Judicial Limitations on Parochialism in Municipal Land Use Decisions: Scott v. City of Indian Wells

Jeffrey C. Nelson

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol25/iss3/11
JUDICIAL LIMITATIONS ON PAROCHIALISM IN MUNICIPAL LAND USE DECISIONS: SCOTT v. CITY OF INDIAN WELLS

An inevitable by-product of the growth of industrialization and population in the twentieth century has been increasing population and housing density in habitated areas. This greater density has created a situation in which land use decisions that concern one parcel of land frequently affect neighboring property. These land use decisions often affect neighboring landowners adversely, particularly when the decisions permit further development of the land. Thus, when a

1. The population density in the United States has increased approximately 65% from near the inception of zoning in 1920 to the present. There were 35.6 persons per square mile in the United States by 1920. That number had grown to 58.2 per square mile by 1970. F. Pollara, Trends in United States Population, THE AMERICAN POPULATION DEBATE 58 (D. Callahan ed. 1971). This increase in average density merely reflects an increase in population. The actual density in urban-suburban complexes is far greater; for example, in California more than 85% of the population lives on only 2% of the land. CALIFORNIA DEP'T OF FINANCE, CALIFORNIA STATISTICAL ABSTRACT, VII, 2 (1969). Accordingly, the actual density is very high. For example, there is approximately one acre of land per person in the eight counties surrounding the San Francisco bay area, but only one-third of this land is useable for habitation. The actual urbanized density is 12.8 persons per acre (8,129 persons per square mile). W. ALONSO & C. MCGUIRE, NEW COMMUNITIES IN THE BAY AREA 11-12 (1971).

2. "Surely it is naive . . . to think the consequences of one property user's activities are confined to his property. Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships which is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, the use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149, 152 (1971).

3. More affirmative, demonstrable harms seem to be associated with land use decisions which permit development than with decisions which prohibit further development. It is submitted that land use development may result in six major types of adverse effects on neighboring property owners. Two of these effects fall solely on residents of the municipality making the decision: (1) The strain which increased population puts on municipal services such as schools, recreational facilities, police and fire protection and health related services like water and sewage facilities; (2) Increased property taxes caused by the new residents utilizing more municipal services then they provide for in additional revenue. However, the following four adverse effects fall upon residents and nonresidents alike: (1) Reduced property values; (2) Increased traffic congestion near the area of development, initially caused by the construction and thereafter caused by the new patrons, employees or inhabitants of the
land use decision concerns property near a political border, the municipality's self-interest often results in casting those adverse effects upon nonresidents. The frequency of this occurrence has been multiplied by the great number of governmental units making these land use decisions and the physical proximity of these municipalities to one another. In the aggregate, this kind of parochial municipal decision-making constitutes a serious land use problem.

One example of this problem recently occurred in Southern California. There, a municipality permitted a development near its border which many nonresidents believed affected them adversely. The non-

development; (3) A detrimental "change in character" of the area or community, particularly where the size, shape or architectural style of the structure conflicts with other existing structures, thus making the development aesthetically objectionable; (4) Various forms of pollution including air or water pollution, visual blight or interference with a view, excessive noise and/or noxious odors. The existence and extent of these harms, of course, is dependent on the particular physical setting in which the development is permitted and on the nature and magnitude of the development, regardless of whether it is residential, commercial or industrial.

4. "Municipality" is used in this note to designate the local governmental body making land use decisions. The term "municipality" technically includes cities, villages and towns, but does not include counties which are subdivisions of the state rather than municipal corporations. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 33 (1971) [hereinafter cited as D. HAGMAN]. For the purposes of this note however, the term "municipality" will embrace both municipal corporations and counties. A far greater number of municipalities than counties exercise zoning power. In 1968, 6880 municipalities (out of more than 18,000) exercised zoning power. Only 711 counties (out of more than 3,000) engaged in zoning. M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 98 (1971); D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN & LAND DEVELOPMENT, CASES AND MATERIALS 234 (1973).

5. In California there are two primary examples of this institutional fragmentation in the land use decision-making process. In the San Francisco bay area there are nine counties and 92 cities making land use decisions. CALIFORNIA TOMORROW, DEMOCRACY IN THE SPACE AGE 15 (1973). In southern California there are 164 separate incorporated cities in the eight counties surrounding Los Angeles. "Most of [these municipalities] are small; created to meet pressing and immediate needs. Nearly all are inadequately financed to meet the regional pressures that are now bearing upon them. The political structure of each of these cities is of a separate design, carefully dividing each community from its neighbors. The result of this fragmented structure has been a narrow, myopic view of local problems. None has seen the regional needs of an area which is fast becoming a megalopolis." Statement by Don Reining, executive secretary, Southern California Rock Products Ass'n, Oct. 13, 1969, Hearings on Preparation and Adoption of the Open Space Element Before the California Joint Legislative Comm. on Open Space Lands 130 (1972).

6. "Parochialism" is commonly used to describe the implementation of the selfish priorities of municipalities when making land use decisions. See generally Feiler, Metropolization and Land-Use Parochialism—Toward a Judicial Attitude, 69 Mich. L. REV. 655 (1971). This term should be contrasted with the term "fragmentation" which is commonly employed in referring to a situation in which land use decisions are being made by a large number of independent governmental units. See generally Vestal, Government Fragmentation in Urban Areas, 43 U. Colo. L. REV. 155 (1971).
residents opposed the development in the California courts, and ultimately the California Supreme Court confronted the problem in *Scott v. City of Indian Wells*. Acting resolutely against the city's parochial approach, the court significantly expanded the protection afforded nonresidents adversely affected by land use decisions. The *Scott* decision expanded this protection in three ways. First, nonresidents were given standing to challenge adverse land use decisions in court. Second, the right to notice and a prior hearing was extended to nonresidents when such decisions affect their property. Finally, *Scott* imposed upon municipalities the correlative duty to consider the effect of a land use decision upon all neighboring property. The significance of this decision is enhanced by the court's broad approach to what was a narrow problem and by the fact that the court cloaked the novelty of the decision by deceptively intimating that it accorded with prior land use decisions.

This note will analyze these three complementary elements of the *Scott* holding and will discuss the potentially wide-ranging impact of *Scott* on land use decisions in California.

**The Factual Setting in Scott**

The controversy from which *Scott* arose began when the city of Indian Wells issued a conditional use permit which would have allowed the construction of a major development on land just within the city limits. The development would have consisted of golf and tennis facilities, 675 condominium units, a seven-story apartment building and a heliport. Since the development was designed to be compatible with a neighboring country club in Indian Wells, the taller buildings and commercial shops would have been located behind a hill, thus making them invisible to members of the adjacent country club. However, these buildings would have directly blocked the view of Albert Scott and his neighbors. Scott's property adjoined the proposed construction site, but it was located just outside the city limits. Because Indian Wells gave notice of pending permit hearings only to its

---

7. 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).
8. "Standing" refers to the permission granted parties to appear in court. The right to a "hearing" refers to permission granted individuals to appear before an administrative body.
9. A conditional use permit grants administrative permission for uses not normally allowed by the zoning ordinances in the district. These conditionally permitted uses are usually, but not always, listed in the ordinance. D. HAGMAN, J. LARSON, & C. MARTIN, CALIFORNIA ZONING PRACTICE, § 7.64 (1969) [hereinafter cited as CALIFORNIA ZONING PRACTICE].
10. 6 Cal. 3d at 544, 492 P.2d at 1138, 99 Cal. Rptr. at 746.
11. Id. at 545, 492 P.2d at 1138-39, 99 Cal. Rptr. at 746-47.
12. Id.
residents, the notice received by Scott was sent erroneously; none of his neighbors received a similar notice.\textsuperscript{13} Mr. Scott spearheaded opposition to the project; he appeared at both the planning commission and city council meetings and registered protests on behalf of himself and forty-five other neighboring nonresidents.\textsuperscript{14} Scott argued that the city should consider the well-being of nonresidents as well as of the members of the country club. Further, he contended that neighboring nonresidents should be given notice and an opportunity to be heard before the city approved the development.\textsuperscript{15} The city ignored both of these protests, thus prompting Scott to file suit in the Riverside County Superior Court.

After the trial court sustained the defendant city's demurrer to Scott's complaint, the district court of appeals affirmed the demurrer.\textsuperscript{16} On appeal, the California Supreme Court considered legal questions not previously settled in California:

[T]he City of Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents, a duty to hear their views, and a duty to consider the proposed development with respect to its effect on all neighboring property owners. . . . [A]djoining landowners who are not city residents may enforce these duties by appropriate legal proceedings and have standing to challenge zoning decisions of the city which affect their property.\textsuperscript{17}

**Nonresidents' Standing to Challenge A Land Use Decision**

Scott held that nonresidents have standing to challenge zoning decisions which affect their property.\textsuperscript{18} This aspect of the decision was based upon allegedly persuasive authority from other jurisdictions.\textsuperscript{19} It will be seen, however, that the court employed this

\textsuperscript{13} Id. at 544, 492 P.2d at 1138, 99 Cal. Rptr. at 746.
\textsuperscript{14} Id. at 544-45, 492 P.2d at 1138-39, 99 Cal. Rptr. at 746-47.
\textsuperscript{15} Id. at 545, 492 P.2d at 1139, 99 Cal. Rptr. at 747.
\textsuperscript{16} Id. at 546, 492 P.2d at 1139, 99 Cal. Rptr. at 747.
\textsuperscript{17} Id. at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
\textsuperscript{18} Id.
\textsuperscript{19} The supreme court appears to have confused the issues of standing and of a right to a hearing by an administrative body. The only case the court cited on the standing issue granted a hearing but did not grant standing. Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954). The court cited four cases that appeared to deal with the right to a hearing. 6 Cal. 3d at 547-48, 492 P.2d 1140-41, 99 Cal. Rptr. 748-49, citing Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962); Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963); Hamelin v. Zoning Board, 19 Conn. Sup. 445, 117 A.2d 86 (1955); Schwartz v. Congregation Powolei Zeduck, 8 Ill. App. 2d 438, 131 N.E.2d 785 (1956). Koppel, however, dealt with both issues of standing and right to a hearing. Roosevelt and Hamelin considered only standing, whereas Schwartz dealt with neither issue. This note will assume that the court meant to cite the cases for the appropriate issues because there is some ambi-
authority so selectively as to be misleading. The court selectively
cited cases supporting its decision without mentioning contrary au-
thority, and it deceptively attributed persuasive value both to deci-
sions based primarily upon statutory construction and to dicta.
Moreover, the discussion of nonresident standing was deceptive be-
cause it concealed the decision's innovative character by intimating
that most other jurisdictions have taken equally progressive positions
in extending standing to nonresidents.

Prior to Scott, seven other states had considered the question of non-
residents' standing to challenge an adverse zoning ordinance. Four of
these states have afforded standing to nonresidents and thus seem to
comport with Scott. Two state courts have held contrary to Scott,
and one state court has rendered clearly contradictory decisions on this
issue.

Prior Authority on the Standing Issue

The case denoted by the California Supreme Court as the lead-
ing case on nonresident standing is Borough of Cresskill v. Borough
of Dumont. In that 1954 New Jersey case, the court voided a zoning
change from residential to commercial where the land which sur-
rounded it had previously been zoned by another community for resi-
guity as to which cases were intended to serve as authority for which issues. But cf.
Note, Notice Requirements to Parties Outside of City's Zoning, in The Supreme Court
that the cases cited by Scott did concern the hearing issue. Id. at 599.

20. See notes 46-51 and accompanying text infra.

21. It is, of course, impossible to discern the intent behind the approach taken
by the court in Scott. Use of the term "deceptive" is not meant to impute to the
court an intent to delude. "Deceptive applies almost exclusively to surface appearance"
and does not necessarily imply deliberate misrepresentation. THE AMERICAN HERITAGE
DICTIONARY OF THE ENGLISH LANGUAGE 342, 839 (1971). While this note maintains
that the Scott court employed authority in a manner which would mislead the casual
reader, it does not pretend to comprehend the court's true intentions.

22. See notes 37-41 and accompanying text infra.

23. See notes 33-34 and accompanying text infra.

24. See note 56 and accompanying text infra.

25. The four states are New Jersey, Connecticut, Kansas and Illinois. For a dis-
cussion of New Jersey, see notes 35-36 infra; for a discussion of Kansas, see note 39 infra;
for a discussion of Connecticut, see note 38 infra; for a discussion of Illinois,
see note 40 infra.

26. The two states are New York and Maryland. For a discussion of New York,
see note 46 infra. The principal Maryland case is City of Greenbelt v. Jaeger, 237
Md. 456, 206 A.2d 694 (1965).

27. See text accompanying notes 47-50 infra for discussion of conflicting Colo-
rado cases.

28. 6 Cal. 3d at 547, 492 P.2d at 1140, 99 Cal. Rptr. at 748.

29. 28 N.J. Super. 26, 100 A.2d 182 (1953), aff'd, 15 N.J. 238, 104 A.2d 441
(1954).
dential uses. The change to commercial zoning was challenged both by residents of the municipality which was proposing the zoning change as well as by the adjacent municipality and nonresident neighbors.\textsuperscript{30} The lower New Jersey court struck down the zoning change on a number of grounds,\textsuperscript{31} and the supreme court affirmed on two grounds: the change constituted spot zoning\textsuperscript{32} and was not in accord with the comprehensive plan of the borough.\textsuperscript{33} While the court strongly denounced the municipality's failure to consider the impact of the zoning change on neighboring nonresidents,\textsuperscript{34} that denunciation must be considered dictum with regard to the issue of nonresident standing, since the court expressly reserved any discussion of that issue.\textsuperscript{35}

Later New Jersey cases have allowed nonresidential standing to sue, citing \textit{Borough of Cresskill v. Borough of Dumont}.\textsuperscript{36}

**Cases Permitting Standing On Statutory Grounds**

Cases from three other states have granted standing to nonresidents.\textsuperscript{37} In each of these state, however, there is a specific statute

\begin{itemize}
\item 30. 15 N.J. at 240, 104 A.2d at 442.
\item 31. The rezoning was struck down for being "spot zoning," for failing to promote the public welfare, for failing to be in accord with the comprehensive plan of the borough in which it was situated, for constituting a public and private nuisance, and for failing to consider the character of the region properly. 28 N.J. Super. at 32, 42-44, 100 A.2d at 185-86, 191-92.
\item 32. A spot zone results when a small parcel of land is subjected to more or less restrictive zoning than surrounding properties. \textit{California Zoning Practice}, \textit{supra} note 9, at §5.33.
\item 33. 15 N.J. at 251, 104 A.2d at 448.
\item 34. \textit{Id.} at 244, 104 A.2d at 444.
\item 35. The California Supreme Court apparently realized this reservation because it did not state that the language quoted was a holding, whereas they did identify the quotation from the lower court as a holding. 6 Cal. 3d at 547, 492 P.2d at 1140, 99 Cal. Rptr. at 748.
\item 37. The three states are Connecticut, Kansas and Illinois. For a discussion of Connecticut, see note 38 \textit{infra}; for a discussion of Kansas, see note 39 \textit{infra}; for a discussion of Illinois, see note 40 \textit{infra}.
\end{itemize}
defining standing which had to be interpreted, whereas there was no such construction required in Scott. These cases involved three different types of statutes. One type of statute limits challenges of zoning actions to “aggrieved” parties. Similarly, another type of statute gives standing to persons whose property has been “affected” by the zoning decision. A third type of statute gives “adjoining” property owners the right to protest zoning changes.

A decision based on statutory construction normally is of neither mandatory nor persuasive value in a decision not involving that statute. This principle seems to be relevant to those cases which construe the statutory terms “affected” and “adjoining” property owners. However, it might be argued that cases which construe the statutory term “aggrieved” could have been of some persuasive value to the Scott court for two reasons. First, the term “aggrieved” is an ambiguous standard which is used in determining that persons suffering a sufficient harm will be granted standing. Second, the meaning of “aggrieved” is the product of a long history of judicial construction. The requirement that one be “aggrieved” in order to have standing derives from the Standard State Zoning Enabling Act, published in

38. Connecticut has granted standing to nonresidents owning property adjoining the property subject to the change. Hamelin v. Zoning Board of the Borough of Wallingford, 19 Conn. Supp. 445, 117 A.2d 86 (1955). The court determined that nonresidents so situated were “aggrieved” within the meaning of Connecticut General Statutes section 286c.

39. Kansas nonresidents were given standing to challenge a zoning change in Koppel v. City of Fairway, 189 Kan. 710, 371 P.2d 113 (1962). They satisfied the statutory requirement because they had an interest in property affected by the zoning change. Id. at 714, 371 P.2d at 117, discussing KAN. GEN. STAT. § 12-712 (1949).

40. Illinois nonresidents were granted standing in Whittingham v. Village of Woodridge, 111 Ill. App. 2d 147, 249 N.E.2d 332 (1969). The decision was based partially on a statute which requires a 2/3 vote to pass a zoning change that has been challenged by 20 percent of the “adjoining” property owners. The term “adjoining” was construed to include property owners across municipal boundary lines. Id. at 152, 249 N.E.2d at 334. Another Illinois case recognized that “adjoining” property includes property outside the boundaries dividing separate zoning districts. Schwartz v. Congregation Powolei Zeduck, 8 Ill. App. 2d 438, 131 N.E.2d 785 (1956). But cf. Krembs v. County of Cook, 212 Ill. App. 2d 148, 257 N.E.2d 120 (1970).

41. “[A] decision which is good authority at home may be of no value in another jurisdiction, on account of differences in the legal systems of the two states. For instance, if the judgment in the case turns entirely upon the provisions of a statute, it will not be available in another state, unless the statute law of the latter jurisdiction is substantially the same in this respect.” BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 436 (1896).

42. Unlike the “aggrieved person” requirement, these statutory requirements do not appear to have been widely adopted. Cf. Note, The “Aggrieved Person” Requirement in Zoning, 8 WM. & MARY L. REV. 294 (1967). Consequently, the statutes protecting “adjoining” and “affected” landowners do not have the long history of judicial construction that the “aggrieved person” requirement has.

43. The Standard State Zoning Enabling Act was sponsored by the United States
1924 by the United States Department of Commerce and subsequently adopted by many states, though not by California. The meaning of "aggrieved" has evolved in the past five decades solely through judicial interpretation. Therefore, it could have been argued persuasively that cases construing "aggrieved" have been the product of judicial discretion and have not been grounded in explicit statutory terminology. But the Scott court did not articulate such an argument. In fact, the Scott decision proffered no explanation for using cases grounded in statutory construction.

Decisions Denying Standing To Nonresidents

Another deficiency with Scott's treatment of authority was its failure to mention New York decisions, which have been the least receptive of all state decisions to the pleas of nonresidents adversely affected by land use decisions. The courts of that state have consistently held that nonresidents cannot challenge onerous zoning decisions because they own no property within the boundaries of the municipality making the decision.

Possibly the most serious deficiency in Scott's use of authority was its citation of a case which had been overruled by implication. In 1963, the Colorado Supreme Court permitted protesting nonresidents to intervene in a suit challenging a zoning change. After recogniz-

Department of Commerce. The act is now out of print, but it is reproduced at 3 RATHKOPF, THE LAW OF ZONING AND PLANNING 100-1 to 100-6 (3d ed. 1956).


45. "It would be wasteful for courts not to utilize . . . statutory materials when they are so readily available for analogy as well as adoption. The statutes that protect specified classes of people from specified risks in specified areas are rich sources of analogy.

When a judicial rule is thus modelled after a statutory rule, the very fact of copying signifies that it is not to be confused with interpretation that clarifies an obscure statute or amplifies a skeletal one. Such a judicial rule takes on a life of its own in the common law. It can prove endlessly useful within its own orbit and may even serve as a model itself for successive judge-made rules." Traynor, Statutes Revolving in Common-Law Orbits, 17 CATHOLIC U.L. REV. 401, 416, 419 (1968).

46. Town of Huntington v. Town Bd. of the Town of Oyster Bay, 57 Misc. 2d 821, 293 N.Y.S.2d 558 (Sup. Ct. 1968) (adjoining town prohibited from challenging neighboring town's zoning change although the change would have burdened the complaining town with increased traffic); Wood v. Freeman, 43 Misc. 2d 616, 251 N.Y.S. 2d 996 (1965) (nonresident property owners denied power to challenge variance permitting a pitch-and-putt golf course because they were "not aggrieved"); Browning v. Bryant, 178 Misc. 576, 34 N.Y.S.2d 280 (Sup. Ct. 1942), aff'd 264 App. Div. 777, 34 N.Y.S.2d 729 (1942) (nonresidents denied standing to challenge a determination which allowed oil storage tanks to be built on adjoining property across a municipal boundary).

ing that the zoning change would confer similar detriments on residents and nonresidents alike, the court concluded that "[c]learly those residing [in the adjoining community] are entitled to intervention. . . ."48 Four years later, that same court refused to allow an affected nonresident the right to challenge a zoning change49 and proclaimed that "it [is] clear that plaintiffs have no standing. . . ."50 Inexplicably, the Colorado Supreme Court failed to mention its earlier conflicting decision. The Scott court conveniently cited the earlier opinion but omitted any reference to the later case.51

Criticism of the Scott Court's Approach

It is apparent that the California Supreme Court took a great deal of liberty with the authority it cited to support its decision permitting standing for nonresidents. It did so by relying heavily on dicta from Borough of Cresskill v. Borough of Dumont,52 by relying on cases that were decided on the basis of statutory construction,53 by ignoring authority from New York,54 and by failing to cite a later Colorado case which contradicted the case it did cite for support.55 If the court had examined the cases on this issue more closely, it might not have claimed to "find the foregoing authorities persuasive."56

It is suggested that the Scott court relied too much on muddled case authority from other states and too little on straightforward, cogent reasoning. The impact of zoning decisions does not cease at the artificial lines dividing municipalities. If a neighboring property owner is adversely affected by a zoning decision, it seems eminently sensible that he should have standing to challenge it regardless of where the political boundary line ends. If social and economic injury is not confined exclusively within certain political boundary lines, judicial relief should not be so confined.

The Similarities Between Standing Requirements For Residents and Nonresidents

Since nonresidents in California now have standing in court to challenge potentially adverse land use decisions,57 the remedies should

48. Id. at 574, 384 P.2d at 100.
50. Id. at 596, 428 P.2d at 361.
51. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
52. See text accompanying notes 33-34 supra.
53. See notes 38-41 supra.
54. See note 46 supra.
55. See text accompanying notes 47-50 supra.
56. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
57. One of the major ambiguities of Scott concerns the question of which adverse effects will be recognized by courts as interests deserving protection. See note 3 supra.
be essentially the same for residents and nonresidents. Either class of aggrieved citizens should be able to secure judicial relief by petitioning for a writ of mandamus. Ordinary mandamus is the appropriate writ if the administrative action is in the form of a zoning ordinance, while administrative mandamus is appropriate if the administrative body's decision was a quasi-judicial exercise of discretion. Thus, because the granting of either a variance of a conditional use permit is a quasi-judicial administrative act, the appropriate judicial remedy is administrative mandamus. With either form of mandamus, the court must first determine that the petitioning party is "beneficially interested" in the local agency's decision before a writ of mandate will issue. Prior to Scott, a resident could show such a beneficial interest by alleging that there had been an actual or potential interference with his rights of property or person. After Scott, a nonresident should be able to establish a beneficial interest by alleging the existence of some interference with his property or his personal rights.

---


59. Ordinary mandamus is an extraordinary writ designed to compel performance of a clear ministerial duty and to review the validity of a quasi-legislative action such as zoning ordinances. Cal. Code Civ. Proc. § 1085 (West 1955). For examples of successful attacks on a zoning ordinance by means of ordinary mandamus, see Roman Catholic Welfare Corp. v. City of Piedmont, 45 Cal. 2d 325, 289 P.2d 438 (1955); Reynolds v. Barrett, 12 Cal. 2d 244, 83 P.2d 29 (1938).


61. Both the conditional use permit and variance are forms of zoning relief granted by administrative bodies. A conditional use permit allows special types of uses, such as churches and schools; these special uses must be permitted if the plans satisfy the criteria established in the ordinance. However, a variance is permitted only to alleviate a situation in which, for no public reason, uniform zoning for an area burdens one parcel of land more stringently than others. The variance may permit minor departures from the zoning ordinance in regard to the size of the structure to be built or the variance may permit a different use of the property than would normally be permitted. Hagman, supra note 4, at 105, 106, 113.


63. Silva v. City of Cypress, 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962); cf. Tustin Heights Ass'n v. Board of Supervisors, 170 Cal. App. 2d 619, 339 P.2d 914 (1959) ("beneficial interest" demonstrated where the effect of the challenged decision was to decrease the property value of petitioner's land).

64. 6 Cal. 3d at 549, 492 P.2d at 1141, 99 Cal. Rptr. at 749.

65. Scott implies that standing should be granted to nonresidents even if they have no present property interest to protect. 6 Cal. 3d at 547 n.5, 492 P.2d at 1140 n.5, 99 Cal. Rptr. at 748 n.5. See text accompanying notes 147-154 infra.
Although the manner in which the decision was reached can be questioned, the Scott court's decision to grant standing to nonresidents complements two other protections which the decision affords nonresidents: the right to receive notice and a prior hearing\textsuperscript{66} and the right to have their interests equally considered in the process of making land use decisions.\textsuperscript{67} This note will now explore these two aspects of the Scott holding.

**Duty to Give Notice and Hear Nonresidents' Views**

A corollary protection to granting nonresidents standing is the added protection they gain by injecting their views into the planning stage of zoning decisions whenever those decisions might ultimately affect their property. There are two reasons why standing to challenge a zoning decision would, by itself, be an inadequate remedy for aggrieved nonresidents. First, once a zoning decision is reached without the benefit of nonresidents' views, there is little likelihood that it will be reversed because the scope of judicial review is always narrow after the fact. Generally, a municipality's zoning decision is upheld unless the petitioner establishes to the court's satisfaction that the decision is not supported by the finding of fact\textsuperscript{68} or that it is arbitrary and capricious.\textsuperscript{69} Second, input from affected nonresidents is important at the local level because they are not likely to seek judicial relief unless they have both the time and financial resources or they believe the zoning decision is particularly onerous.\textsuperscript{70}

\begin{itemize}
\item 66. See text accompanying notes 79-87 infra.
\item 67. See text accompanying note 99 infra.
\item 68. When the local land use decision is an administrative decision, i.e., either a variance or a conditional use permit, the decision will not be overturned unless (1) the decision is not supported by the findings of fact or (2) the findings of fact are not supported by the evidence. This latter requirement can only be met if the court determines that the findings are not supported by substantial evidence in light of the whole record. \textit{CAL. CODE CIV. PROC.} § 1094.5(b)-(c) (West 1955). Regardless of whether the variance or conditional use permit was granted or denied, there exists a presumption that an "official duty has been regularly performed." \textit{CAL. EVID. CODE} § 664 (West 1966). Accordingly, very few variances or conditional use permits are judicially invalidated. \textit{CALIFORNIA ZONING PRACTICE}, \textit{supra} note 9, at §§ 7.52, 7.77.
\item 70. Most state courts use this legal standard to assess the validity of a municipality's action. However, the application of this standard varies between different jurisdictions. For example, one knowledgeable commentator estimates that while the California courts have upheld municipalities' actions approximately 95 percent of the time, the rate of municipal success is approximately 75 percent in New Jersey, and only 50 percent in Ohio and Minnesota. Hagman, Book Review, 34 U. CHI. L. REV. 469, 479 (1967). No comprehensive explanation has yet been given for this disparity in judicial perspective. \textit{Id.} at 479-80.
\end{itemize}
A Nonresident's Right to Hearing Prior to Scott

Prior to the Scott decision, there were few decisions which recognized a nonresident's right to receive notice and to be given an opportunity to air his grievances. While the New Jersey Supreme Court stated in Borough of Cresskill v. Borough of Dumont that municipalities must hear the complaints of affected nonresidents, it did not require municipalities to give a prior notice of the hearing.

Statutory requirements have provided the basis for the few decisions which have required the airing of nonresidents' complaints. However, the ordinances involved in these cases do not require that prior notice of the hearing be given to the nonresidents; they merely included nonresidents among those neighboring property owners who could register their protests.

Another common type of ordinance might be construed to provide nonresidents a right to prior notice of a hearing. These ordinances require that notice of the hearing be mailed to owners of property located within 300 feet (or some similar distance) of the proposed development. Thus, nonresidents are arguably afforded some protection under these statutes because they fail to exclude nonresidents specifically from their purview. There has been a paucity of appellate cases construing these statutes. Indian Wells had such an ordinance and Scott claimed protection under it, but the court refused to interpret the ordinance.

Some judges and commentators oppose any requirement of a hearing for affected nonresidents because it allegedly infringes on the

72. Id.
74. E.g., Los Angeles, Cal., Mun. Code § 12.32(C)(1)(b) (1970) requires that notice of a proposed zoning change be sent to the “owners of all property within 300 feet of the area proposed to be changed as shown upon the records of the City Clerk.” San Francisco, Cal. City Planning Code § 306.3(a)(2) (1969) contains essentially the same requirement with the additional provision that failure to give notice will not invalidate the proceeding if the address of a property owner within the 300 foot radius was not on the assessment roll. Neither statute explicitly excludes nonresidents from its purview. However, nonresidents would be effectively excluded because their property would not be listed in the city's property records. See also ALI Model Land Development Code § 2-304 (Tent. Draft No. 2, 1970). In the interest of having a readily ascertainable standard, the proposed model code gives standing to every owner of property located within 500 feet of the proposed development. ALI Model Land Development Code §§ 9-103 to 9-105 (Tent. Draft No. 3, 1971). See also N.J. Municipalities & Counties Stat. 40:55-44 (1968), which requires that all landowners within 200 feet of the property to be affected by a zoning appeal must be given prior notice of the hearing whether those landowners live in or outside of the municipality.
75. 6 Cal. 2d at 545, 492 P.2d at 1139, 99 Cal. Rptr. at 747.
February 1974] MUNICIPAL LAND USE: NONRESIDENTS' INTEREST 751

municipality's traditional sovereignty. The reasoning implicit in this approach is that a municipality is responsible only to and for its residents, taxpayers and voters. According to this logic, it would be anomalous to require the citizens of a municipality to elect and pay for that municipality's governmental functions while simultaneously requiring the municipality to hear the views of outsiders before making decisions.

It is submitted that such a position exalts formality over reality and truly makes "a fetish out of invisible municipal boundary lines." Scott declared that a combination of common sense, wise public policy and the due process clause of the Fourteenth Amendment impose a duty on a municipality to notify and hear the views of affected nonresidents.

The Due Process Requirement For A Prior Hearing

The aspect of Scott which requires municipalities to give nonresidents notice of a prior hearing was based upon the due process clause of the Fourteenth Amendment. As stated in Mullane v. Central Hanover Bank & Trust Co., the due process clause requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing. . . ." This requirement for a prior hearing is not explicitly applicable in a situation where, as in Scott, there is no "deprivation" of property but merely governmental action which adversely affects property. The Scott court recognized this difference but it attempted to justify its expansion of the prior hearing protection to "affected property" by

78. 6 Cal. 3d at 548-49, 492 P.2d at 1141-42, 99 Cal. Rptr. at 749-50.
79. Id.
81. The term "deprivation" denotes "a taking altogether, a seizure, a direct appropriation, dispossession of the owner." BLACK'S LAW DICTIONARY 529 (rev. 4th ed. 1968). "Affected" property is not the same as property that has been taken or confiscated. The term "affected" denotes having been "[a]cted upon, influenced or changed." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 21 (1971).
82. "Zoning does not deprive an adjacent landowner of his property, but it is clear that the individual's interest in his property is often affected by local land use controls, and the 'root requirement' of the due process clause is 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest . . . .' (Boddie v. Connecticut, [citation omitted])." 6 Cal. 3d at 549, 492 P.2d at 1141-42, 99 Cal. Rptr. at 749-50.
quoting from Boddie v. Connecticut. However, Boddie only held that a prior hearing is required before a person can be "deprived of any significant property interest." This language from Boddie does not adequately justify Scott's expansive reading of the due process clause. Whereas the term "deprive" is used in the Fourteenth Amendment, due process protections are required by Scott when property is merely "affected" by a land use decision. Moreover, this interpretation is not desirable because it would require that municipalities give all affected nonresidents a prior hearing before even the most innocuous land use decisions could be made. The summary treatment of due process requirements is another example of the Scott court veiling the significance and novelty of its holding.

84. Id. at 379. After a discussion of the due process clause, the Court held that Connecticut violated that standard by statutorily requiring payment of court fees and costs for service of process as conditions precedent to bringing suit for divorce. Id. at 380-81. Problems like that in Boddie require a court to undertake a balancing process in analyzing the interests of individuals who desire a prior hearing before their property interests are adversely affected as opposed to the interests of governmental decision makers in executing decisions quickly without time consuming hearings. The dual test which the United States Supreme Court set forth in Boddie is that a person must demonstrate that he has been 1) "deprived" of a 2) "significant property interest" before he can be afforded a prior hearing. Id. at 379.
85. Courts have frequently answered the question of what constitutes a "significant property interest." E.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). However, the issue of what constitutes a "deprivation" has seldom been explained by the courts. See notes 89-91 and accompanying text infra.
86. "No state shall . . . deprive any person of . . . property, without due process of law . . . ." U.S. Const. amend XIV, cl. 1.
87. There may seem to be a conflict in Scott between the broad language which states that the due process clause requires a prior hearing for all affected landowners, 6 Cal. 3d at 549, 492 P.2d at 1141-42, 99 Cal. Rptr. at 749-50, and the more restrictive language which states that Indian Wells owes nonresident landowners "a duty of notice to the extent given similarly situated city residents." Id. One conclusion which has been drawn from this apparent inconsistency is that "[t]he court's solution fails to measure up to the breadth of the due process premise the court had asserted." Note, Notice Requirements to Parties Outside of City's Zoning, in The Supreme Court of California 1971-1972, 61 Calif. L. Rev. 273, 600 (1973). However, this note maintains that the due process discussion is not mere dictum. First, it is likely that the court simply used this more restrictive language to grant relief to Scott and his neighbors because they had petitioned for this type of relief. Appellant's Petition for Hearing at 3, Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). All of the nonresident plaintiffs would be protected under an equal application of the local hearing statute. Therefore, the relief they sought was phrased in terms of receiving notice that it was received by similarly situated residents. See text accompanying note 129 infra.

Second, by stating that nonresidents must be given the same notice as residents, the scope of nonresidents' right to a hearing becomes necessarily dependent on the determination of the scope of residents' right to a hearing. Since the due process clause
The question of whether a hearing is required for anything short of a "deprivation" of property has not been uniformly answered.\textsuperscript{88} One federal district court required a prior hearing in a case involving a lien imposed upon the property which would have seriously restricted its uses.\textsuperscript{89} But another federal district court refused to permit a prior hearing where property interests were merely "affected" on the ground that deprivation "refers only to direct appropriation of an individual's property."\textsuperscript{90}

The overly broad due process standard enunciated in \textit{Scott} apparently has been modified in another recent Supreme Court decision, \textit{City of Escondido v. Desert Outdoor Advertising, Inc.}\textsuperscript{91} A prior hearing may no longer be required whenever a land use decision "affects" an individual's property, but only when a municipality proposes a "substantial interference with land use."\textsuperscript{92} In \textit{City of Escondido},\textsuperscript{93} protects landowners whose property is "affected by local land use controls," 6 Cal. 3d at 549, 492 P.2d at 1141, 99 Cal. Rptr. at 749, all affected residents would be entitled to a prior hearing by \textit{Scott}'s terms. Therefore, to require a hearing for all affected nonresidents is to give them notice to the extent given to similarly situated residents.

Third, since \textit{Scott} held that the city must consider the effect of its action with respect to all neighboring property owners, it would be inconsistent to require the municipality to consider the interests of nonresidents if those persons' interests were not made known to the municipality initially through the normal hearing process.

Fourth, a California appellate court has labeled as a holding language in the \textit{Scott} opinion stating that all affected property owners are entitled to a prior hearing, People's Lobby, Inc. v. Board of Supervisors, 30 Cal. App. 3d 869, 873, 106 Cal. Rptr. 666, 669 (1973).

\textit{Scott}'s discussion of the due process requirement for a prior hearing thus was not relegated to the character of dictum by the court's statement that Indian Wells owed nonresidents the right of notice to the extent given similarly situated residents.

88. The issue of what interferences with property constitute "deprivations" has not been widely discussed in the context of the requirement for a prior hearing. See text accompanying notes 89-91 infra. However, that issue has been widely discussed in the context of the Fifth Amendment's protection against "taking without just compensation" since that provision has been incorporated into the meaning of the Fourteenth Amendment's due process clause. \textit{See generally F. BOSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971); Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964).}

89. "[T]he lien resulting from the entry of judgment, while not completely depriving the debtor from the use of his property, would nevertheless seriously restrict his ability to sell it or use it for collateral." Osmond v. Spence, 327 F. Supp. 1349, 1356 (D. Del. 1971).


91. 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172 (1973).

92. Id. at 790, 505 P.2d at 1016, 106 Cal. Rptr. at 176, \textit{citing} Scott v. City of Indian Wells, 6 Cal. 3d 541, 549, 492 P.2d 1137, 1142, 99 Cal. Rptr. 743, 750 (1972).

93. 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172 (1973).
the court held that a city ordinance prohibiting billboards adjacent to freeways was a minimal interference with land use;\textsuperscript{94} therefore, a prior hearing was not required. A subsequent appellate court decision has recognized this change in the prior hearing requirement.\textsuperscript{95} \textit{People's Lobby, Inc. v. Board of Supervisors} ruled that a sweeping environmental initiative constituted a substantial interference with land use and thus was invalid because it failed to provide property owners with a prior hearing.\textsuperscript{96}

This slight alteration of \textit{Scott}'s approach in determining which property owners are entitled to due process protections seems desirable. It avoids the breadth of the court's "affected" standard without seriously stripping property owners of due process protections. California courts may now grant a prior hearing if the harm caused to a person's property interest by local land use controls is "significant." It would seem that the significance of the harm can be measured both by the severity of the interference and by the substantiability of the property interest. While this standard of "significance" is necessarily ambiguous, it permits municipalities to make inconsequential land use decisions without the time-consuming process of giving notice and holding a public hearing. Yet this modification of the \textit{Scott} hearing requirement will not permit substantial interferences with property interests if California courts continue to follow the spirit of \textit{Scott} and scrutinize municipal land use activities.\textsuperscript{97}

\textsuperscript{94} \textit{Id.} at 791, 505 P.2d at 1010, 106 Cal. Rptr. at 176.

\textsuperscript{95} "Scott . . . held that the Due Process Clause of the Fourteenth Amendment requires that an individual whose property is 'affected by local land use controls' be given the opportunity for a hearing before he is deprived of any significant property interest.

. . . .

The recent case of City of Escondido . . . limited the constitutional and statutory due process requirements to a proposal that involved a substantial interference with land use . . . ." \textit{People's Lobby, Inc. v. Board of Supervisors, 30 Cal. App. 3d 869, 873, 106 Cal. Rptr. 666, 669 (1973)}.

\textsuperscript{96} \textit{Id.} at 872, 874, 106 Cal. Rptr. at 669-70; \textit{contra}, San Diego Bldg. Contractors Assn. v. City Council, 35 Cal. App. 3d 384, — Cal. Rptr. — (1973) (making land use changes by initiative does not violate due process because affected landowners are given sufficient notice of the possible zoning change and they have an opportunity to be heard during the election process).

\textsuperscript{97} The indication from \textit{Scott} that California courts may now scrutinize municipal land use activity seems to disapprove the prior posture of upholding virtually all municipal decisions. "Final municipal action on a zoning matter is more likely to be sustained by the California courts than any other courts in the country. . . . California courts tend to be planners' courts, sympathetic to the public, rather than attorneys' courts, sympathetic to landowners. As a consequence, whatever the decision of the zoning body, California courts tend to uphold it." \textit{CALIFORNIA ZONING PRACTICE supra} note 9 at § 1.6. \textit{See also D. Hagman, Book Review, 34 U. CHI. L. REV. 469 (1967)}, wherein the author estimates that as of 1966, the California courts had upheld the position of the municipality in approximately 95 percent of the cases concerning local land
Increase In Protection For Residents

The extent to which Scott protects nonresidents is dramatized by the realization that this protection is even more extensive than that traditionally afforded to residents affected by land use decisions. As previously discussed, statutes regulating notice for hearings frequently exclude property owners whose land lies beyond a specified distance from the property subject to the zoning decisions. Therefore, if a proposed development was extensive enough to affect property beyond this radius, many potentially affected residents living beyond the radius would not be entitled to a hearing. Application of Scott's due process protections gives all affected nonresidents the right to a hearing regardless of their proximity to the proposed development. The People's Lobby, Inc. court recognized that residents should also be given the protection of a prior hearing if, according to Scott's broad terms, they are individuals whose property is affected by local land use controls.

Consideration of Effect on All Neighboring Property

The court in Scott not only gave affected nonresidents the twin rights of standing and notice of and right to appear at a hearing, it also imposed an affirmative duty on the city to consider any proposed development with respect to its effect on all neighboring property owners. This suggests that the reasonableness of any city's decisions will be at least partially determined by its impact on any property affected by the decision. It appears that as a development becomes more substantial, the radius of the affected area increases. Thus, it

use disputes. This contrasts with the ratio of municipal successes of approximately 75 percent in New Jersey, and only 50 percent in Ohio and Minnesota. Id. at 479. The Scott court's implied approval of judicial interference in municipal activities does not mean that the California Supreme Court is no longer a "progressive" land use court; rather, it seems to reflect the recent change in what level of judicial scrutiny is considered to be a "progressive" approach. When zoning was first recognized as an acceptable planning tool, "progressive" courts readily upheld municipal zoning activity. Thus, they encouraged systematic land use controls in contrast to the nonexistent or erratic land use controls that had preceded zoning. Currently, "progressive" courts have been and should be protecting the broader interests of the region as a whole when those interests conflict with the narrow, selfish interests of the municipalities. Accordingly, the interests of individual landowners should, as they did in Scott, prevail over the interests of municipality when those individuals represent truly "regional" interest. Cf. Clemons v. City of Los Angeles, 36 Cal. 2d 95, 114, 222 P.2d 439, 451 (1950) (dissent); Hagman, Book Review, 34 U. CHI. L. REV. 469 (1967). Both these authorities express the opinion that courts should start examining municipal zoning action more closely and should not uphold the municipality's action automatically.

98. See text accompanying note 74 supra.
99. 30 Cal. App. 3d at 873, 106 Cal. Rptr. at 669.
100. 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
would contravene the *Scott* holding to permit a municipality to consider the effect of a development on only the immediately adjacent property if, in fact, other property also would be affected.

This aspect of the *Scott* decision goes beyond most prior judicial action in the United States by imposing on California municipalities an affirmative duty to give full consideration to nonresidents' property interests. A few state cases prior to *Scott* permitted a municipality to look to regional needs in order to justify its zoning decisions. Other decisions, such as *Kunzler v. Hoffman*, went a step further in coaxing municipalities to adopt a regional perspective. The *Kunzler* court remarked that although municipalities "have not yet been compelled to recognize values that transcend municipal lines, they certainly should be encouraged to [do so]." *Scott* seems to have taken the final step in this evolutionary process by making this extra-local perspective a requirement in local land use decision-making.

**Exclusionary Zoning Cases**

Prior to *Scott*, cases other than those which involved adverse effects on neighboring property owners had required municipalities to discard a parochial perspective and consider the effects of their conduct on legitimate interests outside their borders. These cases are those labeled "exclusionary zoning" cases. The typical factual setting in which exclusionary zoning cases arise is one where a municipality seeks to maintain the status quo of its community by prohibiting landowners from developing property with more dense housing or

---

101. *See Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955); Caboux v. Planning & Zoning Comm'n, 162 Conn. 425, 294 A.2d 582, cert. denied, 408 U.S. 924 (1972); Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949).*


103. *Id. at 287, 225 A.2d at 326.*


106. Where a smaller minimum lot size was sought, see *Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965) (Four acre minimum lot requirement invalidated).* Where the attempted development was of a multi-unit structure, see *Simmons v. City of Royal Oak, 38 Mich. App. 496, 196 N.W.2d 811 (1972) (single family dwelling restriction invalidated).*
some other use common to low or middle income neighborhoods.\textsuperscript{107} Prospective developers challenge these actions on the ground that this method of maintaining the status quo results in the exclusion of poor or middle income individuals from the community. The municipality generally attempts to justify its decision to deny development by relying on the presumed validity of its decision\textsuperscript{108} and by arguing that the development would unduly burden the city's existing facilities.\textsuperscript{109} Some courts, however, have subjected these restrictions to close scrutiny and have required the municipality to show that its decision promotes the "general public welfare" in its broadest sense.\textsuperscript{110} After discussing much of the authority on this issue, one court has concluded that "the strictly local interests of a municipality must yield if such conflict with the overall state interests of the public at large."\textsuperscript{111} Such strict judicial scrutiny requires local political units to face the realities of growth responsibly. There has been some judicial recognition that "the overall solution to these problems lies with greater regional planning,"\textsuperscript{112} but until true regional planning becomes a reality, land use decisions will continue to be made by various local governing units. One court has declared that while this situation persists, it will not tolerate municipalities abusing their power by "attempting to zone out growth at the expense of neighboring communities."\textsuperscript{113}

Common policy considerations and similar legal principles link these exclusionary zoning cases with the \textit{Scott} case. At first glance, it might appear that the competing interests in a case such as \textit{Scott}
are wholly different from those interests involved in exclusionary zoning cases. In *Scott*, a property owner was successful in challenging a developer with whom a municipality had fully cooperated. In the exclusionary zoning cases, courts have permitted a developer to build against the wishes of the community. Whereas the developer's interests are contrary to those of the nonresidents in situations like *Scott*, in exclusionary zoning cases the developer is the party who represents the interests of the nonresident.\(^{114}\) Thus the similarity between these two types of cases lies in the fact that in both situations courts have compelled the municipalities to act responsibly in relation to nonresidents' interests.

Without judicial action in these exclusionary zoning cases, nonresidents would be harmed by the conduct of the city which attempts to limit growth. Absent judicial intervention, the city could continue to deny an unascertainable constituency a theoretical expectancy. This judicial protection of the interest of outsiders is justified since the outsiders, though unascertained and without sufficient motivation to engage in the present litigation, are still part of the public whose interests should be considered in determining if the municipality's action promotes the general public welfare. In fact, the interests of the outsiders should be a persuasive factor in a court's determination of whether the municipality's prohibition of further development was reasonable. If there was no real growth in the area and no real need for further housing, then prohibiting or inhibiting development would not be unreasonable. Conversely, if a genuine regional housing shortage existed, limitations on development would be more difficult to justify.

Admittedly, the exclusionary zoning cases arise in a factual context different from that in *Scott*, but the legal principle presented in each type of case seems identical. That principle requires municipalities to act responsibly in relation to interests outside their borders, whether those interests be neighboring property owners or unascertained potential residents.

**Antiparochial Perspective Foreshadowed in Village of Euclid v. Ambler Realty Co.**

While the judiciary has only recently enforced this anti-parochial perspective, its origin dates back to 1926 when the United States Supreme Court decided *Village of Euclid v. Ambler Realty Co.*\(^{115}\) Al-

---

\(^{114}\) Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970). The court explained that while the exclusionary zoning problem is generally depicted as involving a deprivation of due process by limiting a developer's use of his land, "it cannot realistically be detached from the rights of other people desirous of moving into the area 'in search of a comfortable place to live.'" *Id.* at 474 n.6, 268 A.2d at 768 n.6.

\(^{115}\) 272 U.S. 365 (1926).
though the Court upheld the constitutionality of comprehensive zoning, it also recognized certain limits on the authority of a municipality in making local land use decisions. While the court permitted the city of Euclid to have industrial growth at its city limits by the use of its zoning power, it warned: "It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far out-
weigh the interest of the municipality that the municipality would not be allowed to stand in the way."

This priority of the "general public interest" over the narrow inter-
ests of the municipality is a limitation on the exercise of local police power. The municipality's police power must be exercised to pro-

tome the "public health, safety, morals, or general welfare" but it is

unclear what constituency comprises the "public." Euclid stated that the "general public interest" transcends the selfish "interest of the mun-

cipality," but this statement went unnoticed for many years. State courts have consistently construed "public" as embracing only the citi-
zens of the municipality. California courts have implicitly accepted this narrow definition of "public." For example, Miller v. Board of Public Works upheld an interim zoning ordinance because it pro-
moted the general welfare of the "city as a whole."

This narrow view of the "general public interest" was virtually unchallenged through the infancy of zoning. During that time, munici-

palities were functionally more independent and physically more isolated than they are now. Consequently, the interests of municipalities seldom clashed with regional interests or with the interests of neighboring nonresidents.

Today, greatly increased urban and suburban growth has com-

116. Id. at 390.
117. The Euclid decision stated that the limitations on municipal authority were the organic law of its creation and the state and federal constitutions. 272 U.S. at 389. Whether this priority in favor of the general public interest is considered as coming from the limitation inherent in its organic law or from the Federal Constitution, its ultimate source is the same. The organic law creating local zoning power is usually the state enabling legislation in which the state delegates its police power over local land use to the municipality. The limits attached to this power coming from the organic law ultimately merge into the constitutional requirement that the police power be exercised to promote the public health, safety, morals or general welfare.
119. See text accompanying note 116 supra.
120. See, e.g., Crum v. Bray, 121 Ga. 709, 49 S.E. 686 (1905); County of Cook v. City of Chicago, 311 Ill. 234, 142 N.E. 512 (1924); City of New Orleans v. Calamari, 150 La. 738, 91 So. 172 (1922); State v. Sugarman, 126 Minn. 477, 148 N.W. 466 (1914).
121. E.g., Odd Fellows' Cemetery Ass'n v. City & County of San Francisco, 140 Cal. 226, 73 P. 987 (1903); In re Ackerman, 6 Cal. App. 5, 91 P. 429 (1907).
123. Id. at 496, 234 P. at 388.
monly resulted in a megalopolis composed of contiguous municipalities. Boundaries between these separate zoning units now exist as theoretical division lines rather than as true geographical community parameters. The *Scott* court recognized these changed social circumstances:

> In the early days of zoning, when there were "large undeveloped areas at the borders of two contiguous towns," [citations omitted] the municipality's responsibility in using its zoning power might extend only to the municipal boundary lines. In today's sprawling metropolitan complexes, however, municipal boundary lines rarely indicate where urban development ceases.

Since the impact of local land use decisions is often not confined to municipal borders, the municipality's responsibility often should not be so confined. Recognizing the common sense of this approach, *Scott* imposed on municipalities the duty to consider the effect of their land use decisions on all neighboring property.

**Potential Impact of Scott**

The California Supreme Court took a very broad approach in *Scott* to a case that could have been decided on very narrow grounds. The decision's wide scope is reflected in the court's holding, which granted relief more extensive than the appellant sought, and in its recognition of general land use problems reflected by, but not limited to, *Scott*'s specific factual setting. From this broad approach, it may reasonably be predicted that California courts will, or at least should, take a firm position against parochial land use decisions.

When Albert Scott petitioned the California Supreme Court for a hearing of the case, his grounds for doing so were that Indian Wells had violated its own notice-of-hearing ordinance and that a scenic easement had been established under Civil Code section 801(8).

---

124. See note 4 supra.
125. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
126. *Cf.* CAL. CIV. CODE § 3514 (West 1970), "One must so use his own rights as not to infringe upon the rights of another."
127. 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
128. Not all “progressive” land use decisions have had the potent impact expected of them. One of the pre-eminent land use jurists in the country has asked plaintively in a dissent what has happened to the “landmark decisions” of New Jersey. Vickers v. Township Comm., 37 N.J. 232, 262, 181 A.2d 129, 145 (1962) (Hall, J. dissenting), appeal dismissed, 371 U.S. 233 (1963). Justice Hall was referring to Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954) (see notes 29-33 supra) and Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 349 (1949). These two New Jersey cases closely parallel the *Scott* decision in terms of the issues presented and the progressive judicial posture.
court could have granted judicial relief under at least the first of these theories\textsuperscript{130} and thereby avoided the broader problems involved in the conflict between a municipality and nonresidents.

Alternatively, the court could have acknowledged due process rights of nonresidents to receive notice and have their views heard at a hearing, but affirmed the trial court's decision because those requirements were actually met. Scott did receive notice of the proposed development\textsuperscript{131} and did appear at the planning commission hearing and made his views known.\textsuperscript{132} He also appeared at the city council meeting where he read aloud a petition opposing the development.\textsuperscript{133} The court recognized these facts, yet it did not affirm the lower court on the basis of mootness. It chose instead to decisively oppose the municipality's parochial action.

The court also could have recognized that the nonresidents were harmed, but then it could have denied them a remedy on the basis of Government Code section 65801. That section provides that no zoning action shall be set aside for procedural error, including failure to give notice, unless a court decides that the error was prejudicial, that it caused substantial injury, and that a different action probably would have resulted had there been no error.\textsuperscript{134} It is highly probable that reconsideration of this matter would not have caused a different result, for Indian Wells had repeatedly demonstrated that it was not going to permit the desires of nonresidents to interfere with the planned development.\textsuperscript{135} The court refused to construe section 65801 narrowly and stated that when the matter was returned to the local level, the consideration of "the rights, desires, suggestions, and welfare [of nonresidents] may well yield a 'different result.'"\textsuperscript{136}

\textsuperscript{130} It is unlikely that Scott would have been successful in contending that the development would violate his visual easement. California courts long ago repudiated the English doctrine of ancient lights under which a landowner acquires, by uninterrupted use, an easement over adjoining land for the passage of light and air. Easements for light and air and visual easements are created only by express grant or covenant. \textit{E.g.}, \textit{Kennedy v. Burnap}, 120 Cal. 488, 52 P. 843 (1898); \textit{Western Granite & Marble Co. v. Knickerbocker}, 103 Cal. 111, 37 P. 192 (1894); \textit{Katcher v. Home Sav. & Loan Ass'n}, 245 Cal. App. 2d 425, 53 Cal. Rptr. 923 (1966).

\textsuperscript{131} 6 Cal. 3d at 544, 492 P.2d at 1138, 99 Cal. Rptr. at 746.

\textsuperscript{132} \textit{Id.} at 545, 492 P.2d at 1139, 99 Cal. Rptr. at 747.

\textsuperscript{133} \textit{Id.} at n.2.

\textsuperscript{134} \textit{Id.} at 550, 492 P.2d at 1142, 99 Cal. Rptr. at 750.

\textsuperscript{135} "Since the Indian Wells planning commission, city council, and officials were determined to proceed regardless of the wishes of the nonresidents, and even fought the matter to the California Supreme Court, there is some doubt that consideration of the 'rights, desires, suggestions, and welfare' of the nonresidents 'may well yield a different result.' But the court so found, laying to rest any fear that courts will give any over-literal interpretation to \textit{Gov't C.} § 65801." \textit{California Zoning Practice, supra} note 9 at § 4.17 (1973 Supplement).

\textsuperscript{136} 6 Cal. 3d at 550, 492 P.2d at 1142-43, 99 Cal. Rptr. at 750-51.
It is clear, then, that the court could have decided *Scott* on narrow grounds. Instead, it eschewed such an approach and focused its attention on the wide-ranging problems resulting from the fragmentation of land use decisions "[i]n today's sprawling metropolitan complexes."\(^{137}\) Expressing its concern over the exercise of municipal land use powers without regard to regional impact, the court cited cases with language that emphatically stressed the importance of regional considerations.\(^{138}\) This orientation can, as one prominent commentator has stated, "be read broadly as frowning on municipal parochialism in land-use controls in California."\(^{139}\)

**Possible Extensions Of Scott**

The likelihood that *Scott* will have broad-ranging application beyond its own narrow factual setting is supported by the recent case of *People's Lobby, Inc. v. Board of Supervisors*.\(^{140}\) In that case, the Board of Supervisors of Santa Cruz County refused to place an environmental initiative on the ballot which would have substantially restricted the use of land near the coast of Santa Cruz County. The court of appeals held that the initiative was properly kept off the ballot because, if enacted, it would have violated *Scott*: affected property owners would not have been given a hearing before the statute became effective.\(^{141}\) *People's Lobby, Inc.* applied the *Scott* prior hearing requirement even though the facts differed in three respects. First, the case involved the rights of residents, and not nonresidents.\(^{142}\) Second, the proposed land use decision would have been implemented through the initiative process; that process, unlike typical zoning procedure, fails to afford anyone a prior hearing.\(^{143}\) Finally, *People's Lobby, Inc.* involved a land use decision that was not strictly a zoning decision.\(^{144}\) These three extensions of the requirement of a

---

137. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
138. *Id.* "When the effects of change are felt beyond the point of its immediate impact, it is fatuous to expect that controlling such change remains a local problem to be solved by local methods." People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 498, 487 P.2d 1193, 1204, 96 Cal. Rptr. 553, 564 (1971). Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954) (discussed at note 29-33 supra).
139. Donald Hagman in *CALIFORNIA ZONING PRACTICE*, supra note 9, at § 5.46 (1973 Supplement).
141. *Id.* at 873, 106 Cal. Rptr. at 669-70.
142. *See id.*
143. *See id.*
144. There are other local land use controls in addition to zoning. *Scott* stated that the prior hearing requirement would be applicable whenever landowners are affected by "local land use controls." 6 Cal. 3d at 549, 492 P.2d at 1141, 99 Cal. Rptr. at 749. It is uncertain for which of the following six types of non-zoning local land use controls California courts will now protect affected landowners with the prior
prior hearing seem to have been foreshadowed by the broad approach taken in *Scott*.145

*Scott* may be extended into many other land use problems; four merit special attention. First, the principles enunciated in *Scott*, by their own terms, will be used by nonresidents as protection against a municipality that is "pro-development." Conversely, those same principles can also be used by a municipality when it seeks to avoid growth. For example, if a municipality's limitation on growth is challenged by a prospective developer, that municipality could buttress its position by showing an adverse effect on neighboring property outside its boundaries.146

An indication of a second important possible extension of *Scott*

(1) *Subdivision Control*—regulation of lots split for the purpose of residential development. The local control includes dedication of land for use as streets, utilities or other "public" purposes. *See generally California Zoning Practice, supra* note 9, at §§ 3.46-3.52; D. *Hagman*, *supra* note 4, at §§ 134-140 (1971).

(2) *Building and Housing Codes*—local regulation of construction specifications enacted and enforced to establish minimum health and safety standards. Building codes establish such standards with regard to new structures, whereas housing codes regulate existing structures. *See generally California Zoning Practice, supra* at §§ 3.5-3.6; D. *Hagman*, *supra* at §§ 152-57.

(3) *Governmental Prohibition of Nuisances*—promulgation of local ordinances regulating or prohibiting offensive land uses. *See generally California Zoning Practice, supra* at §§ 3.24-3.34; D. *Hagman*, *supra* at § 159.

(4) *Eminent Domain*—exercises by the local government of its power to take property for public use with just compensation paid to the landowner whose property is taken. *See generally California Zoning Practice, supra* at §§ 3.7-3.23; D. *Hagman*, *supra* at 173-187.

(5) *Local Property Taxes*—local taxation of land with exceptions or other forms of preferential treatment for desired uses such as agricultural land, urban redevelopment, open space, or "clean" industry. Also, local taxes are sometimes imposed in the form of special assessment on property owners who derive special benefit from an improvement. *See generally California Zoning Practice, supra* at §§ 3.53-3.66; D. *Hagman*, *supra* at §§ 188-200.

(6) *Creation of Official Maps*—specification by the local government of the location of future streets, park sites and other public improvements, the selection of which necessarily prevents other developments on those sites. *See generally D. Hagman, supra* at § 14b-51.

145. See text accompanying notes 129-139 *supra*.

146. This is essentially the approach taken by some courts in permitting a municipality to recognize outside considerations in order to justify the prohibition of a particular use. For example, in Cadoux v. Planning & Zoning Comm'n, 162 Conn. 425, 294 A.2d 582 (1972), a small residential community had refused to permit additional commercial uses. That decision was upheld because one shopping center already existed in the town and residents had access to satisfactory additional shopping areas in the region. *See also* Valley View Village v. Proffett, 221 F.2d 412 (6th Cir. 1955); Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957); Duffcon Cement Prods. Inc. v. Borough of Cresskill, 1 N.J. 509, 64 A.2d 347 (1949).
appears in an inconspicuous footnote\textsuperscript{147} and provides a clue to the position that the supreme court may take when an exclusionary zoning case reaches it. Indian Wells unsuccessfully employed \textit{Silva v. City of Cypress}\textsuperscript{148} to argue that Scott had no standing. In \textit{Silva}, the plaintiff sought a writ of mandamus to prevent the defendant city from issuing a variance which would have permitted the construction of a drive-in theatre. The petition for a writ of mandamus was denied because it contained neither an allegation that the petitioner owned any affected property nor one that he was actually or potentially aggrieved\textsuperscript{149}. The \textit{Scott} court reiterated these reasons for the denial of mandamus to \textit{Silva},\textsuperscript{150} but then it added this sentence: "Nor, in that case, did the plaintiff allege that the land use control in question, whose effect was only local, effectively precluded his owning land or residing in the affected area.\textsuperscript{151} This sentence neither paraphrased an idea expressed in \textit{Silva} nor served to distinguish \textit{Silva} from \textit{Scott}. The sentence's meaning seems inescapable; a nonresident could challenge a land use decision if he alleges that it precludes his residing or owning property in the area.

The novelty of this proposition must not be overlooked. No previous California decision has permitted a nonresident to challenge a land use decision that excluded him from a community. While many legal commentators have offered arguments favoring standing for such an individual,\textsuperscript{152} no reported case has permitted such standing.\textsuperscript{153} It is true that the sentence is dictum, yet it is nevertheless significant. In that sentence, the California Supreme Court intimated that it would not be inappropriate for a California court to give standing to an outsider who has no \textit{present} property interest to protect. Once again, the significance of this proposition was camouflaged by the intimation that the authority cited in \textit{Scott} supported this approach.\textsuperscript{154}

A third possible extension of \textit{Scott} is that California courts may

\textsuperscript{147} 6 Cal. 3d at 547 n.5, 492 P.2d at 1140 n.5, 99 Cal. Rptr. at 748 n.5.  
\textsuperscript{148} 204 Cal. App. 2d 374, 22 Cal. Rptr. 453 (1962).  
\textsuperscript{149} Id. at 377, 22 Cal. Rptr. at 455.  
\textsuperscript{150} 6 Cal. 3d at 547 n.5, 492 P.2d at 1140 n.5, 99 Cal. Rptr. at 748 n.5.  
\textsuperscript{151} Id.  
\textsuperscript{153} Cf. "All courts agree that interest groups composed of nonresidents, such as civil rights organizations, do not have standing" to challenge another municipality's zoning decisions. Note, Extending Standing to Nonresidents—A Response to the Exclusionary Effects of Zoning Fragmentation, 24 VAND. L. REV. 341, 357 (1971).  
\textsuperscript{154} See notes 24 & 87 and accompanying text supra.
construe it to require of municipalities a truly regional and not merely an extra-local perspective. However, the assessment of whether Scott requires a regional perspective depends upon the nature of the particular land use decision. The Scott court "recognize[d] that local zoning may have even a regional impact." Since the municipality must consider the effect of its decision on all affected property, it must adopt a regional perspective where the effect of a decision will be region-wide. However, there is an element of subjectivity in determining whether a particular land use decision does, in fact, have a regional impact. Some courts, in the exclusionary zoning context, have recognized that local decisions prohibiting housing development do have a regional impact. The interests of the region as a whole therefore are considered in determining the validity of the decision. The suggestion in Scott that harmed outsiders may challenge exclusionary zoning decisions implies that the California Supreme Court might follow those progressive courts in recognizing the regional impact of such decisions and assessing their validity accordingly.

A fourth possible extension of Scott is that municipalities now have standing in certain circumstances to challenge a neighboring municipality's decisions. Scott extends protection to all affected property owners; therefore, property owned by another municipal corporation is deserving of this protection if the property is affected by a land use decision.

However, Scott has no application in two situations in which one municipality challenges another's land use decisions. First, if the harm alleged by the municipality is not linked to a specific parcel of land, Scott would not apply because there is not an "affected property owner" involved. Therefore, if a municipality claims that it is forced by another municipality to bear too much of the regional land use burden, there is no remedy under the terms of Scott. The protection

155. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
156. See text accompanying notes 105-114 supra.
157. See note 106 and accompanying text supra.
158. See text accompanying notes 111-12 supra.
159. See text accompanying notes 145-52 supra.
160. 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
161. A municipal corporation has the capacity to acquire and hold property. Holland v. City of San Francisco, 7 Cal. 361 (1857), disapproved on other grounds, McCracken v. City of San Francisco, 16 Cal. 591 (1860); cf. Pimental v. City of San Francisco, 21 Cal. 351 (1863); Williston v. Yuba City, 1 Cal. App. 2d 166, 36 P.2d 445 (1934).
162. Cf. Town of Huntington v. Town Board, 57 Misc. 2d 821, 293 N.Y.S.2d 558 (Sup. Ct. 1968). In that case, Huntington sued to challenge a zoning change permitting a shopping center in Oyster Bay which allegedly would force Huntington to spend much money to enlarge its roads to accommodate increased traffic created by the development. The court denied Huntington's claim, holding that one town has no power to challenge another city's zoning.
afforded outsiders is limited by the terms of the decision to those actually owning land.\textsuperscript{163} Second, if the municipality sues in a representative capacity on behalf of inhabitants who are individually harmed by another municipality's action, the \textit{Scott} decision does not apply. California courts permit representative suits only if the municipality is acting to protect a common right of its citizens.\textsuperscript{164}

Inherent Limitations on Judicial Solutions to Parochial Land Use Practices

After analyzing several aspects of the potential impact of \textit{Scott}, it is necessary to point out that the general problem \textit{Scott} reflects, parochial land use decisions, cannot be solved by judicial action alone. Absent comprehensive legislation, these parochial actions will continue for three reasons: (1) the institutional fragmentation of land use planning, (2) the inevitably selfish nature of action taken by municipalities, and (3) the impossibility of judicial review of all local land use decisions.\textsuperscript{165} Even progressive judicial decisions, as exemplified by \textit{Scott}, confront only the most harmful municipal actions.

Judicial action occurs only in a piecemeal fashion without any systematic application of a cohesive plan directed at the source of the problem—institutional fragmentation in the making of land use decisions.\textsuperscript{166} Unfortunately, most state legislatures have failed to respond to the problem of fragmented zoning authority effectively.\textsuperscript{167} In the absence of effective legislation, other state courts should emulate the California Supreme Court and actively deter future parochial land use decisions.

Conclusion

\textit{Scott v. City of Indian Wells} is a significant land use decision. Despite the fact that the decision goes well beyond the authority cited

\begin{itemize}
  \item \textsuperscript{163} 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
  \item \textsuperscript{164} A municipal corporation has the authority, on behalf of its inhabitants, to maintain an action preserving the common rights of its citizens, such as the use of public property. People ex rel. Bryant v. Holladay, 93 Cal. 241, 29 P. 54 (1892), \textit{writ of error dismissed}, 159 U.S. 415 (1895).
  \item \textsuperscript{165} See \textit{National Land \\& Inv. Co. v. Easttown Township Bd. of Adjustment}, 419 Pa. 504, 521, 215 A.2d 597, 607 (1965). "This court has become increasingly aware that it is neither a super board of adjustment nor a planning commission of last resort."
\end{itemize}
to support it, this defect does not detract from its vast importance and potential impact. The court merely concealed the innovative character of its decision by intimating that its holding accorded with the weight of authority in other jurisdictions.

Through Scott, the California Supreme Court has stated emphatically that a municipality may no longer make land use decisions that serve its own interests at the expense of the interests of neighboring nonresidents. The three significant aspects of the decision merit restatement. In making land use decisions, municipalities must now give as much consideration to the interests of affected property owners outside their borders as to property owners located within their borders. In order for nonresidents to assert rights correlative to this duty, municipalities must give them notice and a hearing before they can make a decision adversely affecting the nonresidents’ property. Finally, the California judiciary will now begin to oversee this process because nonresidents have standing to enforce these newly created rights.

The significance of this three-pronged protection afforded nonresidents is enhanced by the wide scope of the court’s opinion in a case which could have been decided on much narrower grounds. While many factors inherent in parochial land use decision-making prevent the problem from being totally remedied by judicial action, within these limitations, Scott v. City of Indian Wells is one of the strongest judicial statements yet directed against harmful municipal parochialism.

Jeffrey C. Nelson*

168. See text accompanying note 100 supra.
169. See text accompanying note 79 supra.
170. See text accompanying note 18 supra.
* Member, Third Year Class.