Housing for the Elderly: Constitutional Limitations and Our Obligations

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I. INTRODUCTION

The desirability and necessity of adequate housing for the elderly have been unequivocally recognized in recent years. While some municipalities have made no provisions to accommodate this need of the aged, others have responded affirmatively by enacting zoning ordinances permitting planned retirement communities. These communities have sought to meet senior citizens' unique needs, with adequate roads for emergency vehicles, more and wider walkways with fewer stairs, interiors and exteriors designed to permit easy social contact, common rooms, short distances between buildings and well-lighted walkways and halls. Individuals have also sought to guarantee suitable accommodations for the elderly by employing restrictive covenants which limit residency in a certain area to persons within given age limits.

1. Deyo, Reminiscences After Sixty-Four Years at the Bar, 19 N.Y. St. B.A. Bull. 213, 217 (1947).
2. See, e.g., Senior Citizens Housing Act of 1962, Pub. L. No. 87-723, 76 Stat. 670 (1962). The Senior Citizens Housing Act, among other things, amended the National Housing Act to read in pertinent part:
   The Congress finds that there is a large and growing need for suitable housing for older people both in urban and rural areas. Our older citizens face special problems in meeting their housing needs because of the prevalence of modest and limited income among the elderly . . . and their need for housing planned and designed to include features necessary to the safety and convenience of the occupants in a suitable neighborhood environment. The Congress further finds that the present programs for housing the elderly . . . have demonstrated the urgent need for an expanded and more comprehensive effort to meet our responsibilities to our senior citizens.


4. A third solution, not discussed in this note, is boarding houses for the aged. See Melman, supra note 2. See also Fla. Stat. ch. 651 (1975); Commentary, Florida's Life Care Law: Revitalizing a Dormant Statute to Protect the Aged, 28 U. Fla. L. Rev. 1016 (1976).
These zoning ordinances and restrictive covenants have been subject to constitutional attack, since they often exclude younger families, particularly those with children. This note will examine to what extent, without violating constitutional provisions, a municipality or individual may utilize zoning ordinances or restrictive covenants to afford the elderly housing designed to meet their needs. It will also explore to what extent, if any, a municipality has an obligation to assure the aged adequate accommodations. This writer will argue that municipal and private attempts to provide the elderly with retirement communities should—with rare exception—be sustained against constitutional attack, and that there ought to be an affirmative obligation for municipalities to provide such assistance.

II. EQUAL PROTECTION

State or municipal actions which seek to resolve a problem shared by a distinct group such as the elderly may be challenged as violations of both state and federal equal protection guarantees. In responding to the needs of one segment of society, the state or local government arguably may impinge on the constitutional rights of another group.

Through the appellate process, the New Jersey courts have supplied answers to many of the constitutional problems posed by zoning ordinances favoring the elderly. In Taxpayers Association v. Weymouth Township, a New Jersey intermediate appellate court struck down an ordinance which required that occupancy in a public trailer park be limited to persons of age fifty-two and older. The court reasoned that in an attempt to provide dwellings which the elderly in need of housing could afford, the municipality invidiously discriminated by excluding low-income persons under age fifty-two. Two years later, a New Jersey appellate court invalidated another municipal attempt to provide the aged with accommodations tailored to their needs. In Shepard v. Woodland Township Committee and Planning Board, the court struck down an ordinance which, in addition to authorizing accommodations for the aged, permitted limited commercial facilities

5. The most common attacks are based upon equal protection and due process grounds, invoking both federal and state constitutions. The other recurrent attack upon zoning ordinances is a charge of ultra vires, i.e., that the ordinances are outside the municipality's authority granted under the state's enabling act. Each of these methods of attack will be discussed more fully in this note.


7. Id. at 190. The age limit was found violative of the equal protection clause of the United States Constitution; the state constitution was not invoked.

and service establishments, intended primarily for the use and convenience of the residents, and required recreational and cultural facilities for their sole use. The township argued that the *Shepard* ordinance, unlike the *Weymouth* one, was inclusionary because it did not restrict property to one type of use or single class of users:

The ordinance in the *Weymouth* case may easily be distinguished from ... [the one in] this case. There was a total and unequivocal exclusion [in *Weymouth*] of any and all mobile homes in the township except those owned and occupied by "elderly" persons, defined and thereby classified by a defined age.

There is no exclusion of any class, type or number of persons in any zone in the Woodland Township ordinance. The owner of a parcel of land may use it in various ways, restricted only by normal residential and agricultural uses. One of these methods of use, open to a landowner qualified to do so, is the use as a senior citizens' community.

Defendant was, in essence, arguing that the ordinance was inclusionary and not exclusionary as was the *Weymouth* ordinance. The court did not find this argument persuasive, however, and found *Weymouth* controlling.

9. Woodland Township argued that the following ordinance, authorizing senior citizen housing, was a permissible exception to the residential-agricultural zone, authorized by the Act of April 3, 1928, ch. 274, § 3, 1928 N.J. Laws 696 (repealed and replaced by N.J. STAT. ANN. § 40:55 D-62, -65 (West Supp. 1977)):

8. Senior Citizen Communities. In R-A Zones where one or more parcels of land having a contiguous total area of at least 500 acres are under common ownership or control, there may be established a Senior Citizen Community in accordance with the laws of the State of New Jersey and with the following additional requirements:

a. Age and Occupancy Requirements. The permanent residents of a Senior Citizen Community shall be confined to persons who are 52 years of age or over . . . .

342 A.2d at 854.


11. 342 A.2d at 855. The dissent responded to the plaintiff's position that the ordinance was exclusionary by asserting:

The ordinance, however, does not designate a use district exclusively for senior citizens housing and it is not suggested that in its failure to provide an exclusive district for this [special] use, the ordinance transcends the authority of the zoning statutes. . . . There has been no showing, *prima facie* or otherwise, that the allowance of such a use within the township trenches unduly upon other land areas available for general housing or would bar entry into the municipality of all classes of persons in need of reasonable housing.

Id. at 859 (Handler, J., dissenting) (citations omitted). The dissent asserted that the ordinance should be sustained because it did not invidiously discriminate.

The majority did not expressly discuss the equal protection issue, but their approval
On appeal, the New Jersey Supreme Court considered *Shepard* and *Weymouth* as companion cases and reversed in a landmark decision. Following an in-depth discourse in *Weymouth* on the particular problems of the aged, a unanimous court held that the ordinances were repugnant neither to the United States nor to the New Jersey Constitutions.

### A. Federal Equal Protection

Under traditional equal protection analysis, the United States Supreme Court has applied one of two tests, depending on the subject matter of the attempted regulation. When a suspect class or fundamental right is involved, a zoning ordinance will be subject to strict judicial scrutiny, and the municipality will be required to demonstrate that the ordinance serves a compelling state interest. On the other hand, the party attacking an ordinance not discriminating against a suspect class or not denying a fundamental right must show that it lacks a rational relationship to a legitimate state interest. Recognizing that age is not a suspect class nor housing a fundamental right

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14. *Id.* at 1035.

15. *Id.* at 1036. Although plaintiffs did not allege that the ordinances were violative of the state’s equal protection clause, the court addressed the possible future contention with dicta. *Id.*


17. So long as a legitimate state interest could conceivably have been the intent of the legislature, the statute will survive. See, e.g., *Kelley v. Johnson*, 425 U.S. 238 (1976).


under the United States Constitution, the *Weymouth* court applied traditional equal protection analysis to the federal constitutional attack. Thus, the *Weymouth* ordinance was sustained.

The Taxpayers Association feared that by zoning portions of its undeveloped land for the aged, a municipality might prevent development of that land as housing for other less welcome segments of the population. In particular, the plaintiffs were concerned that municipalities would zone for the aged in an effort to avoid school-aged children and the concomitant costs of more schools, thereby holding down their taxes. This concern led the court to require supplemental briefs on the effect of the exclusionary practices, and the court concluded:

The peril to which our attention is drawn is a significant one. This court recently had occasion to condemn zoning practices which deny a realistic opportunity to certain classes of people to live in desirable communities. *Southern Burlington Cty. NAACP v. Mt. Laurel Tp.*, . . . 336 A.2d 713. In that case, we determined the impropriety of attempts by municipalities to improve their financial position by selectively restricting new housing to categories of people who are not revenue producers, *i.e.*, those whose local tax contribution exceeds their demands upon locally financed governmental services. . . . We also disapproved of attempts to restrain increases in school expenditures by directly or indirectly excluding families with children. . . .

[However,] it seems obvious that the seriousness of any exclusionary threat will depend upon the circumstances of each case, including in particular the relationship which the population, area, and available vacant land within the municipality bears to that within the areas occupied by the senior citizens communities.

The *Weymouth* court reasoned that the best means of safeguarding against the exclusionary effect is to insist that similar housing for less welcome residents exist in other districts within the municipality.

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20. Although the standing requirements may not have been satisfied, the *Weymouth* parties did not raise standing as an issue.
21. *Id.* at 1034–37.
22. *Id.* at 1038–39. Defendants' expert on housing for the aged characterized the effect of development permitted by the ordinance as "architectural birth control." *Id.* at 1039. Most of the briefs filed by the plaintiffs were statistical and mathematical demonstrations, along with economic arguments.
25. *Id.* at 1040. If the senior citizens communities are too large, the exclusionary problem would not be avoided by providing (as did the *Shepard* ordinance) for other uses within the zoning district.
In the instant case, the ordinance was found to be in accordance with a comprehensive municipal plan; thus, the exclusionary effect had been averted. But where a comprehensive plan is challenged as being inadequate, this aspect of the decision could become a focal point of analysis. Since the Weymouth ordinance was in accordance with a comprehensive plan, it seems that the adverse effect upon the interests in Weymouth Township was relatively insubstantial. This seems particularly true in light of the importance of the interests which the state seeks to promote, namely, providing for the needs of the elderly and remedying past housing discrimination directed towards the aged. Weymouth explored the unique social, psychological, economic, and physical needs of the elderly. Since the state has an interest in promoting the well-being of its citizens, assisting the elderly in meeting those needs is of significant importance. The state has an additional interest in remedying past discrimination. The United States Supreme Court has not ruled on the constitutionality of measures to remedy past racial discrimination, where the remedial measures themselves involve direct discrimination on the basis of race, e.g., through quotas. The Supreme Court has subjected state action aimed at rectifying past discrimination based on sex to minimum scrutiny. Discrimination based on age might be more properly com-

26. Id.
27. Id. at 1025–30.
28. Regarding racial discrimination, the Supreme Court has stated: """[T]he [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past . . . ."""" Franks v. Bowman Transp. Co., 424 U.S. 747, 770 (1976), quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
29. The question is now pending in Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152 (Cal. 1976), cert. granted, 97 S. Ct. 1098 (1977) (No. 76–811). In an earlier case, the Washington Supreme Court, construing the United States Constitution, held that the state interest in remedying the effects of past discrimination must be a compelling one in order to classify on the basis of race. The court found """"the state interest in eliminating racial imbalance within public legal education to be compelling."""" DeFunis v. Odegaard, 507 P.2d 1169, 1182 (Wash. 1973), vacated as moot, 416 U.S. 312 (1974).
30. In Frontiero v. Richardson, 411 U.S. 677 (1973), Justice Brennan, speaking for a plurality of the Court, struck down a statute which discriminated on the basis of sex and treated sex as a suspect class. But he carefully distinguished the statute from one which was """"designed to rectify the effects of past discrimination against women."""" Id. at 689 n.22, suggesting the latter type of discrimination may not be subject to the same compelling standard. The Frontiero plurality's labeling of sex as a suspect class has never been accepted by a majority of the Court. See Craig v. Boren, 97 S. Ct. 451 (1976).
In Kahn v. Shevin, 416 U.S. 351 (1974), Justice Douglas, speaking for a six-justice majority, held that a state tax exemption for widows (but not for widowers) was reasonably related to the legitimate state policy of cushioning the financial impact of spousal loss upon the sex for whom the loss imposes a disproportionately heavy burden. Distinguishing Frontiero, the Kahn Court stated that the Frontiero statutes were """"not in any sense designed to rectify the effects of past discrimination against women."""" Id.
pared to sex rather than racial discrimination, since age, like gender, is not a suspect classification.31

In order to establish that the state action is aimed at remedying past discrimination, past discrimination must be shown. This may sound anomalous, but proof is often difficult. Under the Supreme Court's standard enunciated in *Washington v. Davis*32 and *Arlington Heights v. Metropolitan Housing Corp.*,33 it must be shown that an intent to discriminate existed. Thus, in *Bakke v. Regents of the University of California*,34 the California Supreme Court, relying on *Washington*, held that a medical school admission policy which provided for a quota to be filled by minority students was violative of equal protection absent a showing of past discrimination.35 Without proof of past intent to discriminate, the University did not meet its burden of demonstrating the compelling state interest of remedying past discrimination.36 Past intent to discriminate against the aged could be difficult to demonstrate,37 particularly in light of the Supreme Court's position in *Massachusetts Board of Retirement v. Murgia*,38 where the Court stated: "While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons . . .

at 355 n.8, quoting *Frontiero v. Richardson*, 411 U.S. at 689 n.22. Thus, the Court implied that statutes designed to rectify past discrimination against women might be subject to minimal scrutiny. But it is questionable if the *Kahn* statute was designed to remedy past sex discrimination. In dissent, Justice White wrote: "[I]f the State's purpose was to compensate for past discrimination against females, surely it would not have limited the exemption to women who are widows." *Id.* at 361. *Contra*, *Cramer v. Virginia Commonwealth Univ.*, 415 F. Supp. 673 (E.D. Va. 1976) (holding an affirmative action plan aimed at correcting past discrimination in employment violative of equal protection).

31. See note 18 supra.
35. The University also argued that the validity of quota admission programs should be determined by the more lenient "rational basis" test. It reasoned that the stricter "compelling interest" standard should be employed only when the classification discriminates against a minority. The court rejected the University's "proposition that deprivation based upon race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than a minority." *Id.* at 1165.
37. In *Arlington Heights*, 97 S. Ct. 555 (1977), the Court suggested four avenues along which to trace a municipality's intent to discriminate via a zoning ordinance: (1) the historical background of the zoning decision; (2) the specific sequence of events leading up to the challenged decision; (3) departures from the normal procedure; and (4) legislative or administrative history. *Id.* at 564-65.
have not experienced a 'history of purposeful unequal treatment' . . . "  

Despite the increased burden of proof imposed upon remedial programs and the nonrecognition of age as a suspect class, the courts have not retreated from the principle that remedying past discrimination is an important state interest.

As to the appropriate judicial test to apply, it can be argued that governmental action which seeks to aid a traditionally disadvantaged group should be presumptively valid. When a democratically elected legislative body which controls the decisionmaking process, particularly at the local level, rectifies a problem so as to advantage the aged and disadvantage themselves, the reasons for suspicion and therefore a stringent standard of review are absent.  

The apparent purpose of the zoning ordinance is to accommodate the unique housing needs of older persons. The substantiability of the connection between this purpose and the classification of elderly persons may be challenged only in regard to the age limit at which the legislature draws the line. The selection of fifty-two years of age as the boundary was an obstacle which the intermediate appellate courts could not overcome. While the New Jersey Supreme Court conceded that the line is somewhat arbitrary, they reasoned that "[t]he specification is a legislative judgment which ought not to be disturbed unless it exceeds the bounds of reasonable choice." Thus, the legislative classification of persons over fifty-two years of age was  

39. Id. at 313.  
40. This was not the approach taken by the Washington Supreme Court in DeFunis, 507 P.2d 1169 (Wash. 1975), vacated as moot, 416 U.S. 512 (1974). There, the court did not consider whether the discrimination was seeking to aid a traditionally disadvantaged group. The fourteenth amendment was interpreted literally; consequently, the language, "[n]o state shall . . . deny to any person . . . the equal protection of the laws" was taken to apply to state action depriving whites of equal protection as well as to state action depriving blacks of equal protection. In light of the history of the amendment, this approach is questionable. Cf. United Jewish Organizations v. Carey, 97 S. Ct. 996, 1009-10 (1977) (in upholding apportionment legislation, three justices stated: "There is no doubt that in preparing the 1974 legislation, the State deliberately used race [classifications] in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . . ."). But see McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976) (a white citizen may have a cause of action under 28 U.S.C. § 1981). See also Ely, The Constitutionality of Reverse Discrimination, 41 U. Chi. L. Rev. 728, 737 (1974).  
41. In Weymouth, the New Jersey intermediate appellate court found the age limit to be unauthorized, unreasonable, and violative of equal protection. 311 A.2d at 189-90.  
42. 364 A.2d at 1035.  
43. Id. The court added: "Though the elderly are commonly defined as those persons approximately 65 years old, it cannot be said that 52 is unreasonable or without a factual basis." Id.
held directly and logically related to the legitimate state interest of making accommodations available to the elderly.\textsuperscript{44}

In evaluating the validity of the zoning practices in \textit{Shepard} and \textit{Weymouth}, the New Jersey Supreme Court apparently did not consider it material that the \textit{Shepard} ordinance was inclusionary, \textit{i.e.}, the zoning classification permitted (included) other uses besides housing for the aged, while the \textit{Weymouth} ordinance was exclusionary, \textit{i.e.}, the zoning classification allowed only housing for the aged and excluded all other uses. The fact that the \textit{Shepard} ordinance was inclusionary (that is, allowed for other uses) resulted in its being viewed more favorably when the issue of ultra vires\textsuperscript{45} was encountered.\textsuperscript{46} But with regard to the exclusionary impact of retirement communities, the court stated: "And if [the retirement communities] were excessively large, the exclusionary impact would not necessarily be obviated by requiring that some similar housing . . . be permitted within the same zoning district."	extsuperscript{47} Thus, in New Jersey, an inclusionary ordinance making accommodations available to the aged will not have less severe constitutional ramifications than an exclusionary ordinance.

The Court of Appeals of New York, however, viewed the inclusionary-exclusionary dichotomy in another light. In \textit{Maldini v. Ambro},\textsuperscript{48} a Huntington Township ordinance\textsuperscript{49} similar to the \textit{Shepard} inclusionary ordinance, was upheld. The court reasoned: "It is one thing for a local zoning board to deny an application [for a special exception] based solely upon the age of the intended residents; it is quite another for it to establish a zoning district allowing, \textit{among other things}, residences designed for, but not necessarily limited to,

\textsuperscript{44} \textit{Id.} The intermediate appellate court objected that the classification was unreasonable because young, low income persons would be denied equal protection. 311 A.2d at 190. However, it seems the lower court placed excessive emphasis on economic similarities between the poor and elderly, improperly ignoring the other distinct needs of the elderly. \textit{See} note 3 \textit{supra} and accompanying text.

\textsuperscript{45} \textit{See} text accompanying notes 77-88 \textit{infra}.

\textsuperscript{46} 364 A.2d at 1013.

\textsuperscript{47} \textit{Id.} at 1039-40.


\textsuperscript{49} \textit{Building Zone Ordinance of Town of Huntington}, ch. 62, § 4.9.01 reads:

\textit{In the R-RM Resident District a building or premises shall be used only for the following purposes:

(1) Any use permitted in the R-80 Residence District [single family dwellings . . ., farms, churches, schools and libraries].

(2) Multiple residences designed to provide living and dining accommodations, including social, health care, or other supportive services and facilities for aged persons . . . .

(3) Any accessory use or structure permitted in the R-80 Residence District.

330 N.E.2d at 405. It should be noted that the ordinance in no way tried to define "aged persons." \textit{Compare} the Huntington with the Woodland Township ordinance, \textit{supra} note 9.
aged persons." The 5–2 decision of the New York Court of Appeals was a breakthrough, since it was the first zoning case upholding a senior citizen community. But the constitutionality of an ordinance that was not inclusionary was left in doubt.

The Town of Brookhaven, New York, had also provided for a retirement community, limiting occupancy to persons fifty-five and older. But in *Campbell v. Barraud,* the trial court, relying on the *Weymouth* appellate decision, declared the zoning ordinance violative of equal protection. The court distinguished *Maldini* on the grounds that unlike the Brookhaven ordinance, the Huntington zoning did not regulate the age of the users of the housing. It is submitted that the *Campbell* result is incorrect. As the *Maldini* court stated: "'Age' considerations are appropriately made if rationally related to the achievement of a proper governmental objective." But *Maldini* clearly establishes the inclusionary-exclusionary dichotomy as a relevant distinction in New York.

The validity of the dichotomy is questionable; it seems that the New Jersey view, as expressed in *Weymouth* and *Shepard,* is the sounder position. Once permits are granted and developers begin to build for a particular class of residents, other classes of users are de facto excluded. The inclusionary ordinance has then become exclusionary. Obviously, the distinction becomes tenuous. Essentially, the same result is achieved whether a small exclusionary zone for the aged or a larger inclusionary one is provided in the ordinance. Thus, both inclusionary and exclusionary ordinances provide functionally equivalent means of making accommodations available to the aged.

From one standpoint, the decision in *Weymouth* could have been improved. The *Weymouth* plaintiffs unsuccessfully argued for the establishment of a condition precedent rule: before a municipality would be permitted to set a zone restricted for senior citizens, it must demonstrate that the restriction would not, in the actual economic market, tend to decrease the availability of housing for children.  

50. 330 N.E.2d at 407 (emphasis added).
52. Id. at 383–84.
53. Id. at 386.
54. 330 N.E.2d at 407.
55. Indeed, plaintiff's contention was that the township enacted the ordinance expressly to exclude children. The "Concise Statement of Facts" in plaintiff's brief reads: "A garbage collector and a land speculator got together and decided to convince a small town that they could have new housing in the town without increasing the number of children." Plaintiff's Brief at 1. The *Weymouth* plaintiffs put forth a rather novel argument: the ordinance violates the fundamental rights of (1) survival, (2) perception, (3) communication, (4) progeneration, (5) bodily integrity, (6) mental security, (7) sabbath, (8) ambulation, (9) negotiation. These rights are said to be
This is a problem for New Jersey and all other states which fund schools substantially through ad valorem taxes on real property.\textsuperscript{56} The approval of a condition precedent rule could have served to limit the possibilities of municipal attempts to take unfair advantage of the \textit{Weymouth} decision.\textsuperscript{57}

\textbf{B. State Equal Protection}

The degree of protection afforded by the courts can differ significantly depending on whether the state or federal constitution is invoked.\textsuperscript{58} The \textit{Weymouth} appellants' equal protection attack, based both on alleged age discrimination and on a claimed right to housing, was rejected on state as well as federal constitutional grounds. But the New Jersey Supreme Court's analysis of the state constitutional issues differed crucially from its federal constitutional analysis.

The \textit{Weymouth} court asserted its adherence as a matter of state constitutional practice to the federal two-tier method of analyzing allegedly suspect classifications. Thus, with regard to the charge of age discrimination, the court—finding age not a suspect classification under state law—summarily rejected the equal protection claim of age discrimination.\textsuperscript{59}

innate and to predate and preempt the Constitution. \textit{Id.} at 5. Plaintiff also asserted that these rights are present in the preamble of the Constitution along with the first, fourth, fifth and eighth amendments.

Despite plaintiff's contentions, the courts construing land use ordinances have not spoken to these "fundamental rights" in their opinions. \textit{But see} Moore v. City of East Cleveland, 97 S. Ct. 1932 (1977), discussed briefly in note 85 infra. Prior to publication of this note, however, a Florida appellate court ruled that restricting condominium residents so as to preclude children under twelve years of age is unconstitutional. Franklin v. White Egret Condominium, Inc., No. 76-1535 (Fla. 4th Dist. Ct. App. Aug. 9, 1977). The court held that the restriction violated plaintiff's rights to marry and procreate, citing \textit{Loving} v. Virginia, 388 U.S. 1 (1966), \textit{Skinner} v. Oklahoma, 316 U.S. 535 (1942), and Griswold v. Connecticut, 381 U.S. 479 (1965).


59. 364 A.2d at 1036.
The Weymouth court sidestepped a clear analysis of the federal issues regarding a right to housing. Noting the Supreme Court's rejection of such a right, it merely left the plaintiffs with the insurmountable burden of showing that the zoning classification lacked a rational basis. The same was not found to be true under the New Jersey Constitution, however. The Weymouth court had earlier found in Southern Burlington County NAACP v. Township of Mt. Laurel that "[t]here cannot be the slightest doubt that shelter, along with food, are the most basic human needs." Interpreting this earlier statement, the court now found that it had "accorded the right to decent housing a preferred status under our State Constitution."

Through its use of the term "preferred status," the Weymouth court avoided—perhaps deliberately—conflict with the Supreme Court's rejection of a "fundamental" right to housing. The court, in fact, rejected the viability of the term "fundamental right," and thereby moved away from the strictures of a two-tiered analysis. Instead the court carefully weighed the "preferred status" of housing against the municipality's interests reflected in the housing ordinance, for "any governmental action which significantly impinges upon the ability of some class of individuals to obtain this necessity of life deserves close scrutiny." But despite this close scrutiny, the court found the municipality's interests dominant and rejected appellant's attack based on a state constitutional right to housing.

Thus, although appelants lost both their federal and state constitutional attacks, the battle differed significantly on the respective grounds. Under the state constitution, the right to housing proved a formidable foe, forcing the court to a careful scrutiny of the municipality's purpose. The suggestion is implicit that in the future, state equal protection attacks can be made successfully on other, perhaps rational but less justifiable, zoning restrictions. The court's doors are by no means shut.

C. The Restrictive Covenant

An alternative to the zoning ordinance when providing housing for the elderly is the restrictive covenant applied in a common scheme. In Riley v. Stoves, an action by owners of mobile home lots against

60. Id. at 1033–34.
62. Id. at 727.
63. 364 A.2d at 1037.
64. Id. at 1036.
65. Id. at 1037.
66. Id.
other owners of lots, the court sustained a restrictive covenant limiting occupancy of mobile homes to persons twenty-one years of age and older. Though finding state action, the court found the covenant did not violate federal equal protection because it was rationally related to a legitimate state interest: providing an area for older buyers who sought to retire in an area undisturbed by children.

Two crucial facts formed the basis of the decision: (1) there was an absence of testimony as to any area shortage of housing which would accommodate families with children, and (2) the area subject to the covenants was a small portion within the subdivision. Both factors check the possibility of constitutionally repugnant exclusionary effects. The lack of any housing shortage allays the Weymouth plaintiffs' principal grievance: the opportunity for a municipality to limit expansion to segments of the population who would increase its tax revenue without imposing a financial burden on the city facilities. The second limitation on the covenant would fortify it against equal protection and due process attacks. Although only briefly mentioned in Weymouth, Riley presented many of the same problems and reached basically the same result.

In Franklin v. White Egret Condominium, Inc., a Florida court held unconstitutional a restrictive covenant in a condominium deed which excluded children under twelve. The court relied both on the age discrimination and the abridgment of the fundamental rights of marriage and procreation to invalidate the covenant. Neither Weymouth nor Riley was cited. The only distinguishing factor seemed to be that the Franklin covenant was directly and intentionally aimed at excluding children, while the Weymouth ordinance and arguably the Riley covenant were aimed at permitting housing exclusively for the aged.

III. DUE PROCESS ATTACKS

Equal protection attacks are generally accompanied by claims that the ordinance or covenant is violative of substantive due process guaranteed by the fourteenth amendment. The constitutional guarantee of substantive due process requires that the ordinance not be un-

68. The finding of state action was predicated upon Shelley v. Kraemer, 334 U.S. 1 (1948), where a racially restrictive covenant was found to be unenforceable as violative of equal protection. The Supreme Court found that private agreements to exclude persons of a designated race did not violate the fourteenth amendment; however, any governmental action, including judicial proceedings to enforce the terms of the agreement, would deny rights protected by the fourteenth amendment.

69. 526 P.2d at 752.

70. No. 76-1585 (Fla. 4th Dist. Ct. App. August 9, 1977).

71. Id. at 8. See note 55 supra.
reasonable, arbitrary, or capricious, and that it bear a rational relationship to a permissible legislative purpose. Justice Pashman disposed of the claim that this type of zoning ordinance violates due process: "[T]he claim that the ordinances violate the due process clause is little more than a restatement of the contention that they contravene principles of equal protection. . . . As we have already found, the age and occupancy provisions . . . bear a real and substantial relationship to the ends sought." The converse is also true: those ordinances which were found violative of equal protection (e.g., in the Weymouth appellate opinion) were violative of due process as well.

For an ordinance to be reasonable and in accordance with the general welfare, the legislating body should evidence a careful consideration of the varying community and regional interests. Thus, it becomes important that the ordinance allowing a senior citizens community also consider the special needs of the elderly residents.

Complete regional exclusion of a class in need of housing would tend to show that the various interests were not properly weighed.

IV. ULTRA VIRES ATTACKS

A municipality's zoning power must be founded upon a legislative delegation. In the absence of such a grant, zoning enactments will be ultra vires and void. The ultra vires, equal protection, and due process limitations on zoning overlap to some extent. To satisfy the equal protection clause, the classification system used in the non-exclusionary ordinance must be rationally related to a legitimate state interest. Due process requires that the ordinance not be unreasonable,

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73. 364 A.2d at 1037.
74. In Oakwood at Madison, Inc. v. Township of Madison, 283 A.2d 353, 358 (N.J. Super. Ct. 1971), aff'd 320 A.2d 223 (N.J. 1974), the court stated: "In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed in the general welfare." See also Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J.), appeal dismissed, 423 U.S. 808 (1975).
75. See, e.g., Huntington Township ordinance, supra note 49.
77. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 296 (N.Y. 1972). The requirement for a legislative delegation will not apply to those municipalities which have been granted home rule powers under the state constitution.
arbitrary, or capricious. The ultra vires doctrine demands that the ordinance not exceed the zoning power granted to the municipality. These three limitations on zoning are not sharply distinguished in many cases. Most ordinances which violate one contravene the others, and the courts often decide any one issue using language of another.

Authority to zone is a component of the state's police power, that is, its sovereign power to provide for the health, safety, morals, and general welfare of its citizens. Traditionally, each state has specifically delegated its police power within the zoning sphere to the municipalities, and the state's zoning enabling act generally grants the local authorities wide discretion in exercising their zoning perogatives. Thus, the zoning decisions of local boards have been restricted only by legislative enactments and judicial interpretations.

When determining whether an ordinance is ultra vires, the court will be inquiring whether the ordinance exceeds the authority granted the zoning board. Since all of the police power of the state in the area of zoning has been traditionally granted to the zoning board, the issue of ultra vires becomes the issue of whether the police power has been exceeded. The ultra vires doctrine ordinarily presents questions of state law. But where the state has delegated all of its power in a given area to an agency, and that agency has allegedly exceeded that delegated authority, the question of whether the agency has exceeded its delegated power (ultra vires) is identical to the question of whether the agency has exceeded the state's power within the area. *Village of Belle Terre v. Boraas* is the current Supreme Court guideline for determining whether a zoning ordinance is a valid

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78. 272 U.S. at 391-95.
79. Id. Section 1 of the Standard State Zoning Enabling Act attaches the zoning power securely to the police power. Authority is delegated "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community." R. Anderson, American Law of Zoning § 26.01 (1968).
81. In recent years states have retrieved some of their zoning power from localities by enacting legislation which requires localities to weigh the regional and state implications of local land planning decisions. See, e.g., Florida Environmental Land and Water Management Act of 1972, Fla. Stat. ch. 380 (1975), held unconstitutional in part, Cross Key Waterways v. Askew, No. Y-362 (Fla. 1st Dist. Ct. App. Aug. 10, 1977). It may also be necessary for zoning boards to consider the environmental impact of their decisions. See, e.g., Seadade Indus., Inc. v. Florida Power & Light Co., 245 So. 2d 209 (Fla. 1971); Local Government Comprehensive Planning Act of 1975, Fla. Stat. §§ 163.3161-.3211 (1975). Furthermore, zoning boards may be restricted by legislation which requires that rule-making bodies comply with procedural guidelines. See, e.g., Administrative Procedure Act, Fla. Stat. ch. 120 (1975); however, the applicability of ch. 120 to certain local planning and zoning activities is not free from doubt. Compare Fla. Stat. § 120.52(1)(b)-(c) (1976 Supp.) with Fla. Stat. § 163.3164(12), (17) (1975).
exercise of this facet of the state police power entrusted to the municipality. In *Belle Terre*, six unrelated students sharing a home challenged a zoning ordinance which restricted land use to single family dwellings and defined family as "'[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit. . . . A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related . . . shall be deemed to constitute a family.'"\(^{83}\)

The Court upheld the ordinance against attacks that, *inter alia*, it was not within the police power of the municipality because it did not promote the general welfare and was not rationally related to a legitimate state interest: "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."\(^{84}\) Apparently, family values and clean air were a sufficiently substantial concern of the municipality for the ordinance to contribute to the general welfare.\(^{85}\)

*Belle Terre* dispels the notion that zoning regulations can only regulate land use and not land users. The *Weymouth* court recognized that restrictions on land use frequently restrict those who may utilize it: "[O]rdinances which regulate use by regulating identified users are not inherently objectionable."\(^{86}\) The concept of "use" is critical when considering the constitutionality of retirement communities. The *Maldini* dissent asserted that zoning regulations can only regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and *use* of buildings, structures and land for trade, industry, residence or other purposes.\(^{87}\)

The intermediate appellate court in *Weymouth* also contended that the concept was limited to physical use.\(^{88}\) This narrow reading of "use," limiting the term to actual physical use, is inconsistent with *Belle Terre*

\(^{83}\) *Id.* at 2.

\(^{84}\) *Id.* at 9.

\(^{85}\) In Moore v. City of East Cleveland, 97 S. Ct. 1982 (1977), the Supreme Court held that a zoning ordinance regulating the number of related persons who could live together violated due process. The majority distinguished *Belle Terre* since that case did not involve family members. *See also* Franklin v. White Egret Condominium, Inc., No. 76-1535 (Fla. 4th Dist. Ct. App. Aug. 9, 1977).

\(^{86}\) Taxpayers Ass'n v. Weymouth Township, 364 A.2d at 1031.

\(^{87}\) 350 N.E.2d 403, 408 (N.Y. 1975) (Jasen, J., dissenting).

\(^{88}\) 311 A.2d at 189.
and the modern view of zoning law which allows wide discretion to the municipality in promoting the general welfare.

V. An Affirmative Duty

Once the constitutionality of retirement communities is established, additional questions arise: (1) Does a municipality have an affirmative duty to provide housing communities for the elderly; and (2) May prospective residents and developers bring suit to enforce such an affirmative duty?

A. Standing

Standing is the first problem encountered by persons attempting to establish a legal obligation on the part of a community to permit accommodations for the aged. The United States Supreme Court is presently not receptive toward plaintiffs who assert that zoning ordinances violate their constitutional rights. The Court has demonstrated its hostility toward constitutional attacks on zoning ordinances by severely restricting the concept of injury in fact, a customary prerequisite for standing. Thus, in Warth v. Seldin, plaintiffs who asserted that enforcement of a zoning ordinance effectively excluded persons of low and moderate income from the town were denied relief because they could not show sufficient injury in fact. The plaintiffs were not residents of the suburb whose zoning ordinance they were contesting. The Court held that a party “who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court’s intervention.”

In some instances, however, the standing barrier is not insurmountable. In Village of Arlington Heights v. Metropolitan Housing Development Corp., a developer of low-income housing was found to have standing because it could show a possible loss of funds already expended on the project. In addition, the Court found that the developer, a nonprofit corporation, had a legitimate, non-economic interest in the project, that of making low-cost housing available in areas where such housing was scarce.

89. Standing was not an issue in Weymouth and Shepard because the parties never raised it. 364 A.2d at 1023 n.5.
90. 422 U.S. 490 (1975).
91. Id. at 508 (emphasis in original).
93. The Arlington Heights plaintiffs showed the Court detailed and comprehensive plans to demonstrate that but for the ordinances, the project would be built. Id. at 562.
94. Id. “[E]conomic injury is not the only kind of injury that can support a
In addition to the developer, an individual plaintiff was found to have standing by virtue of his interest in finding housing near his place of employment. The Court reasoned that if he is granted the relief he seeks, “there is at least a ‘substantial probability,’ Warth v. Seldin, . . . that the [housing] project will materialize, affording [plaintiff] the housing opportunity he desires in Arlington Heights.”

Presumably, a developer of housing for the aged would likewise have standing, if he could demonstrate that funds were invested, that he acted in accordance with a comprehensive plan, and that there existed a need for housing for the elderly. Arlington Heights leaves open the question of whether the developer may raise the rights of third parties once he has established threshold standing. Assuming arguendo that an affirmative duty is placed on municipalities to allow for housing for the aged, it is unclear whether a developer would be able to assert a violation of that duty. Nevertheless, it would seem that an aged person desiring to live in a retirement community would have standing if the developer is prepared to build. The interest of an aged person in living in a community that provides for his special needs would be at least as great as the interest of the Arlington Heights plaintiff who was deprived of housing near his employment. But, the grievance must “[focus] on a particular project and [not be] dependent on speculation about the possible actions of third parties not before the court.”

B. Nature of the Duty

No judicial decision has expressly held that a municipality has an affirmative duty to zone so as to allow for senior citizen communities where a demand exists. However, this writer submits that Weymouth, when read in light of Mount Laurel, lends support to the proposition that such a duty exists. In Mount Laurel, the New Jersey Supreme Court established the proposition that municipalities have an affirma-
tive obligation to allow housing for all categories of people. A unanimous court held:

[T]he presumptive obligation arises for each such [developing] municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.100

The Court then granted the township ninety days to remedy the ordinance thwarting that opportunity by excluding low- and moderate-cost housing when a regional demand for such housing had been established.101

The Weymouth court was quick to utilize Mount Laurel’s language: “[T]he concept of the ‘general welfare’ in land use regulation is quite expansive, and encompasses the provision of housing for all categories of people, including the elderly.”102 Thus, Weymouth coupled with Mount Laurel results in an affirmative duty of developing municipalities to assure adequate opportunities for the aged.

It appears that a municipality must provide for its fair share of

100. Id. at 728. Mountain and Pashman, JJ., concurred separately. Id. at 735. Justice Pashman joined the opinion of the court, but he urged the court to “go farther and faster in its implementation of the principles announced” by laying down broad guidelines for judicial review of municipal zoning decisions which effectuate exclusionary zoning directed at the poor. Id.

101. Id. at 734.

102. 364 A.2d at 1080 (emphasis in original) (footnote omitted). But developers “have no absolute right to construct a project of any size or shape in a district selected by them, merely on the thesis that senior citizen housing promotes the public welfare.” Leon N. Weiner & Assoc., Inc. v. Zoning Bd. of Adjustment, 366 A.2d 696, 701 (N.J. Super. Ct. App. Div. 1976). The court sustained the zoning board’s denial of an application for a variance to construct a senior citizen housing community. The court limited the issue on appeal to “whether the discretionary and presumptively valid act of the board’s denial is so arbitrary as to require judicial correction.” Id. Weiner may imply that Weymouth and Shepard give only the right to construct a community for the aged, but not the obligation. However, the Weiner court noted that adequate provision had been made by the zoning board to permit housing for the aged in other districts within the municipality. Id.

the elderly by considering the housing needs of the region.\textsuperscript{104} This concept inevitably leads to many problems. The problems inherent in determining a municipality’s obligation include the identification of the relevant housing region and the determination of the municipality’s fair share of the region’s housing. The pertinent criteria for evaluating a municipality’s fair share include: (1) the number of low- or moderate-income households of elderly persons in the region; (2) employment opportunity and growth potential; (3) population of developing municipality; (4) extent of deficient housing; (5) per capita fiscal capacity; (6) opportunity for growth as measured by land size or availability of water and sewer facilities; and (7) growth in residential units.\textsuperscript{105}

An interesting problem presents itself when comparing the duty imposed on municipalities in \textit{Mount Laurel} and in \textit{Weymouth}. Many municipalities deplore the \textit{Mount Laurel} obligation, for low-income persons tend to increase the fiscal burden, but welcome the \textit{Weymouth} duty, since older persons without children decrease their financial burden.

\textbf{C. The Remedy}

If the municipality itself has a duty to plan for and zone in a manner which allows developers to build a fair share of housing for the elderly, and if this obligation is not met, the right to initiate legal action would presumably vest in those injured. Injured parties might include developers and elderly persons seeking adequate accommodations.\textsuperscript{106} A court could require that the municipality permit construction of an equitable share of housing units for the aged. The remedy may also be statutory. Florida adopted the Local Government Comprehensive Planning Act of 1975.\textsuperscript{107} The act requires that counties and

\textsuperscript{104} Although the demand for housing by the elderly in \textit{Weymouth} was small, Weymouth Township was also responsible for its fair share of housing needed within the surrounding region. 364 A.2d at 1030 n.9. See also Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975), in which the court states: “[I]n enacting a zoning ordinance, consideration must be given to \textit{regional} needs and requirements.” Id. at 242 (emphasis supplied).

\textsuperscript{105} These factors were first suggested in Ackerman, supra note 103, at 27-28. See also \textit{Fair Share Housing Distribution: An Idea Whose Time Has Come?} 353 (T. Norman ed. 1974).

\textsuperscript{106} But see notes 89-98 and accompanying text supra.

municipalities develop a comprehensive plan before they zone.\textsuperscript{108} It also requires that municipalities consider the plans and needs of other municipalities, make studies, make specific findings, and take into account other factors before zoning is implemented.\textsuperscript{109} The act provides that "[a]fter a comprehensive plan . . . has been adopted . . . all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan . . . shall be consistent with such plan . . . ".\textsuperscript{110} Comprehensive plans must be adopted on or before July 1, 1979.\textsuperscript{111} There is thus far no case law construing this portion of the act.

Although the Florida act does not specifically mention housing for the aged, it does require the zoning municipality to consider such factors as the provision of housing for existing residents, anticipated population growth of the area, and provisions for low- and moderate-income persons.\textsuperscript{112} And although not mandatory, the municipality may consider other factors such as "design recommendations for land subdivision, neighborhood development and redevelopment, design of open space locations, and similar matters to the end that such recommendations may be available as aids and guides to developers in the future planning and development of land in the area."\textsuperscript{113}

It is not certain that the act can be relied on for relief by elderly persons, since the act does not require that a municipality specifically take into account the needs of the elderly when forming a comprehensive plan. Additionally, even if the municipality considers the needs of the elderly, it may deem planned retirement communities inappropriate. Indeed, one could argue that providing other types of services, \textit{e.g.}, meals on wheels, reduced bus fare, homemaker services, etc., is a better solution to the problems of the elderly than are planned retirement communities, since such communities could result in "ghettoization" of the elderly. The issue must ultimately be determined with reference to the extent and nature of the needs of the elderly within each region. But regardless of which path the municipality follows, the general purpose and intent of the act,\textsuperscript{114} namely, to encourage the most appropriate use of land and other resources, would seem to indirectly require the zoning municipality to consider and provide for all special interest groups, including the aged.

\textsuperscript{108} \textit{Fla. Stat.} \textsection 163.3194 (1975).
\textsuperscript{109} Id.
\textsuperscript{110} Id. \textsection 163.3194(1).
\textsuperscript{111} Id. \textsection 163.3167(2).
\textsuperscript{112} Id. \textsection 163.3177(6)(f)(1), (4).
\textsuperscript{113} Id. \textsection 163.3177(7)(g).
\textsuperscript{114} Id. \textsection 163.3161(3).
VI. THE FUTURE OF Weymouth

Two other substantial considerations have thus far not been examined: (1) the needs of other special interest groups (e.g., handicapped persons), and (2) the problems of a municipality with unique difficulties in maintaining its environment.

Presumably, the same considerations that apply to housing for the aged apply to housing for the handicapped. Within any zoning region, if there are a sufficient number of handicapped persons desiring to live in a community for the disabled, and a developer is willing to build, Weymouth should pave the way, at least in New Jersey. The distinction between groups entitled to a Weymouth community and those not so entitled should lie in the fact that the former group has impaired physical abilities and extraordinary social and psychological needs. Limiting Weymouth groups to this requirement prevents a regression of the law to the "separate but equal" state endorsed by Plessy v. Ferguson and would alleviate the Weymouth plaintiffs' concern that a ruling against them would result in "ghetto-like" segregation.

Mount Laurel considered the problem of a municipality with unique difficulties in maintaining its environment. If a municipality can demonstrate a substantial environmental problem, the Mount Laurel (and presumably the Weymouth) duties could be limited. Concern for the potential conflict between zoning ordinances and environmental problems generated the ALI Model Land Development Code, which has been adopted by several states, including

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115. 165 U.S. 537 (1896).
117. See also Ackerman, supra note 103, at 44.
118. The possibility of a significant detrimental environmental effect has allowed for exclusionary zoning before Mount Laurel. See, e.g., Gautier v. Town of Jupiter Island, 142 So. 2d 321 (Fla. 2d Dist. Ct. App. 1962) (sustaining exclusionary ordinance enacted to preserve unique historical status of town). See also 4 FLA. ST. U.L. REV. 163 (1976). If a fundamental right is abridged, however, the municipality would presumably be required to demonstrate that the environmental issue presented a compelling state interest.
Florida. The Florida enactment gives the Governor and Cabinet, sitting as the Administration Commission, authority to designate and regulate areas of "critical state concern." However, this section was recently declared unconstitutional. Once an area is so designated, local land development regulations must be approved by the state agency which considers the environmental impact of the proposed development on both the region and the state as a whole.

Although it is not yet clear exactly how Weymouth and environmental issues will interact, and although the future of Weymouth is uncertain in other regards, the Weymouth decision was a major advance in providing housing for the elderly. Although only New Jersey, New York, and Arizona have upheld housing communities for the elderly, the New Jersey Supreme Court's well-reasoned opinion should provide the leadership for other municipalities around the nation to fulfill their obligations toward our nation's aged citizens.

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123. The First District Court of Appeal declared § 380.05 unconstitutional as an invalid delegation of legislative authority. Cross Key Waterways v. Askew, No. Y-362 (Fla. 1st Dist. Ct. App. Aug. 10, 1977). The opinion invalidates "the Act's delegation of power to designate areas of critical state concern by criteria expressed in Section 380.05 (2)(a) and (b). [The] decision does not affect other aspects of the Act." Id. at 16-17.
124. See, e.g., FLA. STAT. § 380.05(6) (1975).
125. See, e.g., id. § 380.05(2). See also FLA. STAT. § 163.3177 (1975).