] 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), *aff'g* 318 F. Supp. 669 (W.D. N.Y. 1970).

[56] 436 F.2d at 111.

[57] 318 F. Supp. at 679-81.

the city's arguments. Focusing upon the discriminatory effect of the city's actions, the Second Circuit stated:

> Lackawanna is obligated to deal with its sewer needs without infringing on plaintiffs' rights. Even were we to accept the City's allegation that any discrimination here resulted from thoughtlessness rather than a purposeful scheme, the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify. [Citations omitted]. The city must provide sewerage facilities to the plaintiffs in conformity with the Equal Protection Clause of the Fourteenth Amendment and provide it [*sic*] as soon as it does for any other applicant.[58]

Like the Ninth Circuit in *SASSO*, the Second Circuit focused not upon the means used to achieve the discriminatory result, but upon that result itself. Such a rationale should apply irrespective of whether the means used to achieve the discriminatory result are zoning or subdivision controls.

V. CONCLUSION

Exclusionary subdivision control practices may become more common when cities discover that zoning ordinances are subject to close scrutiny by the courts. Nevertheless, as the above analysis has attempted to demonstrate, subdivision control practices should have no more success in excluding minority groups than zoning. If the courts focus on the *effect* of the practice rather than the *type* of practice, discrimination however achieved will not be allowed. The fate of exclusionary subdivision control is inevitably tied to the fate of exclusionary zoning.

—*Robert E. Hirshon*

[58] 436 F.2d at 114.