California Lower Income Housing Policy: At Legislative and Judicial Crossroads

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Introduction

Local land use regulations in California have long resulted in closing suburban housing and land markets to low and moderate income families. Local officials too frequently have employed exclusionary land use techniques to promote local interests at the expense of regional housing needs. Land use regulations originally intended to maintain community health and safety standards have been used to bar low and moderate income housing. For example, by establishing zoning restraints on multifamily dwellings, setting minimum lot sizes for single family homes, precluding mobile homes, and requiring subdividers to provide expensive public improvements, local governments have diminished the supply of land available for low income housing. Such land use practices cause the price of homes to increase. The cumulative effect of these regulations, therefore, acts to exclude potential residents whose housing budgets are exceeded in part because of higher prices attributable to the regulations.

This denial of residential access in the suburbs has many potential adverse consequences. The exclusionary ordinances of several cities may operate in combination to reduce severely the supply of low and moderate income housing in a region. Lower income persons are crowded into the existing lower cost housing, typically located in the central city. The resultant overcrowding often leads to rent increases or causes the housing to deteriorate structurally at a

1. E.g., utility systems, streets, schools, and parks.
3. Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent, 21 STAN. L. REV. 767, 781 (1969). See also Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 YALE L. J. 385, 391, 500 (1977) (proposing a lump-sum damage award as consumers' class-action remedy for exclusionary land use regulations). Although studies show that interest rates and finance charges are responsible for recent sharp increases in housing costs, it is not disputed that restrictive land use regulations traditionally have accounted for and continue to account for, high housing prices in the suburbs.
4. The extent and bounds of a region are variable. A region is generally considered to be the geographical area in which housing units are in competition for the people seeking housing.
level far above normal rates. Exclusionary land use regulations also force the low or moderate income individual to forego job opportunities in the suburbs to the extent the employment involves an unreasonable commute from the center city. Most low income job seekers in poor central city areas rely on public transportation, but almost all existing public transportation networks are poorly structured to move people from central city residential areas to suburban job centers during rush hours. This predicament forces most workers employed in suburban areas to use automobiles for commuting; yet many poor central city workers cannot afford automobiles.

Another adverse effect of exclusionary land use restrictions is the fostering of cultural segregation by promoting residential segregation along socioeconomic lines. The continued exclusion of almost all lower income households from developing suburban areas fosters undesirable divisiveness. Different economic groups will continue to attend and patronize separate schools, churches, shopping centers, and community activities. This occurrence leads to the development of spatially separate and unequal societies.

This Note examines the effect of the California legislature's development of a low and moderate housing policy and evaluates the validity of exclusionary land use regulations in an area of regional lower income housing shortages. The first part of the Note surveys California statutes, administrative regulations, and current legislative proposals regarding lower income housing. Recent legislative action has apparently put legislative programs in disorder so that responsibility for providing Californians of all economic segments with equitable residential access has been placed on the courts.

The second part of the Note discusses the prospects of judicial invalidation of exclusionary land use regulations. The California Supreme Court's decision in Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore, which requires regional welfare considerations in local zoning, is reviewed. The Note then advocates

5. See text accompanying note 113 infra.
6. This development is especially troubling because job opportunities are growing fastest in the suburbs. See C. Haar & D. Iatridis, Housing the Poor: Exclusion and the Courts, in 1 Urban Land Institute, Management and Control of Growth 493 (1975).
8. Id.
11. See text accompanying notes 69-76 supra.
12. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
rigorous application of Livermore so that low and moderate income households are not denied equal access to affordable housing.

Low and Moderate Income Housing Policy
Before the Legislature

The Housing Element Requirement

The California legislature's most important statement concerning low and moderate income housing is found in California's planning and zoning law enacted in 1969. This law requires that all local governments adopt general plans which include nine mandatory elements. One of the mandatory elements is a housing element, which must consist of standards and plans both for improvement of housing and for adequate housing sites. Significantly, the housing element must describe the process by which a locality is making "adequate provision for the housing needs of all economic segments of the community."14

The California legislature's intent regarding low and moderate income housing policy is evidenced not only by its 1969 enactments but also by the Housing and Home Finance Act of 1975 (Housing Act).15 In the Housing Act, the legislature determined that the early attainment of a decent home and a satisfying environment for every Californian is an important goal for state government.16 In support of this goal, the legislature created the State Department of Housing and Community Development as a permanent state agency and directed it to prepare a statewide housing plan for legislative approval.17 The plan is considered vital to the Housing Act's purpose because it will help to establish a unitary system of planning and delivery for federal and state housing and community development aid. The legislature directed that the plan be designed to take account of housing conditions for all economic segments and provide for the identification of any market restraints that prevent a substantial reduction in the number of households that pay more than 25 percent of their gross income for shelter. The statewide plan has been promulgated and is currently before the legislature for review and adoption.18

14. Id. (emphasis added).
16. Id. at § 41002.
17. Id. at §§ 41100, 41125 (West Supp. 1977). The former department existed under a temporary legislative mandate, due to expire in 1976.
Notwithstanding the state level endorsement evident in the planning and zoning law and the Housing Act, local governments in California have been slow in adopting and implementing adequate housing elements. A survey of local compliance with the planning legislation indicates deep-rooted municipal resistance to the program. By early 1973, only 38 percent of the cities and 67 percent of the counties had adopted a housing element, which has been required since 1969. By late 1974, 66 percent of the cities and 76 percent of the counties had complied.\textsuperscript{19} This increase signals an improvement but could be misleading; notwithstanding the enactment of a housing element, the plan may not be adequate.\textsuperscript{20} What constitutes compliance with the housing element requirement has been debated. At a minimum, the housing element should describe how local land use regulations are permitting the construction of multifamily dwelling units, the siting of mobile homes, the decrease of lot sizes for single family homes, and the reduction of expensive public improvements exacted from subdividers. The housing element does not require municipalities to build housing. That function is performed by private builders or various kinds of associations; for public housing, it is performed by special agencies created for that purpose at various levels of government. The municipal function under Government Code section 65302(c), instead, is to provide the opportunity for homebuilders to construct lower income housing. Eliminating land use regulations that unduly generate costs in the development of land fosters this objective.\textsuperscript{21} If a locality cannot provide the opportunity for low income housing construction, existing administrative regulations provide that the political and economic obstacles impeding the objectives of its lower income housing plans must be set forth in detail.\textsuperscript{22} Most existing housing elements do not meet these requirements. The typical plan includes no more than the locality’s population, average income level, and land availability.\textsuperscript{23}

Local government’s sluggish and inadequate response to the general plan’s mandate emanates from two widely held concerns. First, municipal governments premise their resistance on a home rule argument. First, municipal governments premise their resistance on a home rule argument. They contend that local officials are best able to determine


\textsuperscript{20} Id. at 82-83.

\textsuperscript{21} This conclusion is implicit when the language of section 65302(c), requiring adequate provision of housing for all economic segments, is combined with the proposed administration guidelines interpreting the section. See text accompanying notes 27-32 supra.


\textsuperscript{23} Telephone interview with Cleve Livingston, staff attorney for the State Department of Housing and Community Development (Aug. 25, 1977).
local housing needs and that any state intervention will only add another layer of bureaucracy that will hamper the smooth functioning of local government. Second, municipal officials argue that their budgets are stretched to their fiscal limits. This predicament, they say, prevents them from increasing the size of their overburdened planning staffs and from engaging in comprehensive planning as demanded by statute.²⁴

The failure of municipalities to promulgate adequate housing elements is also partially the result of the state governments failure, until recently, to provide guidance. The brevity of the housing element statute and the lack of meaningful regulations on implementation have caused confusion for local governments about the specificity for the components of the housing element required for compliance with the legislative mandate.²⁵ In April 1977, the State Department of Housing and Community Development adopted emergency revised Housing Element guidelines to end the confusion while permanent revised Guidelines were being promulgated.²⁶

Department of Housing and Community Development Regulations

The State Department of Housing and Community Development (HCD) revision of the Housing Element Guidelines (Guidelines) began in May 1976.²⁷ The original guidelines, adopted by the Reagan-appointed Commission on Housing and Community Development, were so terse that they were ineffective in making specific the general statutory language of Government Code section 65302(c), the housing element provision.²⁸ The old guidelines were not adopted pursuant to the Administrative Procedure Act and, therefore, were not binding on local cities and counties.²⁹ HCD, energized by the

²⁴. Testimony of William Kaiser, lobbyist for the California League of Cities, Hearings on A.B. 389 and S.B. 1058 before the Assembly Committee on Housing concerning proposed amendments to the housing element requirement of general plans.


²⁷. Letter of Arnold Sternberg, Director, State Dep't. of Housing and Community Development, accompanying revised Housing Element Guidelines (April 29, 1977) [hereinafter cited as Sternberg letter].


²⁹. For administrative promulgations to have binding effect, they must be developed in accordance with certain hearing and notice requirements set forth in the Administrative Procedure Act. See CAL. GOV'T CODE §§ 11371, 11373-74, 11420, 11423-25 (West 1966).
Brown administration and its new status as a permanent state agency, thus assumed the responsibility for implementation of the legislative goal of attaining a decent home and satisfying environment for every Californian. As a step toward this goal, HCD completed permanent revisions to the Guidelines after engaging in public hearings and consultation with representatives of local and regional governing bodies and the State Office of Planning and Research. The proposed regulations are comprehensive and, as interpretive regulations, establish the criteria against which local compliance with the housing element requirement is to be measured. Generally, the revised guidelines require that a housing element contain a thorough problem solving strategy. The element must establish local housing goals, policies, and priorities aimed at alleviating unsatisfied housing needs. Additionally, it must set forth the course of action that the locality is undertaking and intends to undertake to effectuate these goals, policies, and priorities.

HCD has encountered opposition to its new regulations from local officials. First, they argue that the department lacks the statutory authority to promulgate binding guidelines. This argument is based on an interpretation of Government Code section 65040.2. Section 65040.2 describes as responsibilities of the Office of Planning and Research (OPR) the preparation and adoption of general plan guidelines. Although the statute does provide for the adoption of advisory guidelines, the guidelines to which this section refers are those adopted and developed by OPR pursuant to section 65040.2. Section 65040.2, however, does not apply to the housing element guidelines. The statute expressly denotes that OPR is responsible for the preparation of guidelines for all mandatory elements of the general plan except the housing element.

The contention that the Housing Element guidelines are mandatory and have binding effect is supported by the reading of other statutes. The specific code provision for a housing element, Government Code section 65302(c), expressly requires that local housing elements be developed pursuant to regulations. The Housing and Home Finance Act directs HCD to adopt such regulations. It states that such regulations are to be adopted in accordance with the Administrative Procedures Act (APA). This requirement is im-

30. The regulations have not been formally adopted, pending determination of HCD responsibilities under the California Environmental Quality Act. Sternberg letter, supra note 27.
31. Proposed revised Housing Element Guidelines (to be codified in 25 CAL. ADM. CODE as § 6206) (currently on file with Secretary of State).
34. Id. In pertinent part, The Housing Act reads, "The department shall adopt
important because, in the opinion of the California Attorney General, rules and regulations issued pursuant to the APA are obligatory and thus have the force of law. Careful scrutiny of the statutes, therefore, reveals that the legislature intended that the housing element guidelines have the effect of binding regulations and were not intended to be advisory.

HCD's position that the proposed guidelines have binding effect is additionally supported by analogous case law concerning implementation of the California Environmental Quality Act (CEQA). The Public Resources Code directs that the State Office of Planning and Research develop, and the State Resources Agency adopt, in accordance with guidelines for the execution of CEQA. Both OPR and the Resources Agency have read this language to require the adoption of binding regulations. The judiciary has given full legal force to these guidelines.

The second ground on which HCD has encountered local resistance to its revised regulations is on the theory that the regulations impose implementation costs on local government that require state reimbursement under section 2231 of the Revenue and Taxation Code (S.B. 90). S.B. 90 requires state reimbursement of all state mandated local costs. S.B. 90 did not become effective until 1973 and, accordingly, as HCD is quick to point out, does not apply to local costs incurred in complying with a pre-1973 legislative mandate. Local governments have been required to have an adequate housing element as a component of their general plan since 1969, and the instant revision of the guidelines does not enlarge this pre-S.B. 90 mandate. Local recalcitrance based on S.B. 90 should not excuse noncompliance with the 1969 statute.

To date, only one court has construed the housing element provision of California's planning and zoning law. A recent "citizens guidelines for the preparation of housing elements required by Section 65302 of the Government Code. The guidelines ... shall be adopted in accordance with the provisions of Chapter 4.5 . . . of Part I of Division 3 of Title 2 of the Government Code [the Administrative Procedure Act]." 55 Op. Atty Gen. 381, 383 (1972).

36. Id. at § 21083.
37. 14 CAL. ADM. CODE § 15005. (as promulgated by OPR & the Resources Agency).
40. Id.
41. Id.
42. CAL. GOV'T CODE § 65302(c) (West Supp. 1977).
43. Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974). The
suit,"* Orange County Fair Housing Council v. City of Irvine,* suggests how concrete case law interpreting Section 65302(c) might develop. The suit which pre-dated the *Livermore* decision also is an example of how proponents of low income housing might expand the rule of *Associated Homebuilders v. City of Livermore.* *Livermore* requires regional housing needs to be weighed against local interests when local land use regulations exclude low and moderate income households.

The Irvine Suit and Legislative Retreat

*Orange County Fair Housing Council v. City of Irvine* was triggered by the defendant City Council's adoption on December 10, 1974 of a planned community zoning ordinance for the proposed Irvine Industrial Complex-East. The complex is a 2,000 acre industrial park that will generate a need for at least 54,000 dwelling units. Of these units, 45,000 will be required to house low and moderate income families drawn by newly created employment to the Irvine region. The city plan, however, made no provision for this housing need, even admitting that local prices effectively exclude such persons.

This litigation was kindled by prior acts and omissions. Prior to the city's December 1974 action, a need for 3,000 units of low and moderate income housing already existed. Families with incomes of less than $14,000 could not afford to live in the city. Yet, seventy-five percent of those persons employed in the already established Irvine Industrial Complex-West had incomes of less than $14,000. The University of California campus, located within the city, had approximately 8,000 students, some number of whom needed low income housing in the city. Some 750 of the 3,770 marines assigned to El Toro Marine Base, located adjacent to the city, would...
have lived off base in the city or in neighboring cities if there had been housing available that they could have afforded.53

Prior to December 1974, there were a number of actions that had been taken by the Irvine City Council that, when analyzed cumulatively, demonstrated the city's disregard for the dearth of lower income housing in its community. On February 19, 1974, for example, the City Council had rejected a site plan for 280 units of rental apartments in an area zoned for apartments since 1964. On September 3, 1974, the City Council had received a housing implementation report from its planning department in which there was a finding that 75 percent of the employees in the Irvine Industrial Complex-West earned less than the minimum required to purchase housing in Irvine. Yet, the council rejected planning department recommendations that it join the Orange County Housing Authority, which assists localities in obtaining federal subsidies for low income housing projects; that it enact a real estate transfer tax to fund low income housing programs; and that it appoint a city housing commission charged with studying Irvine's lower income housing shortage. On a broader scale, the City Council, on October 22, 1974, defeated a proposal that 60 percent of residential units in a core area housing development be set aside to serve persons of low and moderate income ranges, and instead set aside only 20 percent of the units for those needs.54 Although Irvine apparently had had a major housing problem for a number of years, legal steps were not taken to oppose the city's pattern of exclusionary zoning until citizens realized that the ICC-East project would greatly exacerbate Irvine's lower income housing shortage.

Plaintiff Orange County Fair Housing Council stated two causes of action in its complaint against the Irvine City Council. In its first cause of action, Fair Housing alleged that the city's general plan did not satisfy Government Code section 65302(c), nor did it comply with HCD guidelines because it did not provide an adequate number of housing sites for all economic segments of the community. The second cause of action alleged that the Irvine Industrial Complex-East rezoning was unlawful because the rezoning was not consistent with the general plan.55 In support of its complaint, the plaintiff alleged that the city had not taken any action to accommodate the 45,000 new workers who would not be able to afford housing in Irvine and that such inaction was contrary to the Irvine general plan's

53. Id. at 8.
55. See CAL. Gov't Code § 65360 (West Supp. 1977) (requiring land use regulations to be consistent with local general plans).
official statement that all persons who work in Irvine should have access to adequate housing at affordable prices.

The HCD guidelines seemed to be the crux of Fair Housing's first cause of action. The guidelines are a standard against which a locality's general plan can be measured for conformance to the housing element requirement. The HCD guidelines upon which plaintiff specifically relied in its complaint, however, were those regulations promulgated by the original HCD Commission. These guidelines were never adopted pursuant to the Administrative Procedure Act and were not considered binding.

The city of Irvine reacted to the litigation by having legislators introduce a panoply of bills intended to weaken low and moderate income housing policy. Of the bills presented to the legislature, S.B. 1058 (Carpenter), A.B. 389 (Ellis), and A.B. 1727 (Robinson) have received the most attention. S.B. 1058 would amend the housing element requirement to provide that it is not the legislature's intent that cities and counties subsidize the housing needs of any or all economic segments of the community. S.B. 1058, if then in effect, probably would have vitiated the suit against Irvine because the housing element law would have become vague and ambiguous. A.B. 389, if passed, would also alter previously expressed legislative intent. The bill provides that HCD guidelines shall be only advisory to local governments.

A.B. 1727, a proposed amendment to section 65302(c) provides that the housing element of a general plan must make adequate provision for the housing needs of all elements of the community "only

56. See text accompanying note 31 supra.
57. See CAL. GOV'T CODE §§ 11373-74 (West 1966). HCD's recent promulgation of emergency revised guidelines in accordance with the APA, however, could have considerably strengthened Fair Housing's position. Assuming that the guidelines are binding, plaintiff could have relied on them to demonstrate that Irvine's housing element was inadequate.
58. Telephone interview with Fred Silva, consultant to the Committee on Local Government of the California State Senate, Aug. 15, 1977.
60 Under such an amendment, localities could possibly be relieved of all section 65302(c) responsibilities because any expenditures made pursuant to this law — even planning costs — could be construed as indirectly subsidizing low income housing.
61. Telephone interview with Rene Franken, consultant to the Assembly Committee on Housing (Sept. 7, 1977).
62. The bill would drastically modify existing legislative intent. Currently, the guidelines offer the only test of what constitutes a sufficient housing element. Without the guidelines, a plaintiff's burden of proof is overwhelming. Private actions seeking to enforce section 65302(c) probably will not surface. Cities could continue to refuse to absorb their fair share of lower income housing demand and, instead, foist the burden on neighboring communities.
to the extent feasible.”63 “Feasible” is defined as capable of being accomplished within a reasonable period of time, taking into account economic, environmental, social, and technological factors. A.B. 1727 seeks to create ambiguities about local lower income housing responsibilities. Rather than specifying in greater detail what “adequate provision” for community housing needs means, the measure introduces a feasibility issue which localities can utilize as a defense for failing to comply with the spirit of section 65302(c). Assembly Bill 1727 has proceeded farthest in the legislative process. The bill has passed the assembly and only awaits review on the senate floor before it goes back to the assembly for concurrence in a minor amendment.64 How Governor Brown will treat the bill, if it reaches his desk, remains an open question.65

Irrespective of the ultimate disposition of pending legislation, the closeness of Assembly Bill 1727 to passage reveals that the California legislature is waffling on the goal of providing decent housing for every Californian. This prospect is distressing. Legislative retreat leaves a progressively worsening problem without a solution. Delay in implementing an equitable housing policy can be expected to produce further shortages because exclusionary land use regulations will be allowed to continue forcing the cost of shelter upwards.66 An answer to the lower income housing question may need to come from the judiciary. Although binding housing element guidelines and clear legislative intent are the most effective tools for alleviating housing injustices, relief may be also sought by pursuing constitutional rights to adequate housing and residential access in the courts. The California Supreme Court recently expressed its sensitivity to the housing issue in its Livermore decision.67

The California Judiciary's Recognition of the Housing Shortage

The Livermore Case: A Glimmer of Optimism

The California Supreme Court for the first time in Associated

64. The amendment provides for the non-controversial removal of an urgency clause.
65. The Irvine suit was scheduled for trial on December 13, 1977, but was settled in October 1977. Plaintiffs decided to compromise and avoid the possible precedential value of the action for two reasons. First, the trial court denied their third amended complaint incorporating the theories of Livermore as a new cause of action and, second, the legislature appeared to be rapidly retreating from its goal to house satisfactorily every Californian. As part of the settlement agreement, the City of Irvine must oversee and facilitate the construction of 1,700 lower income dwelling units.
66. See text accompanying notes 2-3 supra.
67. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
Homebuilders of the Greater Eastbay, Inc. v. City of Livermore,\textsuperscript{68} considered the constitutionality of land use regulations adopted by local governments that adversely affect persons residing outside a particular city's boundaries. Livermore involved a challenge to an initiative ordinance. The ordinance prohibits issuance of residential building permits until local educational, sewage disposal, and water supply facilities meet specified standards.\textsuperscript{69} Plaintiff building contractors sought to enjoin enforcement of this ordinance on the ground it unreasonably promoted local interests at the expense of the greater public welfare. Plaintiffs relied on two legal theories: first, that the ordinance infringed on the constitutionally protected right to travel and, second, that it violated substantive due process by exceeding the constitutional limits of the municipality's police power.\textsuperscript{70} The California Supreme Court found that Livermore's ordinance imposed only an indirect burden on the right to travel and held, on the limited evidence before it, that the city had not exceeded its police power. The court, however, concluded that in appropriate circumstances unreasonable and exclusionary land use ordinances with adverse impacts upon the greater public welfare as seen from a regional perspective could be struck down by the courts as being in excess of the local police power.\textsuperscript{71} Livermore by establishing a regional perspective of the general welfare may provide the means for meeting lower income housing responsibilities.

\textsuperscript{68} Id.

\textsuperscript{69} The Livermore initiative provides: A. The people of the City of Livermore hereby find and declare that it is in the best interest of the City in order to protect the health, safety, and general welfare of the citizens of the city, to control building permits in the said city. Residential buildings permits include single-family residential, multiple residential, and trailer court building permits within the meaning of the City Code of Livermore and the General Plan of Livermore. Additionally, it is the purpose of this initiative measure to contribute to the solution of air pollution in the City of Livermore. B. The specific reasons for the proposed position are that the undersigned believe that the resulting impact from issuing residential building permits at the current rate results in the following problems mentioned below. Therefore, no further residential permits are to be issued by the said city until satisfactory solutions, as determined in the standards set forth, exist to all the following problems:

1. EDUCATIONAL FACILITIES — No double sessions in the schools nor overcrowded classrooms as determined by the California Education Code.

2. SEWAGE — The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board.

3. WATER SUPPLY — No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.

C. This ordinance may only be amended or repealed by the voters at a regular municipal election. D. If any portion of this ordinance is declared invalid the remaining portions are to be considered valid. \textit{Id.} at 589 n.2, 557 P.2d at 481, 135 Cal. Rptr. at 44.

\textsuperscript{70} \textit{Id.} at 600, 557 P.2d at 483, 135 Cal. Rptr. at 51 (1976).

\textsuperscript{71} \textit{Id.} at 607-08, 557 P.2d at 488, 135 Cal. Rptr. at 56.
The "Regional Welfare" Standard

California's adoption of a regional perspective of the general welfare follows a rapidly emerging national trend in the judicial review of exclusionary zoning.\textsuperscript{72} The test formulated in \textit{Livermore} recognizes that some local legislative land use regulations may be myopic and that they may have extra territorial consequences. In \textit{Livermore}, the supreme court utilized the traditional test of a zoning ordinance under the state constitution and required the ordinance to bear a rational relation to the health, safety, and general welfare of the community.\textsuperscript{73} It added an important caveat, however: the local legislature may no longer consider the effect of its ordinance within municipal boundaries alone. Now it must also consider whether its ordinance has a significant effect upon the larger region.\textsuperscript{74} By so requiring, the \textit{Livermore} decision marks a profound shift in the scope of factual examination in which the judiciary will engage.

When a plaintiff challenges a municipal land use regulation as violating due process by exceeding the scope of the city's police power, the reviewing court is actively to consider the effect of the zoning restriction. The \textit{Livermore} court set out an innovative three part test by which trial courts are to determine whether an ordinance reasonably relates to the regional welfare.\textsuperscript{75} The first step involves an analysis of the probable effect and duration of the local restriction. The second step requires the trial court to identify and weigh the competing local and regional interests affected by the local ordinance. The third step is to determine whether the ordinance, in light of its impact, represents a reasonable accommodation of the competing interests. The \textit{Livermore} majority opined that the trial court can in some instances defer to the locality's finding of this accommodation but that the accommodation must reflect a real and substantial, and not fanciful, relationship between the ordinance and promotion of the general welfare.\textsuperscript{76} Thus, while the court ostensibly adopted a

\textsuperscript{72} Note, \textit{A Regional Perspective of the "General Welfare"}, \textit{14 San Diego L. Rev.} 1227 (1977).


\textsuperscript{74} The court stated: "[I]f, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region." \textit{18 Cal. 3d} 582, 607, 557 P.2d 473, 487, 135 Cal. Rptr. 41, 55 (1976).

\textsuperscript{75} \textit{Id.} at 608-09, 557 P.2d at 88-89, 135 Cal. Rptr. at 56-57.

\textsuperscript{76} "But judicial deference is not judicial abdication. The ordinance must have a real and substantial relation to the public welfare. There must be a reasonable basis in fact, not in fancy, to support the legislative determination." \textit{Id.} at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57 (citation omitted).
lenient constitutional standard of review, it actually has burdened trial courts with a searching role in their factual review of an exclusionary ordinance's validity.\textsuperscript{77} The Livermore balancing test can be seen as a mid-level constitutional standard of review because of the increased scope of factual examination that it mandates. The test directs reviewing courts to look beyond the stated motives of municipalities and to consider carefully the actual effect of the local legislation, while not shifting the burden of proof to municipalities.

A middle level of scrutiny must, however, be distinguished from a strict scrutiny standard of review.\textsuperscript{78} Strict scrutiny arises when an equal protection analysis is invoked. In this area, the Supreme Court has determined that state action which discriminates against certain classes,\textsuperscript{79} or which touches upon fundamental rights,\textsuperscript{80} violates equal protection unless it is justified by a compelling state interest.\textsuperscript{81} The heavy burden of proving a compelling state interest rests with the party defending the regulation.\textsuperscript{82} A compelling state interest has rarely been found.\textsuperscript{83}

The Livermore plaintiffs did not allege that the city's provisions denied equal protection of the laws to landowners or migrants. As the court noted, Livermore's prohibitions banned all construction, both expensive and inexpensive.\textsuperscript{84} Thus, the court could distinguish recent decisions in eastern courts dealing with exclusionary zoning,\textsuperscript{85} in which cities had allowed expensive single family residential construction but had prohibited lower income housing. The discriminatory action prompted the eastern courts to classify housing as a fundamental right per se, thereby making strict scrutiny of the local legislation appropriate.

The keystone of the Livermore decision is the closer judicial scrutiny that it recommends.\textsuperscript{86} Because of the heightened scope of factual examination required, the California judiciary can no longer defer to local legislatures without examining regional concerns. Low

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\item \textsuperscript{77} 7 Envir. Law Rep. (BNA) 10066 (1977).
\item \textsuperscript{79} E.g., classifications based on race, alienage, or national origin.
\item \textsuperscript{80} E.g., the right to vote, the right to interstate travel, and the right to freedom of association.
\item \textsuperscript{81} See Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Dunn v. Blumstein, 405 U.S. 331, 342 (1972); Loving v. Virginia, 388 U.S. 1 (1967).
\item \textsuperscript{82} See San Antonio School Dist. No. 15 v. Rodriguez, 411 U.S. 1, 16 (1972).
\item \textsuperscript{84} 18 Cal. 3d 582, 602, 557 P.2d 473, 484, 135 Cal. Rptr. 41, 52 (1976).
\item \textsuperscript{85} See text accompanying notes 88-100 infra.
\item \textsuperscript{86} See 7 Envir. Law Rep. 10067 [1977].
\end{itemize}
and moderate income housing needs have to be considered and analyzed before local exclusionary ordinances can be upheld.

The Evolution of Livermore

A desirable evolution of Livermore should mean that the boundaries of presumptive constitutional validity accorded local zoning ordinances will contract and that municipalities will face greater burdens in defending restrictive ordinances. As a consequence, reformed lower income housing policy could result in at least one of two ways. California courts could move from a balancing test to a strict scrutiny approach, following the lead of the New Jersey and Pennsylvania courts.\(^8\) In the alternative, California courts could continue to utilize the balancing test but in balancing recognize the urgency of regional housing needs, so that in the immediate future the need for housing would prevail over exclusionary attempts by municipalities.

Expanding Livermore by Adopting Strict Scrutiny

Livermore finds parallels in case law that has developed outside California. New Jersey,\(^8\) Pennsylvania,\(^9\) and New York\(^9\) have adopted the regional perspective of the general welfare and have demonstrated a concern for regional housing demand. A community’s use of its police power to bar unwanted growth at the expense of lower income households which are denied residential access and of neighboring cities which are forced to shoulder more than their fair share of certain regional housing needs has not been tolerated.\(^9\) In implementing the regional perspective, with one exception,\(^9\) the eastern cases treated housing as a fundamental right and have adopted a strict scrutiny standard of review.\(^9\) The New Jersey courts, faced

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\(^8\) See notes 88-89 infra.


\(^9\) Berenson, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672, offers a middle-level scrutiny of the local definition of the general welfare. Exclusionary ordinances coming before the New York courts are not presumptively invalid.

\(^9\) See notes 88-90 supra. Like California, the eastern states have founded their decisions on state constitutional grounds, so as to preclude review by the United States Supreme Court. This policy is motivated by the United States Supreme Court’s forty-
with a statewide pattern of exclusion, have been the most rigorous in the application of strict scrutiny. Exclusionary municipal land use regulations come before the New Jersey courts with no presumption of validity. When plaintiffs have presented a prima facie case, the burden shifts and localities must justify their regulations. To be successful, proponents of the regulation must prove that the exclusionary regulation was promulgated and is maintained pursuant to a compelling state interest. In New Jersey, local environmental and fiscal concerns have not been held to constitute compelling state interests. This treatment of two such traditionally valid concerns indicates that in New Jersey exclusionary regulations are unlikely to withstand judicial review.

New Jersey's highest court set forth its rationale in Southern Burlington County NAACP v. Township of Mount Laurel. The court stated that every community in designing its land use regulations, must "make realistically possible an appropriate variety and choice of housing" and that to the extent of the municipality's fair share of regional lower income housing need, it cannot foreclose the opportunity for lower income people to obtain satisfactory housing. Recently, this sentiment was echoed by the New Jersey high court in Oakwood at Madison, Inc. v. Township of Madison. The court stated that "it is incumbent upon the [local] governing body to adjust its zoning regulations so as to render possible . . . 'least cost' housing . . . in amounts sufficient to satisfy the deficit in the year abstention from the field and by the Court's recent rulings on land use matters that have been quite inconsistent with recent developments in the state courts. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (a local land use regulation limiting use to single family purposes did not violate equal protection although a pressing need for multifamily housing was shown), Belle Terre v. Boraas, 416 U.S. 1 (1974). But cf. Arlington Heights v. Metropolitan Housing Dev. Corp., 558 F.2d 1283, cert. denied, 46 U.S.L.W. 3431 (Jan. 10, 1978) (holding that village had a statutory obligation under the Fair Housing Act to refrain from zoning practice that effectively foreclosed construction of any low cost housing).

96. E.g., Southern Burlington County NAACP v. Township of Mount Laurel. Id. at 169, 336 A.2d 713, 731: "While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process of developing communities."
97. See notes 81-82 supra.
98. Id.
99. Id. at 162, 336 A.2d at 724.
pothesized fair share." The court continued, "Nothing less than zoning for least cost housing will . . . satisfy the mandates of Mt. Laurel." New Jersey has thus affirmatively responded to its housing shortage crisis.

Pennsylvania has also dealt with exclusionary land use practices. The jurisdiction has not experienced the degree of exclusion that New Jersey has encountered; therefore, it does not employ the strict scrutiny test as ambitiously. The Pennsylvania Supreme Court nonetheless has announced that thinly-veiled justifications for exclusionary zoning will not be tolerated. For example, in *In re Girsch*, which concerned the validity of a prohibition against a multifamily dwelling unit, the court held that zoning cannot be used as a means for localities to shirk responsibilities that time and population growth have imposed on them. When a locality can be shown to discriminate against low and moderate income groups, a court's invocation of a strict scrutiny test has advantages. The approach removes the uncertainty of the balancing process, and lower income housing needs do not have to be pitted continually against local concerns, like environmental concerns. The adoption of a strict scrutiny standard in California, however, has two distinct shortcomings. First, the approach requires that housing be classified as a fundamental right in order to justify strict scrutiny of local legislation under the doctrine of equal protection. Not all courts are willing to classify housing as a fundamental interest per se. The United States Supreme Court, most notably, has refused to do so. Although strict scrutiny is a product of the successful school desegregation litigation which sharpened the notion of equal protection as a tool against racial classification, there is a difference in treatment of denial of housing on the basis of race and denial of housing on the basis of economic status. Economic equal protection has not been equated

101. *Id.* at 516, 371 A.2d 1207. In 1973 President Nixon impounded funds for federally subsidizing housing. The nonavailability of federal funds impaired the *Mount Laurel* decision because land zoned for low income housing remained vacant. Thus, the court held that the local legislature could meet its *Mount Laurel* obligation by zoning for the "least cost housing" that private industry would build.

102. *Id.*, 371 A.2d at 1208.

103. See note 89 *supra*.

104. *In re Kit-Mar Builders, Inc.*, 439 Pa. at 471, 268 A.2d at 770. The local entity cited inadequate sewer facilities as the reason for the challenged zoning ordinance.


106. See text accompanying notes 79-85 *supra*.


108. See also *Anderson, American Law of Zoning*, § 8.15 (exclusionary zoning as a denial of equal protection).
with racial equal protection. Even when the statistical correlation between race and poverty have been shown to be high, discrimination against the poor has not become discrimination against an ethnic minority.¹⁰⁹

A second disincentive to the adoption of the strict scrutiny standard is the doctrine's rigidity. Under the strict scrutiny test, all zoning and land use ordinances shown to have an exclusionary effect would be invalidated if a municipality was not absorbing its fair share of regional low income housing need. Invalidation could occur despite cogent local reasons for the ordinance. To insist that land use regulations are invalid unless the interests supporting the exclusion are compelling would endanger the municipal planning process. In Livermore the California Supreme Court expressly disapproved such a result whereby presumptions of validity become presumptions of invalidity.¹¹⁰

Expanding Livermore by Utilizing the Balancing Test

The rigidity of the strict scrutiny standard and its need to label housing a fundamental right diminish the doctrine's appeal and decrease the likelihood that the California Supreme Court will adopt the strict scrutiny standard as an expansion of Livermore. As a consequence, housing needs of low and moderate income groups will better be served by employing California's existing balancing test and demonstrating to the court that regional housing needs outweigh local interests. In the immediate future, because of the pressing need for lower income housing, regional housing concerns usually should be seen as outweighing the local interests behind exclusionary zoning. The invalidation of many local exclusionary land use regulations therefore is probable. In this way, because the invalidation of exclusionary land use regulations reduces the cost of residential access,¹¹¹ the balancing approach has the potential to open the suburbs and to bring relief to lower income households.

California's Lower Income Housing Crisis

California's urgent need for lower income housing can be easily demonstrated. The housing industry is unable to provide enough housing at sufficiently low prices. As a result, increasingly fewer people are able to pay for the housing of their choice.¹¹² They must

¹⁰⁹. Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974).
¹¹⁰. 18 Cal. 3d at 603, 557 P.2d at 485, 135 Cal. Rptr. at 53.
¹¹¹. See text accompanying notes 2-3 supra.
¹¹². California State Dep't of Housing and Community Dev., California Statewide Housing Plan, 1977, at 17 [hereinafter cited as HCD Plan].
live in housing that is too small or expensive, that is deteriorated, or that is located on the urban fringe or in the urban ghetto. Exclusionary land use devices contribute to this dearth of low income housing. Local timed growth plans, for example, have placed additional pressures on the housing stock of existing neighborhoods, causing the normal deterioration process to accelerate greatly.113

California's lower income housing crisis relates to two basic problems: an adequate supply of physically sound housing and overpaying.114 Overpaying is the necessity for low and moderate income households to pay more than 25 percent of gross income for housing.115

Inadequate Supply

More than one million housing units will have to be built in California in the next five years to accommodate new households and to replace housing units lost through normal attrition of the housing stock.116 Additionally, at least one million units should be rehabilitated or replaced if all households are to have access to decent housing.117 When this construction need is contrasted to recent construction levels of 230,000 housing units annually, the severity of California's housing situation becomes apparent. Although the normal functioning of the housing market may partially satisfy basic general housing needs, the normal housing market is unlikely to meet rehabilitation or replacement lower income housing needs. This result is a consequence of noneffective demand. Despite the demographic need for housing, dwellers of substandard housing cannot translate this need into market demand.118 They simply cannot afford better accommodations. In the absence, therefore, of an increase in the purchasing power of lower income households or judicial invalidation of exclusionary land use regulations, no major reduction in the proportion of seriously substandard housing to total housing is likely to occur.

Overpaying

Currently, 23 percent of all of California's low and moderate in-

114. HCD PLAN, supra note 112, App. C at 28.
115. The 25 percent-of-income test is the variable the California legislature employs when it discusses its objective of satisfactorily housing every Californian. CAL. HEALTH & SAFETY CODE § 41126(c) (West Supp. 1977).
116. HCD PLAN, supra note 112, at 21.
117. Id.
come households, a total of 1,780,000 households, are overpaying for shelter. The State Department of Housing and Community Development considers overpaying as the most widespread housing problem in California. Yet, the condition will become worse. An extrapolation of present trends reveals that by 1982, 28 to 30 percent of California's households will be lower income households paying more than 25 percent of their income for housing. The significance of overpaying as a major housing problem is emphasized by the fact that the greatest amount of overpaying is prevalent among the lowest income families. The households with less than $2,000 annual income cannot pay as much as 25 percent of their income for housing and have enough money for food and other necessities also. Yet, these households almost universally pay more than 35 percent of their incomes for housing, and the shelter obtained is usually inadequate.

Conclusion

California's lower income housing shortage is approaching critical levels. Local exclusionary land use regulations that oppose regional fair share housing obligations compound the problem. Eradication of exclusionary land use practices will not be a panacea, but such action will significantly increase suburban residential access for lower income households by reducing the cost of housing.

The future of lower income housing policy in California is at a crucial decisionmaking point before both the legislature and judiciary. The legislature, in reaction to detailed administrative regulations implementing Government Code section 65302(c), seems to be retreating from the goal that all Californians be decently housed. The judiciary, although only recently made aware of regional housing shortages, must monitor the evolution of the new zoning standard it expounded in Livermore: the rule that local zoning decisions must bear a reasonable relationship to the regional general welfare. Expansion of the Livermore principle favorable to housing interests can occur in at least two ways. A strict scrutiny test of judicial review which several eastern states employ to strike down exclusionary land use regulations can be adopted. In the alternative, the existing balancing test may be used but used so that because of the urgency of regional housing needs housing concerns preponderate over local interests. The balancing test appears to be the better approach because it is less harsh; the test does not challenge the presumptive validity accorded land use regulations.

119. HCD PLAN, supra note 112, App. C at 28.
120. Id., App. C at 23.
121. Id., App. C at 28.
The public welfare can no longer tolerate municipal contumacy to inclusionary lower income housing policy. In proceeding beyond the current crossroads, the legislature and judiciary should be guided by the consideration that "the overriding objective [of land use regulations] should be to minimize rather than exacerbate social and economic disparities, to lower barriers rather than raise them, to emphasize heterogeneity rather than homogeneity, to increase choice [for residential location] rather than limit it."122

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122. Associated Home Builders v. City of Livermore, 18 Cal. 3d at 618, 557 P.2d at 494, 135 Cal. Rptr. at 62 (Mosk, J., dissenting) (1976).

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