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| To: | Commission to Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions |
| From: | Legislative Staff |
| Date: | September 30, 2021 |
| Subject: | Background on U.S. Supreme Court Rulings Regarding Exclusionary Zoning |

**Summary of Key Points**:

- Explicitly racial or other directly class or category-based zoning policies are unconstitutional under the 14th Amendment of the United States Constitution and illegal under the Fair Housing Act of 1968.
- Zoning ordinances are generally permissible if they are not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," even when those ordinances may result in a disparate impact on certain communities.

**Strict Scrutiny**: While this memo does not go into the intricacies and extended history of case law addressing equal protection under the 14th Amendment more generally, it is important to note that when laws are passed that directly address or discriminate against a class or category of persons such laws will receive what is referred to as "strict scrutiny" review by the courts. To pass strict scrutiny review, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. Strict scrutiny is the highest standard of review which a court will use to evaluate the constitutionality of governmental discrimination. However, laws that have a disparate impact but are not explicitly discriminatory typically do not receive strict scrutiny review.[1]

**Types of Exclusionary Zoning and Defenses to Exclusionary Zoning Challenges:** Zoning ordinances may achieve an exclusionary effect in a number of different ways. The most common have traditionally been by limiting the number of dwellings permitted through large lot zoning, the exclusion of multiple dwellings or multi-family homes, the exclusion or restriction of mobile homes, and various density restrictions, including but not limited to setback requirements, minimum frontage requirements, and lot coverage restrictions. Generally, a court must weigh the public interests served by the regulation against the need for affordable housing. Common defenses to exclusionary zoning challenges include municipal finances, infrastructure and traffic considerations, property values, rural, historic, or unique community character, and open space, agricultural land, and environmentally sensitive areas.

[1] Laws that have a disparate impact on a protected class may still be prohibited by the Fair Housing Act of 1968. *See Texas Department of Housing Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2504 (2015).

**Overview of Seminal Cases**:
Below, please find a brief overview of the seminal cases regarding the constitutionality of exclusionary zoning policies.

In 1917, the United States Supreme Court addressed an ordinance out of Louisville, Kentucky, which prohibited the sale of real property to people of color in white-majority neighborhoods or buildings and vice versa. *Buchanan v. Warley*, 245 U.S. 60 (1917). In that case, the Supreme Court held unanimously that the ordinance in question violated the 14th Amendment of the United States Constitution, as it interfered with individuals' property rights and rights to privately contract. The central holding of the case was that explicitly racial zoning policies are unconstitutional, a principle later codified in the Fair Housing Act of 1968.[2]

However, in 1926, the United States Supreme Court upheld an exclusionary zoning ordinance (that was neither explicitly race or class based) on the basis that it was a reasonable, constitutionally permissible, exercise of police power in the landmark of case of *Village of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365 (1926). In that case the court held that a locality's decision on the separation of uses within its own borders may be afforded substantial deference as long as the division is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, at 395. Although two years later the Supreme Court rejected a different ordinance in *Nectow v. City of Cambridge*, 277 U.S. (1928) as arbitrary and irrational, the Court has expressed a reluctance to question the policy decisions of localities in zoning practices.[3] See, *Euclid*, at 389; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974).

The law around exclusionary zoning practices has not seen much movement since the case of *Euclid v. Ambler Realty*, however in the 1974 case of *Belle Terre v. Boraas* the Court upheld a zoning ordinance that limited the types of groups (those related by "blood, adoption, or marriage") that could occupy a single dwelling because it bore a rational relationship to the objective of promoting "family needs" and "family values." *Village of Belle Terre*, at 6-9. In that case, the Court also explicitly distinguished such an ordinance from those prohibited by *Buchanan v. Warley*.

In 1977 the Court followed up *Village of Belle Terre v. Boraas* with the case of *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) where it overturned an ordinance that regulated

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[2] The *Buchanan* decision, however, did not affect restrictive covenants that were routinely held not to violate the Constitution because they were private agreements, not enforced by state action. In 1948, the United States Supreme Court held that standing alone, racially restrictive covenants do not violate the 14th Amendment, but while private parties may abide by the terms of such a covenant, they may not seek judicial enforcement as that would constitute state action. Accordingly, enforcement of racially restrictive covenants in state court violate the Equal Protection Clause of the 14th Amendment.

[3] Although *Euclid* allows for zoning based on separate uses, the case of *Belle Terre et al. v. Boraas et al.* 416 U.S.1 (1974) upheld the constitutionality of a residential zoning ordinance that limited the number of unrelated individuals who may inhabit a dwelling.

which type of family members may live together in a single dwelling (the ordinance in question prohibited a grandparent from living with a single dependent son and children). The Court stated that "[w]hen a city undertakes such intrusive regulation of the family, neither Belle Terre nor Euclid governs; the usual judicial deference to the legislature is inappropriate" and cited *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) for the proposition that the "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." The Court in Moore looked specifically at the City of East Cleveland's justification for the ordinance, "a means of preventing overcrowding minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system" and determined the ordinance served those goals "marginally, at best." *Moore*, at 498-500.

In 1977 the United States Supreme Court heard also a case dealing with a zoning ordinance of a Chicago suburb of a neighborhood that was zoned for single-family dwellings without variance since 1959, and thus prohibited the construction of multifamily units. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). The Court upheld the ordinance as constitutional, finding that there was no discriminatory intent or evidence of racial motivation.

**Relevant Areas of Interest**:

**Standing**:
Another legal issue that may arise is the doctrine of "standing." Standing refers to whether a person has the legal capacity to bring a lawsuit in court, and it typically revolves around the requirement that plaintiffs have sustained or will sustain direct injury or harm and that such harm is redressable by the court.

Standing in reference to zoning laws has been addressed by the United States Supreme Court. In *Warth v. Seldin*, 422 U.S. 490 (1975), low-income individuals and a non-profit housing organization sued, contending that a town's zoning ordinance effectively excluded persons of low and moderate income from living in the town, in contravention of a petitioners' constitutional rights and in violation of civil rights statutes. The Court held that none of the petitioners in that suit met the threshold requirement of stating a "specific case or controversy" between themselves and the defendant and that to have standing a complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the Court's remedial powers. *Warth, at 517-518.* A "generalized grievance" is typically not enough to show an "actual or threatened injury." *Warth, at 499-502*.[4]

[4] For an example of a discussion of standing in Maine, see *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1380-81 (Me. 1996)

**Inclusionary Zoning:**
A few states have passed laws attempting to create explicitly inclusionary zoning programs. These include, for example, expedited permitting procedures and appeals mechanisms for affordable housing projects, requirements to include affordable housing in municipalities' comprehensive plans, and legislation enabling municipalities to adopt inclusionary zoning requirements. Requirements at either the state or local level may include mandatory inclusionary housing set-asides, mandatory inclusionary housing fees, zoning incentives for affordable housing, affordable housing preservation (for example using community land trusts), permitting accessory dwelling units, and designating affordable senior housing.

Those laws have prompted lawsuits that have yet to be addressed by the United States Supreme Court. At the state level, an oft-cited example of an inclusionary zoning challenge is *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.*, 92 N.J. 158, (1983) (also known as *Mount Laurel II*). In this case, the New Jersey Supreme Court rejected the contention that mandatory set asides are impermissible socioeconomic regulations, explaining that "it is nonsense to single out inclusionary zoning … and label it 'socio-economic' if that is meant to imply that other aspects of zoning are not. Detached single family residential zones, high-rise multi-family zones of any kind, … indeed practically any significant kind of zoning now used, has a substantial socio-economic impact and, in some cases, a socio-economic motivation. It would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality because it is 'socio-economic' when its need has arisen from the socio-economic zoning of the past that excluded it." The court also rejected the claim that mandatory set asides are takings of property, stating that "the builder who undertakes a project that includes a mandatory set-aside voluntarily assumes the financial burden, if there is any, of that condition."

Another of the more high-profile examples of such cases is that of *Cherk v. Marin County* (link to superior court complaint), where plaintiffs challenged a county's $40,000 fee to subdivide a vacant plot of land they owned and had hoped to sell. The fee was part of a county ordinance that required people subdividing parcels of land to either devote a portion of that land to affordable housing or else pay an in-lieu affordable housing fee. The intent of the law was to combat high housing costs in Marin County. Plaintiffs in the case argued that the government had not shown a reasonable relationship between subdividing their lot and housing prices, and was therefore placing an unconstitutional condition on the Cherks' lot split in violation of the Fifth and 14th Amendments.[5] The plaintiffs lost at both the superior court and on appeal, where the court

[5] The plaintiffs argued the fee was invalid under the "unconstitutional conditions doctrine," established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Under that doctrine, the government can't condition a person's receipt of a governmental benefit on the waiver of a constitutionally protected right. Conditions imposing monetary exactions or dedications of property must bear an "essential nexus" and "rough proportionality" to adverse public impacts of the proposed development. The court later applied this doctrine to protect the 5th Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013).

determined that the development fees the county had imposed on the plaintiffs were well within the county's ability to regulate land use.[6] The case was finally appealed United States Supreme Court, where it was denied review.[7]

**Additional Resources**:
Please find below, additional links relevant to exclusionary zoning litigation taken from the presentations at the last meeting.

- United States Department of Justice – Housing and Civil Enforcement Cases
- Post Katrina Discrimination Case – Fact Sheet

[6] *Cherk v. County of Marin*, Cal. App. 1st Dis. (2018) [unpublished No. A153579.]
[7] *Cherk v. County of Marin*, 140 S.Ct. 652 (2019) [unpublished No. 18-1538.]