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Extending Standing to Nonresidents--A Response to the Exclusionary Effects of Zoning Fragmentation

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NOTES

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I. INTRODUCTION

The potential role of governmental action in fostering economic and social discrimination has become the subject of intensive and critical examination. As a part of this examination, the existing structure of land use controls has come under penetrating inquiry to ascertain possible violations of newly enunciated constitutional standards. Zoning is the major instrument of government control of land development in the United States. Because of the decentralization of zoning powers and their susceptibility to infusion of parochial attitudes, zoning laws often exclude certain groups from socially homogeneous communities. Unfortunately, however, the artificial, judicially created concept of standing to sue usually prevents persons who are targets of restrictive zoning legislation from invoking protection by the courts. Nonresidents of a zoning municipality, for example, are generally held to lack sufficient interest in the local land use regulation to challenge its validity. There are indications, however, that this procedural obstacle is beginning to crumble in the face of growing judicial awareness of the need for local land use policies that comprehend the housing and ecological necessities of people outside the local community.

This Note is premised on the belief that courts must recognize the standing of adversely affected nonresidents to contest local zoning ordinances in order to insure appropriate consideration of the issues raised by exclusionary zoning practices in the nation's suburbs. To support this premise, the Note surveys the current fragmented status of zoning, the problems attributable to this fragmentation, and the nonjudicial attempts to resolve the problems. In addition, the Note analyzes the judicial approach to zoning fragmentation, with special scrutiny given to the law of standing as an obstacle to efficacious judicial review. Against this background, the Note explores recent developments in the substantive law concerning exclusionary zoning and in the federal requirements for standing and suggests a test for standing that recognizes the interests of nonresidents.

II. FRAGMENTATION IN ZONING

Since local government has been a powerful tradition in the American political structure, it is not surprising that control over land development has remained largely at the local level. This decentralization of land use controls is consistent with both the original rationale behind zoning—protecting the single-family residential neighborhood—and the established localism in all aspects of property law. Unfortunately, the local zoning process has produced fragmentation in land use patterns resulting in intergovernmental conflicts and exclusionary practices that are anathema to an increasingly urbanized society. Existing methods of combating the insulary effects of fragmented zoning have proved too restrictive in application to remedy the weaknesses of parochial land use regulation in the metropolitan situation.

A. The Present Zoning Structure

The states began to confer comprehensive zoning powers on municipalities early in the 1920's.[1] When the United States Supreme Court first upheld the constitutionality of zoning in 1926 in *Village of Euclid v. Ambler Realty Co.*,[2] the zoning enabling acts applied only to municipal corporations.[3] In response to the urban growth in the first half of the twentieth century, state legislatures also gave zoning powers to townships and counties.[4] Notwithstanding this development, as late as 1950, land use control in metropolitan areas was principally the province of the central city and a few large suburban jurisdictions. In subsequent years, however, many local governments adopted controls and, by 1968, some 6,880 municipalities and 2,004 townships had zoning ordinances.[5] This extension of zoning powers, concomitant with the "Balkanization" of the metropolitan areas into large numbers of local governments, has

1. Most of these early statutes authorizing local zoning were patterned after a model published in 1924 by the U.S. Department of Commerce, commonly known as the Standard State Zoning Enabling Act. The statute, now out of print, is reproduced at 3 A. RATHKOPF, ZONING AND PLANNING 100-1 to -16 (3d ed. 1956).

2. 272 U.S. 365 (1926). The Court upheld a comprehensive municipal zoning ordinance even though it reduced the value of defendant's land from $10,000 to $2,500 per acre. The Court regarded zoning as an extension of public nuisance law designed to prevent the intrusion of industry and apartments into single-family zones. Although current zoning techniques are far more sophisticated, their primary purpose is still to protect the single-family residential district.

3. NATIONAL COMM'N ON URBAN PROBLEMS, FRAGMENTATION IN LAND-USE PLANNING AND CONTROL 5 (1969) (hereinafter cited as FRAGMENTATION).

4. Over half the states authorize counties or townships to enact zoning regulations. *E.g.*, MICH. COMP. LAWS §§ 125.201-.232, .271-.301 (1948).

5. FRAGMENTATION, *supra* note 3, at 19.

produced a chaotic situation in land use regulation in the urban setting.[6] In the New York City region, for example, more than 550 individual municipalities have the sole determination of land development policies.[7] In the five-county area surrounding Philadelphia, the majority of 238 cities, boroughs, and townships have zoning powers.[8] Altogether, of the 7,609 municipalities, counties, and townships encompassed by the Standard Metropolitan Statistical Areas in 1968, some 68.3 percent had adopted zoning regulations.[9]

The wide distribution of zoning powers would not be objectionable if local zoning decisions affected only the residents of that jurisdiction. In a cosmopolitan environment, however, zoning decisions have considerable impact on persons and property throughout the region. The fragmented state zoning also would be acceptable if the individual community considered the land development needs of the surrounding urban area. Unfortunately, the local governmental entities pursue independent solutions to problems that transcend municipal borders[10] and establish largely self-serving controls.[11]

B. Problems Accentuated by Fragmentation

The separatism engendered by zoning laws has greatly aggravated the problems of urban growth. It is not contended that fragmentation in zoning is solely responsible for existing land use problems.[12] It is clear, however, that the diffusion of zoning responsibilities and the resulting localism in land use controls have accentuated three major land

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6. *See* R. BABCOCK, THE ZONING GAME 11-12 (1966).

7. NATIONAL COMM'N ON URBAN PROBLEMS, PROBLEMS OF ZONING AND LAND-USE REGULATION 9 (1968).

8. Another illustration is the northeastern Illinois metropolitan region, in which 249 individual municipalities and more than 1,200 local governments of other types are making independent decisions concerning land development policy. Bowe, *Regional Planning Versus Decentralized Land-Use Controls—Zoning for the Megalopolis*, 18 DE PAUL L. REV. 144 (1968).

9. FRAGMENTATION, *supra* note 3, at 6.

10. *See* Aloi, Goldberg, & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1969 U. TOLEDO L. REV. 65, 72.

11. The use of local land controls for local gain can be attributed to 2 causes. First, zoning decisions are made by government officials who are politically responsible only to residents of a single municipality. Secondly, a growing demand for revenue has caused local units to engage in competition for those land uses that offer monetary gains. *See* Note, *Regional Development and the Courts*, 16 SYRACUSE L. REV. 600, 601 (1965).

12. One author has concluded that the chaos in land use planning and control is the result of a number of circumstances, not all of which are peculiar to zoning: (1) the multiplicity of jurisdictions, (2) the variety of judicial attitudes toward the content of the "general welfare" in the zoning field, (3) the varying social attitudes toward zoning, and (4) the lack of a suitable alternative to local control. R. BABCOCK, *supra* note 6, at 12-16.

development problems that have characterized the nation's transition to a metropolitan society. Before discussing the impact of fragmentation on these problems, several general observations should be made. First, the fragmentation in zoning is not only geographical, but functional as well.[13] Secondly, the fragmented allocation of responsibilities for other land use controls, such as subdivision control and planning, also has magnified existing deficiencies. Thirdly, some of the problems are attributable to the constraints imposed on zoning officials by their local constituents, rather than the decentralization of land use controls.

1. *Intergovernmental Conflicts.*—The most obvious defect of a fragmented zoning system, although probably the least significant in terms of impact, is that it leads to conflicting decisions along borders of local jurisdictions. A frequently cited illustration is the boundary street, one side of which is zoned for residences and the other side for industry.[14] In addition to intermunicipal conflicts, disagrcements also arise between municipalities and county governments over the zoning of unincorporated areas.[15] The primary cause of many intergovernmental disputes is "fiscal" zoning, which is the use of zoning to solve public financial problems.[16] This practice of manipulating local controls in order to protect the revenue base results in an atmosphere of competition for industry and commercial development in which little motivation exists for making zoning decisions based on what neighboring communities are doing.[17]

2. *Placement and Operation of Regional Facilities.*—Localism in

13. Functional fragmentation is a characteristic of government with specialized bureaucracies providing specialized services with little or no coordination between them. Meaningful solutions to functional separatism cannot be found by eliminating the geographical distribution of powers because an organizationally fragmented structure will still remain. *See* FRAGMENTATION, *supra* note 3, at 20-22; Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development,* 1966 WASH. U.L.Q. 1, 7 n.14.

14. The hypothetical appears to have been derived from Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (L. Div. 1953), *aff'd,* 15 N.J. 238, 104 A.2d 441 (1954), a classic case of intergovernmental conflict. *See* note 54 *infra* and accompanying text. For a graphic illustration of possible conflict situations see Note, *Zoning: Looking Beyond Municipal Borders,* 1965 WASH. U.L.Q. 107, 110-13.

15. Bowe, *supra* note 8, at 162. In the Chicago area the suburbs have joined forces against the Cook County Zoning Board in order to protect the joint interests of the participating municipalities against the granting of rezonings in nearby unincorporated areas. FRAGMENTATION, *supra* note 3, at 17.

16. Fiscal zoning has 2 objectives. The first is to encourage forms of land development that minimize the need for services by the municipality. The second is to bolster the municipal tax base by a land use policy designed to attract industry. FRAGMENTATION, *supra* note 3, at 12-13, 29. *See generally* Margolis, *On Municipal Land Policy for Fiscal Gain,* 9 NAT'L TAX J. 247 (1956); Schmandt, *Municipal Control of Urban Expansion,* 29 FORDHAM L. REV. 637 (1961).

17. *See* Aloi, Goldberg, & White, *supra* note 10, at 79.

land use control also may adversely affect the location and operation of public facilities such as schools, highways, and parks. Because zoning fragmentation has so often interfered with the placement of public projects, the federal government and a number of states recently have acted to curb local discretion in these matters, especially with respect to federally financed housing and highways.[18] Although the dispersion of zoning controls may no longer prevent the initial location of public facilities authorized by these programs, local zoning decisions can still seriously interfere with the operation of the facilities.[19] Local officials, for example, could rezone land surrounding a highway interchange to permit construction of a shopping center so that the community would benefit from increased highway traffic. The resulting higher volume of traffic generated by the shopping center would soon defeat the original purpose of the highway interchange.

3. *Exclusionary Practices.*—Local decisions on the timing, location, and content of private land development have magnified the patterns of economic and racial segregation in metropolitan areas. Many suburban communities, for example, have enacted exclusionary zoning ordinances that explicitly or indirectly prevent the immigration of minorities from the inner city.[20] Although outright racial discrimination in zoning is unconstitutional,[21] the same result has been achieved by local zoning legislation that effectively excludes some potential residents because of the increase in housing costs attributable to the zoning ordinances.[22] These exclusionary ordinances are often justified on the theory that they are necessary to promote public health

18. For a discussion of the various federal programs affecting urban and metropolitan development see SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, THE EFFECTIVENESS OF METROPOLITAN PLANNING app.D (1964). *See also* Evans, *Regional Land Use Control: The Stepping Stone Concept,* 22 BAYLOR L. REV. 1 (1970).

19. *See* FRAGMENTATION, *supra* note 3, at 22.

20. *See generally* Aloi, Goldberg, & White, *supra* note 10; Conti, *Suburban Zoning Laws Called Discriminatory to Negroes and Poor,* Wall Street J., Nov. 27, 1970, at 1, col. 6; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767 (1969). There is creditable evidence that the number of exclusionary ordinances in existence is high. In Connecticut, for example, 60% of all undeveloped land is zoned for minimum lot sizes between one and two acres. Becker, *The Police Power and Minimum Lot Size Zoning: A Method of Analysis,* 1969 WASH. U.L.Q. 263, 295 n.66.

21. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance that made it unlawful for any white or black to move into any house on any block in which greater number of houses were occupied by persons of an opposite color held invalid).

22. Since most of the lower income segment of the American population are minorities, any type of economic segregation also brings about racial and ethnic segregation. *See* Williams, *Planning Law and Democratic Living,* 20 LAW & CONTEMP. PROB. 317, 330 (1955). *But see* Morris, *Living Together,* Wall Street J., Dec. 28, 1970, at 1, col. 1 (stating that Negroes are moving to the suburbs in unprecedented numbers despite zoning barriers).

and safety,[23] to balance public services with demand, and to preserve property values.[24] It is apparent, however, that these restrictions also reflect a strong motivation for preserving homogeneity and amenity in local communities. Three zoning techniques have been employed to exclude undesired groups from suburban communities.[25] First, since zoning enabling statutes usually authorize regulation of building size,[26] municipalities have imposed minimum floor space requirements on residential dwellings. Secondly, many localities have relied on their authority to regulate population density as a justification for imposing large acreage requirements in residential developments.[27] Thirdly, suburban communities have frequently adopted zoning ordinances that exclude multi-family housing units.

The economic and social consequences of these exclusionary practices are several. Most importantly, the reduction in the supply of low-cost housing excludes low-income groups from job opportunities in suburbs that are not within commuting distance of the core city.[28] Moreover, by narrowing the selection of housing, these practices have placed the excluded groups at the mercy of the inner-city slumlord.[29] Finally, exclusionary zoning is a formidable barrier to socio-economic integration in residential areas, a consequence that raises issues analogous to the "de facto segregation" problem in public education.[30]

C. *Methods to Combat Fragmentation*

The impact of fragmented land use controls in metropolitan areas has led to the development of a variety of remedial measures and programs. In addition, many untried methods for controlling regional

23. *See* NATIONAL COMM'N ON URBAN PROBLEMS, ZONING CONTROVERSIES IN THE SUBURBS: THREE CASE STUDIES 73-74 (1968).

24. The arguments for these zoning techniques are discussed at length in Sager, *supra* note 20, at 793-98. *See also* Becker, *supra* note 20, at 281-89. For evidence that integration of a suburban municipality does not drive property values downward see Morris, *supra* note 22.

25. Bowe, *supra* note 8, at 150-58.

26. Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507, 511 (1964).

27. Becker, *supra* note 20, at 279 n.26.

28. The Department of Labor pinpointed this development as one of the prime causes of the failure to match available jobs with available personnel. Bowe, *supra* note 8, at 158 n.60. "It isn't solely the issue of discrimination that concerns civil rights groups. It is also a question of jobs. When companies move away from a city to a suburb with no living space for blue-collar workers the worker has no option of either traveling to the job from the city or else quitting. In too many instances, civil rights groups say, he's had to quit, and this in turn has contributed to unemployment in city areas." Conti, *supra* note 20, at 7, col. 4-5.

29. Sager, *supra* note 20, at 781.

30. *See* note 22 *supra*.

land development have been urged. Unfortunately, the existing programs are generally ineffective and the untried proposals appear years away from general enactment.

1. *Existing Methods to Combat Fragmentation.*—Many programs attempt to eliminate the problems of localism in zoning by encouraging cooperation between local governments. Significantly, these arrangements do not diminish local powers and in some instances actually broaden them. These methods include a council of governments, local planning assistance, county zoning of unincorporated territory, and extraterritorial zoning. A council of governments is a voluntary association of area governments for the solution of common problems. Although this approach to regional problems is relatively new, more than 100 councils presently are functioning in 34 states.[31] Since the council of government framework is based on voluntary cooperation and voting equality among governments, however, it seems doubtful that this method will lead to significant changes. Local planning assistance provided by metropolitan planning agencies is another method to cope with separatism. The extent of assistance varies from simply providing advice to preparing comprehensive plans.[32] Since the assistance is advisory only, it does not insure adoption of municipal policies that will implement regional objectives.[33] A few states have provided for participation of county governments in zoning activities. Although county-wide controls provide some regional perspective, these efforts have been frustrated by the clash of interests between county and municipality.[34] Many states permit municipalities to control development of land on their boundaries by zoning extraterritorially up to five miles.[35] This grant of extraterritorial power, however, does not insure that the municipality will consider regional interests in zoning.[36]

31. For detailed data relating to regional variations in the use of council of governments, the nature of their functions, and some observations about their effectiveness see FRAGMENTATION, *supra* note 3, at 32-38.

32. For local planning assistance information see FRAGMENTATION, *supra* note 3, at 46-48.

33. The federal government has adopted an important program, commonly known as the 701 program, designed to assist local agencies in comprehensive planning and encourage cooperation between jurisdictions. Housing Act of 1954 § 701, 40 U.S.C. § 461 (1964).

34. *See* Bowe, *supra* note 8, at 162.

35. *See generally* Bartelt, *Extraterritorial Zoning: Reflections on its Validity*, 32 NOTRE DAME LAW. 367 (1957); Bouwsma, *Validity of Extraterritorial Municipal Zoning*, 8 VAND. L. REV. 806 (1955).

36. Moreover, the powers themselves are severely limited. In most states these extraterritorial powers do not extend to land located within another incorporated community and in some instances can be exercised only in absence of an applicable county zoning ordinance. *See* Becker, *supra* note 13, at 26.

In practice, the communities with extraterritorial powers have usually zoned to protect their interests from surrounding communities.

Other arrangements attempt to emphasize regional considerations in zoning by reducing the discretion of local governments. These measure include regional planning agencies, state-administered land use controls, and metropolitan government. Regional planning agencies have been adopted in the majority of states to examine and approve local decisions of regional significance,[37] but they have had minimal effect because of their lack of enforcement powers.[38] Even though the states are the ultimate repositories of zoning powers, only a few have taken an active role in administering land use controls. One state requires a county to submit a proposed zoning ordinance to the state planning director for advice; another state is presently adopting land use regulations at the local level.[39] Unfortunately, more substantial state participation does not appear to be forthcoming.[40] Metropolitan

37. Enabling legislation authorizing metropolitan or regional planning has been passed in all but 4 states. *E.g.*, TENN. CODE ANN. § 13.201-12 (1955). The statutory approaches are numerous, but typically extend the planning authority of a municipality to a specified area beyond its own perimeter. For an analysis of this legislation that highlights similarities and differences see SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, *supra* note 18, at 48-66. *See also* Haar, *Regionalism and Realism in Land-Use Planning,* 105 U. PA. L. REV. 515 (1957); Melli & Devoy, *Extraterritorial Planning and Urban Growth,* 1959 WIS. L. REV. 55; Wegner, *The Value and Role of Regional Planning,* 7 INST. PLANNING & ZONING 199 (1968); Note, *The Regional Approach to Planning,* 50 IOWA L. REV. 582 (1965).

38. "Although not unfair, it is perhaps unkind to characterize these regional planning enabling statutes as high sounding but hollow moral victories. As presently formulated they are directed to making a regional plan, but not one fashioned to an end; nor is there a bridge by which the plan can influence land development . . . . Certainly the procedures for adoption are not devised with the thought of stimulating discussion, of awakening wide public response, and of having the final acceptance of the plan, which after all sets basic goals that affect the lives of the citizens in many intimate ways, a matter of public concern. Without such clarification, there is small hope for a reconciliation of divergent interests, without which planning becomes simply a pleasant intellectual hobby." Haar, *supra* note 37, at 522.

39. Hawaii has a state land use commission that supervises land use controls throughout the state. Since the conditions in that state differ from those on the mainland, the Hawaiian approach has limited relevance. *See* FRAGMENTATION, *supra* note 3, at 58.

40. President Nixon will propose to the 92d Congress a national land use policy that would give the states broad powers to control the use of land within their borders. Under the proposed land use legislation, which was formulated by the President's Council on Environmental Quality, the 50 states would be encouraged by federal financial policies to develop state land planning and conservation programs that would assure controlled development of land within areas of critical environmental concern and prevent local regulations from restricting development of regional benefit. Certification of the state programs by the Department of Housing and Urban Development, which would have primary responsibility for administering the national policy, would entitle the states to matching funds to assist them in their land development plans. A major concern of the national policy would be to overcome exclusionary practices of some local jurisdictions in favor of nonresident public access to municipally owned beaches, multi-family dwellings, publicly assisted housing, and educational institutions. *See* Karmin, *Nixon to Ask "National Land Use Policy" Giving States Wide Control Under HUD,* Wall Street J., Jan. 20, 1971, at 6, col. 1-2.

government is the most drastic response to the problems caused by fragmentation in land use regulation. Because the transfer of control powers to a metropolitan government has occurred in only a few areas[41] and these experiences have limited applicability, it is difficult to evaluate fully the impact of this approach on regional development.

2. *Proposed Methods to Combat Fragmentation.*—Of the numerous untried proposals for dealing with localism in land use regulation, only three appear to have any likelihood of success. One recommendation is the creation of area-wide commissions to review the impact of local decision-making on area land development.[42] If the disadvantages to the area outweigh the interests of the municipality, the commission would be empowered to overturn local regulations. Such a reviewing agency would undoubtedly impel regional considerations in municipal decisions, but only in the negative manner of vetoing judgments already made. The second proposal calls for focusing authority in the core city to regulate land use for the entire metropolitan area.[43] This delegation of extraterritorial powers over suburban communities to the central city is premised on the communities' substantial dependence upon the urban center. Even though the implementation of this suggestion would likely reduee intergovernmental conflicts, it is inconsistent with the primacy placed on local representation in the United States. The third method proposed as a remedy for the problems of fragmentation is the creation by the federal government of "new towns" with more responsive zoning.[44] Since the construction of completely new towns would require enormous capital investment, however, this suggestion will probably not be enacted in a time of more pressing financial demands.

41. The Nashville experience is worthy of note. When the Metropolitan Government of Nashville and Davidson County was inaugurated in 1963, the Metropolitan Planning Commission was given broad powers in the areas of planning-zoning-subdivision regulation and capital improvements programming and budgeting. Significant advances in regional development have been made in the last 7 years. For a discussion of the inferences that can be drawn from this regionalization of land use controls see FRAGMENTATION, *supra* note 3, at 39-46.

42. One author has suggested the creation of state-wide administrative agencies to supervise decisions of local authorities in land use matters. R. BABCOCK, *supra* note 6, at 166-73. A regional agency would do just as well.

43. *See* Becker, *supra* note 13, at 24.

44. In 1965 the Johnson Administration asked for authority to provide low interest loans to the states for acquisition of land for "new town" sites for the development of new and separated cities. The proposal was defeated because of pressure placed on Congress to preserve suburban autonomy and prevent metropolitan government. *See* Bowe, *supra* note 8, at 164-65; Evans, *supra* note 18, at 16.

III. The Judicial Approach to Zoning Fragmentation

Only in recent years have the courts recognized the role of zoning fragmentation in accentuating urban problems. Moreover, most courts have been reluctant to consider regional circumstances in zoning cases. In the few instances in which regional perspectives have been applied, the courts have relied on them primarily for the purpose of sustaining local zoning ordinances. The failure of courts to invalidate zoning practices that clearly conflict with legitimate regional interests, however, is mainly attributable to the procedural obstacle of standing. As a general rule, courts have not recognized the standing of nonresidents to contest local zoning ordinances. Consequently, those individuals who are most likely to assert regional interests seldom have their day in court.

A. Methodology

The authority to zone is grounded in the police power of the enacting municipality, which is generally described as the power to impose regulations reasonably related to promotion of the health, safety, morals, or general welfare of the public.[45] Courts that have introduced regional perspectives in zoning decisions, therefore, have justified their action as an appropriate incident of their authority to review the reasonableness of an exercise of local police power. Following this approach, the courts have had to consider the scope of the term "public" in determining the extent that municipalities may make provincial use of zoning power. Although the Supreme Court early observed in *Euclid*[46] that a general public interest might outweigh the interest of a single municipality, courts have continued to define "public" so as to exclude persons who are not residents of the zoning jurisdiction.[47] In determining the validity of controls over private land use, therefore, the welfare of nonresidents has often been considered

45. The existence and scope of the police power does not stem from any specific constitutional authorization. Nowhere in the Constitution is Congress given the power to enact a law simply because it promotes the general welfare, and provision for a broad police power is similarly absent from state constitutions. Nevertheless, the courts have assumed the police power to be a necessary element of effective government. *See* Becker, *supra* note 20, at 267.

46. "It is not meant by this, however,[in sustaining the districting of Euclid as a valid police power exercise] to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." 272 U.S. at 390.

47. *E.g., Ex parte* Ackerman, 6 Cal. App. 5, 91 P. 429 (Ct. App. 1907); Cook County v. Chicago, 311 Ill. 234, 142 N.E. 512 (1924); R.Babcock, *supra* note 6, at 176-77; Note, *supra* note 14, at 118. *See also* Makielski, *Zoning: Legal Theory and Political Practice*, 45 J. Urban L. 1, 13 (1968).

irrelevant. In recent years, however, a number of courts have required that the exercise of municipal police power encompass the welfare of public interests outside the enacting community, and have not hesitated to invalidate local ordinances found to be detrimental to the welfare of the larger public.[48] Invalid ordinances, however, are held to be beyond the power of the municipal zoning authority rather than unconstitutional.[49] These courts reason that the "public" whose welfare is served by any exercise of the state police power necessarily includes all residents of the state. Since the power delegated to the municipalities must be as limited as that of the state, a local exercise of power that adversely affects the welfare of any resident cannot be permitted.[50] Although this argument is not entirely convincing, it is clear that a test of reasonableness should include all persons affected, regardless of whether they reside in the zoning municipality.[51]

B. Situations in Which Courts Have Considered Regional Perspectives

The decisional law reveals three situations in which extraterritorial considerations have been used in reviewing zoning legislation. Unfortunately, no clear-cut principles of regionalism in zoning have evolved from these instances of judicial inquiry beyond municipal boundaries. If anything, these cases demonstrate how regional perspectives have been only restrictively employed.

1. *Intergovernmental Conflicts.*—When a municipality zones land located on its border differently from land in an adjacent community,[52] courts have frequently examined regional criteria. The challenge of inconsistent classification usually arises when a resident landowner asks the court to consider the zoning ordinance of the adjoining municipality as evidence that the local restriction is unreasonable.[53] Thus, in the

48. *E.g.*, Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955); Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (L. Div. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954).

49. *See* Feiler, *Zoning: A Guide to Judicial Review*, 47 J. URBAN L. 319, 338-39 (1970). The courts have often failed to distinguish between "reasonableness" in the ultra vires sense and "reasonableness" as a vehicle for determining the validity of state action when challenged on fourteeth amendment grounds. 38 N.Y.U.L. REV. 161 n.5 (1963).

50. *See* Comment, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251, 1254 (1966).

51. *See* B. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 35 (1961); Becker, *supra* note 13, at 14. *But see* Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment, 393 Pa. 62, 77, 141 A.2d 851, 859 (1958) (Bell, J., dissenting) (dangers of a broad concept of general welfare demonstrated). *See generally* McDougal, *The Influence of the Metropolis on Concepts, Rules, and Institutions Relating to Property*, 4 J. PUB. L. 93 (1955).

52. *See* notes 14-17 *supra* and accompanying text.

53. In most instances the classification of adjoining land is sought to be used as evidence that

much-noted decision of *Borough of Cresskill v. Borough of Dumont*,[54] the New Jersey Supreme Court held that a rezoning from residential to commercial was invalid because the rezoned block was surrounded by residential developments in three adjacent municipalities. Undoubtedly, most courts today will analyze the character of land use in neighboring towns before ruling on the validity of a local ordinance.[55]

2. *Exclusionary Practices.*—Courts also have looked to extraterritorial considerations when zoning ordinances either prevent certain groups from living in a municipality or prohibit particular land uses within its borders.[56] When these exclusionary practices are challenged, courts frequently invoke regional criteria, such as the availability of land outside the locality, in order to sustain the restrictions. In the landmark case of *Lionshead Lake, Inc. v. Township of Wayne*,[57] the New Jersey Supreme Court relied on regional land development needs to uphold a local minimum floor-space ordinance. Moreover, in two far-reaching cases[58] the courts upheld local zoning

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the zoned tract is restricted to a use for which it is unsuited. *E.g.*, Forbes v. Hubbard, 348 Ill. 166, 180 N.E. 767 (1932) (since adjoining property was used commercially, plaintiff's land could not be profitable utilized for residence); Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963) (the court found that the land in question was unsuited for residential development because of the commercial uses in the adjoining city).

54. 15 N.J. 328, 104 A.2d 441 (1954), *noted in* 23 FORDHAM L. REV. 384 (1954) *and* 52 MICH. L. REV. 1071 (1954). Rejecting the zoning municipality's contention that the responsibility of a municipality for zoning halts at the municipal boundary without regard to the effect of its zoning ordinance on adjoining municipalities, the court stated: "Such a view might prevail where there are large undeveloped areas at the borders of two contiguous towns, but it cannot be tolerated where, as here, the area is build up and one cannot tell when one is passing from one borough to another. Knickerbocker Road and Massachusetts Avenue are not Chinese walls separating Dumont from the adjoining boroughs." *Id.* at 247, 104 A.2d at 445.

55. Becker, *supra* note 13, at 8; Note, *supra* note 14, at 108.

56. For a discussion of zoning ordinances encountered in these cases see notes 25-27 *supra* and accompanying text.

57. 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953). Lionshead Lake, Inc., a developer, brought an action against the township challenging the validity of a minimum floor area restriction on residential dwellings. The court noted that the ordinance protected Wayne from the approaching wave of suburban development and ruled for the township. Professor Charles Harr later commented: "[T]he only aspect of regionalism considered by the court was the isolationist view of the township: that the city population would be spilling over into its neighborhoods. This is localism, not an attempt at evaluating the interests of the broader community . . . ." Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1053 (1953). *See* N. WILLIAMS, THE STRUCTURE OF URBAN ZONING 126-36 (1966); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

58. Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955) (appropriate use of property depends on nature of entire region in which municipality is located); Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949) (ordinance not arbitrary so

ordinances excluding heavy industry from the community, reasoning that the need for industrially zoned land had been satisfied by areas beyond the community's border. Rarely have regional interests been applied to invalidate a proposed exclusionary ordinance.[59]

3. *Placement and Operation of Regional Facilities.*—A different situation is presented when a local zoning practice is challenged on the ground that it interferes with the placement of regional facilities.[60] Some courts, for example, have been asked to hold that a municipality has an affirmative duty to zone in order to permit proper placement and utilization of public facilities.[61] Whether there is a municipal duty to zone based on regional requirements is a question yet unanswered. Although several courts have recognized a duty to serve a public that extends beyond the local community,[62] no court has invalidated a local restriction on the sole ground that it is inconsistent with regional needs for public facilities.[63]

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long as business and industrial needs are supplied by other accessible areas in the community at large). Most of the cases have involved exclusion of eleemosynary institutions. *See* Comment, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720 (1962).

59. *Compare* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (invalidating a 4-acre minimum lot requirement on the ground that the effect on the residential region as a whole must be considered), *with* Vickers v. Township Comm. of Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962) (local ordinance excluding trailers from township upheld despite vigorous dissent). *See also* Green, *New Trends in Zoning as Recognized by Court Decisions*, 6 INST. PLANNING & ZONING 1 (1965).

60. In the previous 2 situations the courts merely extend the area that will be examined in determining reasonableness of local zoning. Here the courts must extend the conception of the police power in judging the validity of local ordinances. *See* notes 45-51 *supra* and accompanying text.

61. Arguably, the statutory language in most state enabling acts that zoning be "in accordance with a comprehensive plan" could be interpreted to require a local entity to zone in conformity with a regional plan or employ regional considerations. The courts, however, have taken a much more narrow view of the provision, finding that it does not even require a municipal plan. *See generally* Haar, *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154 (1955); 38 N.Y.U.L. REV. 161, 162-63 (1963).

62. "At the very least Dumont owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of Dumont. To do less would be to make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning." Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 242, 104 A.2d 441, 445-46 (1954). *See* R. BABCOCK, *supra* note 6, at 178; note 54 *supra* and accompanying text.

63. *E.g.*, Wrigley Properties, Inc. v. City of Ladue, 369 S.W.2d 397 (Mo. 1963) (ordinance upheld despite landowner's contention that the residential classification was invalid because of regional need for shopping center); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958) (unsuccessful attack on exclusion of apartments based on regional need for more multiple dwelling units). The *Dumont* case has been cited, however, as a situation in which an ordinance was held invalid on the ground that it was not in harmony with regional needs. 38 N.Y.U.L. REV. 161, 163 n.13 (1963).

C. *The Obstacle of Standing*

The divisive structure and administration of zoning laws have placed the burden of raising regional issues on outsiders and persons not originally involved in the zoning proceedings. This result is partially attributable to the tendency of communities to employ land use controls as protective devices. Residents of a suburban community enacting an exclusionary ordinance, for example, are not likely to challenge the validity of the self-serving provision. Outsiders prevented from living or finding employment in the community, however, have a legitimate interest in attacking the ordinance. Unfortunately, outsiders traditionally have been denied standing to seek judicial review of the ordinance. It is clear that the procedural concept of standing is the most formidable obstacle to effective judicial consideration of regional perspectives.[64] One reason that nonresidents have been denied standing in zoning cases is the traditional judicial reluctance to usurp the legislative function and decide controversial economic and social issues. A second and more important cause has been the judicial tendency to impose rigid standing requirements for review of both administrative zoning decisions and constitutional challenges to zoning legislation.

1. *The Statutory Law.*—Most state enabling statutes, like the Standard State Enabling Act,[65] provide that zoning appeals may be taken to a court by *"any person aggrieved"* by a decision of an administrative officer.[66] Anomalously, most of the statutes fail to define who is a "person aggrieved" and courts have had to determine what kind of nexus with the administrative zoning decision entitles a person to judicial review. In addition to providing a general right of appeal to persons aggrieved, however, a few states have specified the standing requirements for contesting zoning restrictions.[67] In New Jersey, for

64. The courts also have made frequent use of 2 other procedural rubrics in order to side-step troublesome zoning issues: (1) that one challenging a zoning ordinance has the burden of proving it unreasonable, capricious,and arbitrary, and (2) that the courts will not interfere with the legislative process when a debatable question is shown. Feiler, *supra* note 49, at 33. Standing is obviously the most insurmountable procedural barrier because if the plaintiff is denied standing he cannot begin to attack the regulation on the merits.

65. *See* note 1 *supra.*

66. *E.g.,* CONN. GEN. STAT. ANN. § 8-8 (Supp. 1969). The majority of states use the same language in describing who can appeal an administrative decision to a higher administrative body. Tennessee, for example, has the aggrieved language for appeal to the board of appeals, but not to the courts. TENN. CODE ANN. § 13-706 (1956). A few statutes only provide that a "party of record" may appeal the administrative determination. 3 R. ANDERSON, THE AMERICAN LAW OF ZONING § 21.05 (1968). *See generally* Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement,* 64 MICH. L. REV. 1070 (1966); Note, *The "Aggrieved Person" Requirement in Zoning,* 8 WM. & MARY L. REV. 294 (1967).

67. *E.g.,* PA. STAT. ANN. tit. 53, § 14759 (1957) ("any taxpayer").

example, a recently enacted statute allows any person, whether residing within or without the municipality, to challenge the zoning laws.[68] New York apparently recognizes the standing of a town to seek judicial review of a village's rezoning of land abutting the town's border.[69]

2. *Judicial Construction of the Requisite Interest for Standing.*—There are two kinds of suits that may be brought to challenge local zoning practices. The first is an appeal to the courts to seek judicial review of a decision by an administrative body. The second is a suit challenging the constitutionality of zoning legislation. The courts have often failed to distinguish the kind of suit in which a standing question is presented. The courts also have repeatedly assumed that the requisite interest to be a "person aggrieved" by an administrative zoning decision[70] is identical with the interest necessary to raise constitutional claims. The principles that have evolved with respect to standing for review of administrative decisions, therefore, have had equal application in determining who can litigate constitutional zoning questions. This equating of standing requirements, however, appears to be clearly erroneous. In the first place, the relevant statutory provisions apply only to the standing requirements for appealing administrative decisions.[71] Moreover, entirely different policy questions are presented by the two situations.

(a) *General requirements for standing.*—The weight of authority is that for a person to be aggrieved within the meaning of the statutes, he must be specially, personally, and adversely affected by the administrative determination. In order for an individual to prove that he was personally affected, most courts have required some showing of a legal or an equitable interest in the property subject to the zoning decision.[72] Obviously, under this restrictive view, residents and

68. "[A]ny person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be effected by any action taken under the act to which this act is a supplement, or whose rights to use, acquire, or enjoy property . . . under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act . . . . N.J. REV. STAT. § 40:55-47.1 (Supp. 1970).

69. No state statute permitting towns to do this has been found, but a county administrative law authorizing the practice was cited in Town of Bedford v. Village of Mount Kisco, 34 App. Div. 2d 687, 312 N.Y.S.2d 617 (1970). *But see* Village of Russell Gardens v. Board of Zoning and Appeals, 30 Misc. 2d 392, 219 N.Y.S.2d 501 (Sup. Ct. 1961) (state statute expressly provides that village shall not have right to review town's zoning determination).

70. Moreover, the courts have not imposed different requirements for standing to appeal from one administrative echelon to another and standing to initiate judicial review. *See* R. ANDERSON, *supra* note 66, § 16.11.

71. *See* Comment, *supra* note 66, at 1072 n.15; notes 98-101 *infra* and accompanying text.

72. *E.g.*, Gregorio v. Zoning Bd. of Appeals, 155 Conn. 422, 232 A.2d 330 (1967); Victoria Corp. v. Atlanta Merchandise Mart, Inc., 101 Ga. App. 163, 112 S.E.2d 793 (1960); Bryniarski v.

nonresidents alike who do not have a proprietary interest in the specific tract of zoned land would never be entitled to judicial review.[73] To remedy this result, most courts have held that a person without a property interest in the zoned land has a right to review if he can prove damages to his own property that are not generally shared with other property owners.[74] As a general rule, people who do not own property are denied standing altogether.[75] Despite this seemingly uniform prerequisite of individual loss, the case law is replete with inconsistent decisions on standing.[76] When a resident of the zoning municipality owns land that abuts the property subject to the challenged zoning regulations, for example, special damages have been deemed to accrue prima facie.[77] If the property does not abut, however, the requirements for special damages have been more stringent. Hence, the more removed the interested party's property is from the zoned tract, the more peculiar and substantial must be his injury in order for him to have standing.[78]

(b) *Standing requirements for nonresidents.*—Most courts have held that a person who owns property adjacent to the zoned property but who lives outside the zoning municipality cannot challenge its zoning ordinances.[79] Consequently, the mere fact of nonresidency has frequently prevented interested persons from qualifying as aggrieved parties.[80] A few courts, however, have permitted nonresidents to attack the land use

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Montgomery County Bd. of Appeals, 247 Md. 137, 230 A.2d 289 (1967). Some courts have allowed much greater latitude than others in determining the qualifications of a party as an aggrieved person. These courts have taken a broader view in the interpretation of the provision and allowed an appeal as a matter of right as long as a party is adversely affected in fact within the scope of the zoning ordinance. *E.g.*, O'Connor v. Board of Zoning Appeals, 140 Conn. 65, 98 A.2d 515 (1953); D'Almeida v. Sheldon Realty Co., 252 A.2d 23 (R.I. 1969); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.16 (1958).

73. *See generally* Foss, *Interested Third Parties in Zoning*, 12 U. FLA. L. REV. 16 (1959).

74. *E.g.*, Garner v. County of DuPage, 8 Ill. 2d 155, 133 N.E.2d 303 (1956); Downey v. Incorporated Village of Ardsley, 152 N.Y.S.2d 195 (Sup. Ct. 1956), *aff'd mem.*, 3 App. Div. 2d 663, 158 N.Y.S.2d 306 (1957). Allowing other persons a right to review seems basic to zoning theory because zoning statutes almost uniformly provide for notice and inclusion of the general public in hearings before the zoning board. 3 R. ANDERSON, *supra* note 66, at § 21.05. For a discussion of what constitutes special damages see 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 7.91 (1968).

75. 1 C. ANTIEAU, *supra* note 74, at § 7.93.

76. *See* Comment, *supra* note 66, at 1079.

77. *See* Heady v. Zoning Bd. of Appeals, 139 Conn. 463, 94 A.2d 789 (1953); Elwyn v. City of Miami, 113 So. 2d 849 (Fla. Dist. Ct. App. 1959).

78. *Compare* Toomey v. Gomeringer, 235 Md. 456, 201 A.2d 842 (1964) (owner of property 2 blocks away had standing), *with* Pattison v. Corby, 226 Md. 97, 172 A.2d 490 (1961) (no right to appeal for owner of property considerably distant from and out-of-sight of affected property).

79. *E.g.*, Clark v. City of Colorado Springs, 162 Colo. 593, 428 P.2d 359 (1967) (en banc).

80. *See generally* Ayer, *The Primitive Law of Standing in Land Use Disputes: Some Notes From a Dark Continent*, 55 IOWA L. REV. 344 (1969).

controls of neighboring municipalities. Implicit in these decisions has been a recognition that property interests may be adversely affected by a political entity in which the landowner has no representation.[81] This extension of standing to nonresidents has logically accompanied the growing judicial awareness of the need to consider regional circumstances in local zoning determinations.[82] Citing the *Dumont*[83] case for the proposition that the general public, both without and within the zoning jurisdiction, has an interest in the zoning regulations enacted, a Connecticut court, in *Hamelin v. Zoning Board,*[84] held that nonresidents had standing to appeal because their injury was manifested by their participation in lower administrative hearings. Similarly, in *Koppel v. City of Fairway,*[85] the Kansas Supreme Court interpreted a state statute authorizing "affected property owners" to challenge zoning action to include nonresident owners of adjacent property. Although several commentators have foreseen a trend toward recognizing the interests of nonresidents in local land use decisions,[86] it seems clear that the vast majority of courts do not grant standing to nonresidents. Moreover, the few courts that have recognized the standing of nonresidents are far from agreement on the nature of the interest required.[87]

All courts agree that interest groups composed of nonresidents, such as civil rights organizations, do not have standing. Surprisingly, even civic and property owners' organizations composed of residents of the enacting municipality are seldom held to be aggrieved persons for purposes of appealing zoning regulations.[88] It is not unlikely that the

81. 38 N.Y.U.L. REV. 161, 163 (1963).

82. *See* notes 45-63 *supra* and accompanying text.

83. *See* note 54 *supra* and accompanying text.

84. 19 Conn. Supp. 445, 117 A.2d 86 (New Haven County C.P. 1955).

85. 189 Kan. 710, 371 P.2d 113 (1962). In this case, the protests of nonresidents had been ignored by the city council in passing a zoning amendment that rezoned land on the city's border from residential to commercial. The court also interpreted a statute requiring a greater affirmative vote by the council if a certain percentage of nearby owners protested to include all property owners within the prescribed area regardless of residency.

86. Comment, *supra* note 66, at 1080; Note, *supra* note 66, at 304.

87. *Compare* Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963) (nonresidents who owned adjacent property had right to intervene in action brought by resident property owner), *and* Al Walker, Inc. v. Borough of Stanhope, 23 N.J. 657, 130 A.2d 372 (1957) (nonresident who faced potential loss of business as result of zoning ordinance had sufficient interest ot give him standing), *with* Krembs v. County of Cook, 121 Ill. App. 2d 97, 257 N.E.2d 121 (Ct. App. 1970) (although land zoned by county was contiguous, city was not entitled to intervene), *and* Wood v. Freeman, 43 Misc. 2d 616, 251 N.Y.S.2d 996 (Sup. Ct. 1964), *aff'd,* 24 App. Div. 2d 704, 262 N.Y.S.2d 431 (1965) (nonresident owners of property contiguous to subject property not aggrieved persons).

88. *E.g.,* Shore Acres Improvement Ass'n v. Anne Arundel County Bd. of Appeals, 251 Md. 310, 247 A.2d 402 (1968) (association not aggrieved); Lido Beach Civic Ass'n v. Board of Zoning

reluctance to grant standing to these groups is motivated by a desire to avoid the difficult decision of whether a group may assert the rights of its members.[89] It is well settled, however, that the zoning municipality may be an aggrieved person within the meaning of the statutes authorizing a right to review,[90] and municipalities are frequently allowed to contest the decisions of their own zoning boards.[91] Concomitant with the extension of standing to nonresidents, there is some authority that a neighboring community may contest a zoning determination under a statutory grant of review.[92] Considerable confusion exists, however, concerning the capacity in which the suit must be brought and the kind of injury that must be alleged by the aggrieved community. Ordinarily, local governments lack standing to sue in behalf of their constituents,[93] and this rule has carried over into the zoning context. In *City of Greenbelt v. Jaeger*,[94] for example, the Maryland Court of Appeals held that the city lacked standing to attack the rezoning of contiguous property because it neither claimed nor showed that it was aggrieved other than in its representative capacity. Similarly, a New York court ruled in *Town of Huntington v. Town Board of the Town of Oyster Bay*[95] that a town did not have standing as an aggrieved person even though it claimed that the zoning would cause economic injury. When an adjacent community alleges some specific injury either to its property or its corporate

Appeals, 13 App. Div. 2d 1030, 217 N.Y.S.2d 364 (1961). *But see* KY. REV. STAT. ANN. § 100.872 (1962).

89. *See* 3 K. DAVIS, *supra* note 72, § 22.06. *See also* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962).

90. *See* Town of Somerset v. County Council, 229 Md. 42, 181 A.2d 671 (1962); 3 R. ANDERSON, *supra* note 65, § 21.11.

91. *E.g.*, City of Baltimore v. Borinsky, 239 Md. 611, 212 A.2d 508 (1965) (city is proper party to appeal because of interest in effectuation of zoning policies).

92. *E.g.*, Borough of Leonia v. Borough of Ft. Lee, 56 N.J. Super. 135, 151 A.2d 540 (App. Div. 1959) (the right of Leonia to bring an action against a zoning amendment by Ft. Lee was not questioned); Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (L. Div. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954) (since nonresidents had standing, it was immaterial whether the municipal plaintiff had adequate status to challenge the ordinance).

93. 2 C. ANTIEAU, *supra* note 74, § 16.00.

94. 237 Md. 456, 206 A.2d 694 (1965). Although noting that the municipality has a right to appeal if it is a party aggrieved in its own right, the court said: "Even if it be further assumed that there were citizens or residents of Greenbelt who were aggrieved by the rezoning ordered . . . it is clear that an association or corporate body representing only the viewpoint of its members is not itself aggrieved merely because its members are." *Id.* at 463, 206 A.2d at 698.

95. 57 Misc. 2d 821, 293 N.Y.S.2d 558 (Sup. Ct. 1968). In this case Huntington brought a proceeding to review the grant of a special exception for a proposed shopping center by Oyster Bay. The corporation that was granted the exception owned land in Huntington, but the subject parcel was in Oyster Bay. Dismissing Huntington's contention that the zoning action would require it to spend vast sums of money to enlarge its roads to accommodate the increased traffic to the shopping center, the court found that Huntington had no right to dictate zoning in Oyster Bay.

capacity, however, it will normally be allowed to maintain the zoning suit.[96]

D. Evaluation

The judiciary has not taken an active role in eliminating problems attributable to zoning fragmentation. In adjudging the reasonableness of the exercise of municipal zoning power, courts generally have disregarded the interests of the public outside the community. Moreover, they usually have examined regional effects of local zoning only at the instance of residents who are relying on regional criteria to sustain zoning ordinances. The strict requirements for standing to contest local zoning ordinances is the greatest obstacle to more frequent and objective judicial consideration of the regional impact of zoning. State courts have constructed a law of standing in zoning litigation that is considerably more artificial and less satisfactory than in other areas of state judicial review.[97] Standing has been made solely dependent upon geographical proximity and jurisdictional boundaries. Moreover, in applying their restrictive tests, state courts have failed to distinguish between the requirements for standing to initiate review of administrative zoning decisions and standing to challenge the constitutionality of zoning legislation.[98] The equation of standing requirements in both instances may mean that an individual who is harmed by unconstitutional governmental action may be denied relief in state court although he would be entitled to relief in federal court. In the latter forum, state court interpretations of standing prerequisites are not controlling and, in order to attack the constitutionality of the legislative act, the challenging party is required by recent federal decisions only to show that he is harmed by the challenged law.[99] No primacy is placed on proprietary interest in the zoned district or damage different from that of the public at large.

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96. *See* 1969 DUKE L.J. 841, 842.

97. By and large, state courts have thrown their judicial doors open to anyone who asserts a legitimate interest in review of other administrative action. Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 468 (1970). The rigidity with respect to zoning seems to be attributable to the influence of nuisance law in this area. Foss, *supra* note 73, at 27.

98. *See* 2 R. ANDERSON, *supra* note 66, § 21.04. For a suggestion that this uniform treatment is not necessarily undesirable see Ayer, *supra* note at 80, at 372 n.162.

99. *See* notes 111-14 *infra* and accompanying text. The law of standing to raise federal constitutional issues was formerly governed by the Supreme Court's decision in Flast v. Cohen, 392 U.S. 83 (1968); it is uncertain to what extent that case is superceded by the *Data Processing* rationale. Under the former decision, plaintiff must merely demonstrate a sufficient nexus between his status and the nature of the alleged unconstitutional governmental action to support his claim of standing. *See generally* Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601 (1968). *See also* 1 C. ANTIEAU, *supra* note 74, § 4.24.

Anomalously, a nonresident who is substantially harmed by a local enactment could attack its constitutionality in federal court, but may be unable to obtain state court review of an administrative decision under the enactment.[100] This failure to distinguish the kind of action that is being challenged also has importance in determining the application of the exhaustion of administrative remedies doctrine.[101]

IV. A Response to the Exclusionary Effects

Broadening the concept of standing in zoning controversies would be an effective judicial response to the plight of persons excluded from many suburban communities by zoning controls. The volume of recent literature concerning exclusionary zoning and the growing number of suits in the area suggest that suburban zoning ordinances are coming under strong constitutional attack. Therefore, since standing is essentially a determination that a plaintiff who has been injured deserves to be heard and is not an adjudication on the merits, the existing barriers to recognizing the right of nonresidents to challenge exclusionary zoning practices should be eliminated in order to allow consideration of these constitutional issues. Furthermore, permitting nonresidents to seek judicial review of zoning decisions would promote consideration of regional needs and reduce the problems of fragmentation in zoning.

A. Current Developments

There has been much recent commentary on the discriminatory character of suburban zoning laws.[102] Most commentators have addressed the problem of whether a pattern of urban slums and segregated suburbs denies the urban poor equal protection of the law and have concluded, as stated by one authority, that "no small number of

100. In most cases the elements of aggrievement under state law will be the same as that necessary for assertion of constitutional claims. In states where nonresidents may not sue as persons aggrieved, however, they would be entitled to assert constitutional issues in federal court if they are injured in fact. *See* notes 111-14 *infra* and accompanying text. Of course, outsiders denied standing to raise their constitutional claims at the state level could seek relief in federal court. Moreover, they could attack the state standing requirements as violations of equal protection to the extent they were discriminated against as nonresidents.

101. Generally, when the constitutionality of a zoning ordinance is attacked, the usual administrative remedial procedure need not be pursued before institution of judicial proceedings. 1 C. Antieau, *supra* note 74, §§ 4.24, 7.94; 8A E. McQuillin, The Law of Municipal Corporations § 25.283 (3d ed. 1965). *But see* Igna v. City of Baldwin Park, 9 Cal. App. 3d 909, 88 Cal. Rptr. 581 (Ct. App. 1970) (property owner was required to exhaust administrative remedies before challenging constitutional validity of zoning ordinance).

102. *E.g.*, Aloi, Goldberg, & White, *supra* note 10; Becker, *supra* note 20; Sager, *supra* note 20; Williams, *supra* note 22; Note, *supra* note 26.

constitutional fatalities would accompany a constitutional campaign in this area."[103] No doubt encouraged by these observations, those of limited means who find themselves shut out from the suburbs are beginning to shape a broad attack against local zoning restrictions. Aided by civil rights organizations, builders, and some businesses that have moved to the suburbs, the excluded classes are pressing the courts and the legislatures for changes in zoning laws.[104] The federal judiciary has not proved unresponsive to their claims. Although all of the recent cases have concerned suits initiated by residents, these decisions clearly evidence an innovation of federal constitutional standards in the review of zoning ordinances that should be equally applicable to challenges made by nonresidents. One court, for example, has ruled that a municipality's rezoning of residential land into a recreational tract to prevent the construction of low-cost housing violated the equal protection clause.[105] Another court invalidated a state constitutional requirement that a local referendum be held to decide whether federally funded low-income housing can be built in the community.[106] In addition, state courts are now being asked to adjudicate suits brought against discriminatory municipal land use controls by members of the local community. In *Baskerville v. Town of Montclair,*[107] for example, a

103. Sager, *supra* note 20, at 799.

104. In Massachusetts the legislature has passed a law that could require each municipality to zone at least 1.5% of its land for low-income housing. *See* Conti, *supra* note 20. New Jersey has statutorily broadened the number of people entitled to standing (*see* note 68 *supra* and accompanying text) and is considering a new enabling law that provides: "[I]n no event shall any zoning ordinance be deemed to have a valid objective if the effect of such ordinance is to exclude racial, religious, or ethnic minorities." Aloi, Goldberg, & White, *supra* note 10, at 104. Mention should be made here of the Housing and Urban Development Department's controversial program to extend low-cost public housing into the suburbs. *See* Karmin, *Romney's Departure Grows More Likely,* Wall Street Journal, Dec. 16, 1970, at 10, col. 3.

105. Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y. 1970). Another important case is Gautreaux v. Chicago Housing Auth., 296 F. Supp. 907 (N.D. Ill. 1969), *noted in* 22 VAND. L. REV. 1386 (1969), in which the court held that equal protection is violated when a public housing authority's site selection policies are deliberately designed to maintain existing patterns of residential segregation.

106. Valtierra v. Housing Auth., 313 F. Supp. 1 (N.D. Cal. 1970), *prob. juris. noted sub nom.* James v. Valtierra, 398 U.S. 949 (1970). A 3-judge panel found the requirement illegal, since other federally assisted projects such as highway construction, hospitals, and college dormitories have no similar impediments.

107. No. L-25287-68 P.W. (N.J. Super., Mar. 30, 1970). Among the plaintiffs were many low-income Negro residents of the community that imposed a $35,000 minimum cost restriction on rezoning of a subdivision of single-family homes. They alleged that the ordinance violated New Jersey law and the thirteenth and fourteenth amendment rights of black citizens. Defendants challenged the right of plaintiffs to attack the ordinance. Noting that the subdivision developer and residents of the surrounding area were not likely to contest the ordinance, the court concluded that since zoning serves the public at large and the community, plaintiffs had the right to have a court determine whether the municipality could by legislation fix the construction costs of new houses.

lower New Jersey court found that a minimum construction cost requirement was unrelated to the health, safety, or general welfare of the community and thus in excess of municipal zoning power.

Coupled with the increasing application of constitutional standards to exclusionary zoning practices, the liberalization of federal standing requirements in two recent cases should have a significant impact in allowing more litigation of zoning issues. First, in a development specifically related to zoning, the Second Circuit decided in *Township of River Vale v. Town of Orangetown*[108] that a municipal corporation is a "person" under the due process clause of the fourteenth amendment for purposes of attacking a zoning ordinance of a contiguous municipality. The court's ruling that economic damage is a sufficient interest to give a township standing to raise constitutional claims[109] may persuade state courts to broaden their conception of standing for constitutional purposes. Although the court's reasoning was premised on the zoning municipality's location in another state,[110] it also may influence the states to interpret their nonconstitutional rules of standing to allow adjoining communities to attack each other's zoning administrative decisions. Secondly, recent Supreme Court decisions culminating in *Association of Data Processing Service Organizations, Inc. v. Camp*[111] have liberalized the federal law of standing as a whole. Rejecting the traditional "legal interest" test and noting a trend toward enlargement of the class of people who may protest administrative action,[112] the Court

108. 403 F.2d 684 (2d Cir. 1968), *noted in* 1969 DUKE L.J. 841; 83 HARV. L. REV. 679 (1970). River Vale, New Jersey, and Orangetown, New York, are residential municipalities having the state line as a common border. Orangetown adopted an amendment to its zoning code rezoning a tract of land contiguous to River Vale from residential to "office park." River Vale sought declaratory relief and damages, contending that the ordinance was "arbitrary and capricious" and that it so depreciated property values as to constitute a deprivation of due process. The district court dismissed the suit on the ground that River Vale was not directly affected by the ordinance and that a municipality is not a "person" within the terms of the fourteenth amendment.

109. River Vale specifically averred that the anticipated property devaluation would result in a decline of tax revenues and that increased expenditures would be necessitated to handle the resulting traffic. The court's recognition of River Vale's economic damage was not compelled by primary authority. *But see* Franklin Township v. Tugwell, 85 F.2d 208 (D.C. Cir. 1936) (township owning real estate with in its limits had sufficient interest to maintain suit to enjoin federal government form erecting "model community" which would impair its property value); 1969 DUKE L.J. 841, 845.

110. Finding contrary precedents inapposite because they involved municipalities attempting to assert federal constitutional rights against their creator, the court concluded that River Vale was a private corporation vis-a-vis New York. 403 F.2d at 686. For a suggestion that the court's conceptual analysis is faulty since it leads to a dual legal nature for the municipal corporation see 83 HARV. L. REV. 679, 680 (1970).

111. 397 U.S. 150 (1970), *noted in* 23 VAND. L. REV. 814 (1970).

112. "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend. . . ." 397 U.S. at 154.

has formulated a new two-fold test for standing: first, whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise, and secondly, whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[113] Undoubtedly, under this new test, many more plaintiffs have standing to litigate the constitutionality of zoning ordinances in federal court. It remains to be seen whether more ready access to the federal forum in zoning disputes will lead to a liberalization of state standing requirements.[114]

B. Prospective Developments

Of even greater significance than the application of constitutional standards for review of suits by residents of the zoning municipality will be the extension of these standards to actions brought by nonresidents challenging local zoning practices. Since nonresidents seldom have a voice in the local zoning decisions of a community, they are frequently the targets of exclusionary regulations.[115] In practice it is nonresidents who will take parochial legislation to court and their interests should be recognized. Extending the class of persons entitled to invoke constitutional claims to include nonresidents would ease considerably the task of challenging zoning laws.

Further liberalization of the standing requirements for nonresidents is not just a remote possibility. An important case, *Lake Nelson Estates, Inc. v. Township of Piscataway*,[116] is now pending in the New Jersey courts. In this action black nonresidents are seeking, on behalf of themselves and similar black persons who are, as a class, excluded from suburban homes, to challenge the constitutionality of ordinances that require one-acre lot sizes and prohibit multi-family housing.[117] Plaintiffs

113. The Court intimated that the only constitutional requirement for standing is injury in fact. The inquiry into the zone of interests is solely for judicial policy reasons. *See* Davis, *supra* note 97. In his article Professor Davis strongly criticizes the second part of the new test and opts for a single test for standing with injury in fact as the main focus.

114. One author has observed that, since the law of zoning has been cut adrift from the federal forum, there has been no maturing body of federal precedents in local land use regulation. He concludes that "the time may have come to adopt some of the federal learning at the local level." Ayer, *supra* note 80, at 371.

115. The restrictions in zoning are not unlike restrictions on interstate commerce that principally affect out-of-state residents. In federal cases dealing with discriminatory practices, outsiders have had standing to contest the validity of the state legislative action. *See* Comment, *supra* note 50, at 1254 n.21.

116. (N.J. Super. Ct., L. Div., filed June 23, 1970) in N.Y. Times, June 23, 1970, at 33, col. 5.

117. Specifically, plaintiffs contend that the zoning limitations of Piscataway

allege that they have standing to sue pursuant to a state statute allowing outsiders to redress the denial of rights to use, acquire, and enjoy real property[118] and, in the alternative, that they have standing to test the validity of action that violates rights secured under the Constitution. Even if the reasoning is based on statutory grounds, a decision in this case acknowledging the standing of nonresidents would have considerable influence on other state courts because of its requisite cognition that nonresidents have an interest in not having housing within their means zoned out of a municipality in which they wish to live.

C. *Evaluation*

It is submitted that all those who are injured in fact by a local zoning decision should be permitted to seek judicial review. It should make no difference whether the zoning practice is challenged on administrative or constitutional grounds. The injury-in-fact test is a valid guide both for construing the statutory term "persons aggrieved" and for determining who is entitled to raise constitutional claims. Whether injury exists should not depend on proprietary interest in or geographical proximity to the property subject to a zoning restriction, but rather on the severity of the wrong done to the party seeking judicial protection. If the injury is substantial,[119] then the party should have standing, unless public policy or legislative intent require that his interest not be shielded.[120] Moreover, a person injured in fact should have standing regardless of whether he has an interest that is statutorily or constitutionally protected.[121] This would preclude the courts from using

unconstitutionally prevent them from using, acquiring, and enjoying real property and securing jobs in the community. Furthermore, they maintain tbat the enabling legislation's vagueness, coupled with its failure to enunciate proper standards for determining wbat promotes the general welfare of citizens, allows definite patterns of racial and economic segregation to develop among municipalities in New Jersey in violation of the fourteentb amendment.

118. *See* note 68 *supra* and accompanying text. The case is said to be the first instituted under the new statute. *See* N.Y. Times, June 23, 1970, at 33, col. 4 (city ed.).

119. *See* Note, *supra* note 66, at 307 (if a party can show that he is being damaged in any substantial way by a zoning decision, the courts sbould liberally construe "aggrieved person" requirement so as to allow standing); 38 N.Y.U.L. REV. 161, 165 (1963) (standing should be granted if an individual has sustained, or is in immediate danger of sustaining, some direct and certain injury).

120. For policy reasons the courts could refuse standing to a nonresident businessman who is seeking to avoid competition or to an adjoining municipality that is competing witb the zoning municipality for an attractive industry.

121. Professor Davis argues that an equity court has always bad power to decide whether or not to provide protection to nonstatutory and nonconstitutional interests. He suggests that the second part of the *Data Processing* test denies standing to many persons with nonconstitutional interests who had standing under pre-1968 law. Davis, *supra* note 97, at 472.

the concept of standing to avoid deciding whether the plaintiff is harmed by the challenged law. If judicial review is thought undesirable, the use of other doctrines of justiciability would be more appropriate.[122] The injury-in-fact test insures that the necessary concrete adverseness is present for litigation of constitutional issues and that the plaintiff is not a mere intermeddler in the administrative process. It accords standing to non-residents whether or not they have a constitutional "right" to a suburban home or job,[123] provided they can demonstrate economic or other injury in the form of commuting expenses, loss of a job, or deprivation of amenities. Similarly, the test permits an adjacent community to sue for a wide variety of economic injuries.[124] In reviewing the standing of persons or nearby communities challenging municipal zoning ordinances under this test, the courts will be compelled to consider the full range of exclusionary effects on the plaintiff.[125] In this manner the liberal test will promote more efficacious judicial consideration of extraterritorial needs.

Liberalizing the law of standing in zoning disputes will likely lead to judicial resolution of issues that have not been extensively litigated. An oft-repeated response to suggestions that the judiciary ought to play a more active role in eliminating discrimination from the administration of local zoning laws has been that the courts are ill-equipped to decide the proper allocation of land resources and that the controversial aspects of exclusionary zoning are best left to the legislature.[126] Similarly, recommendations that the right to judicial review of zoning decisions be extended to nonresidents have elicited the characteristic floodgate response.[127] Whatever the merits of judicial activism, the evils of parochialism in land use regulation are just as prevalent as those of racial discrimination in the public schools and legislative apportionment.[128] As long as the legislatures continue to ignore the

122. Ayer, *supra* note 79, at 352-53; Davis, *supra* note 97, at 473.

123. For a discussion of whether a house in suburbia is an economic right secured by the Constitution see Aloi, Goldberg, & White, *supra* note 10, at 80.

124. *See* notes 92-96, 108-110 *supra* and accompanying text.

125. *See* notes 28-30, 56-59 *supra* and accompanying text.

126. *E.g.*, Becker, *supra* note 13, at 18-19; Bowe, *supra* note 8, at 163; Haar, *supra* note 37, at 530; Note, *supra* note 14, at 124-25; 38 N.Y.U.L. REV. 161, 167-68 (1963).

127. *See* Ayer, *supra* note 80, at 366. *But see* Garner v. County of DuPage, 8 Ill. 2d 155, 133 N.E.2d 303 (1956) (unless standing restrictions applied, harassing suits by persons not aggrieved would ensue). Harassment and extensive litigation have not been experienced in jurisdictions that have permitted nonresidents to challenge the validity of zoning ordinances. 3 K. DAVIS, *supra* note 72, § 22.10.

128. R. BABCOCK, *supra* note 6, at 176-77. It is surprising that a federal judiciary that has been so attuned to constitutional infringements in other areas has been so ambivalent in reviewing allegations of constitutional injury by protective zoning devices.

problems of fragmentation in land use policy, it is incumbent upon the courts to act. Although the extension of standing to nonresidents will not be a panacea for all the defects of a decentralized land development program,[129] it will foster further judicial consideration of regional criteria and expand the concept of the "public" on whose behalf zoning power is exercised.[130] Coupled with the innovation of constitutional standards in the review of zoning legislation, a broader concept of standing will do much to counteract the exclusionary effects of fragmentation in zoning.

V. CONCLUSION

Since zoning controls remain one of the last vestiges of local governmental power, it is important that municipal land restrictions be systematically evaluated to determine whether they are consistent with modern metropolitan land use policies. Paradoxically, while substantial progress has been made in providing for legislative and administrative supervision of local regulations in public education and other areas, no established framework exists for effectively combating the undesirable effects of localism in zoning. As a consequence, the judiciary should be encouraged to use its traditional power to review the exercise of police power in order to introduce regional perspectives into land use regulation. This Note has examined one procedural aspect of judicial review and has explored the impact of its heretofore restrictive application on injured nonresidents. It suggests that the extension of standing to nonresidents will lead to more frequent judicial recognition of regional perspectives by giving full consideration to all interests. It is clear that this change in judicial procedure is necessary if the most serious problem of fragmentation, exclusionary zoning, is to be satisfactorily resolved.

KENT H. MCMAHAN

129. Some of the barriers to changing traditional patterns of land use controls are: (1) lack of knowledge of effects of present regulations, (2) the use of fiscal zoning, (3) the lack of adequate staff and professional expertise, and (4) the vested interests in the distribution of planning activities in metropolitan areas. FRAGMENTATION, *supra* note 3, at 11-19. For an observation that the judiciary is an ineffective guardian of the public and private interests in land development see SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, *supra* note 18, at 80. *See also* R. BABCOCK, *supra* note 6, at 152.

130. *See* notes 45-51 *supra* and accompanying text. Widening the scope of standing will necessarily entail a widening of the scope of judicial review. *See generally* Vickers v. Township of Gloucester, 37 N.J. 232, 262, 181 A.2d 129, 145 (1962).