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Mobile Homes: A Partial Solution to West Virginia's Housing Problems

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MOBILE HOMES: A PARTIAL SOLUTION TO WEST VIRGINIA'S HOUSING PROBLEMS

The development of the mobile home in the American housing industry spans fifty years of growth—evolving from a small vacationer's home into a modern residence affording all of the amenities of conventional single family homes. It has become a permanent pattern of life, considered by owner-occupants to be servicable and economical housing. At the same time, the nomadic occupants of fifty years ago have become stable and permanent citizens in their communities.

Nationwide, the 1970 census found that 7,750,000 persons resided in mobile homes, while a 1972 survey reported that mobile homes accounted for eighty percent of all single family homes selling for less than $20,000 and forty-five percent of all single family homes sold at any price.

A statewide housing survey indicates that West Virginia must provide, through new construction or rehabilitation, approximately 334,975 housing units during the 1970-1985 period to insure adequate housing for all low and moderate income households by 1985. Of the existing housing stock in the state, as much as twenty-seven percent of the housing units in West Virginia have been found to be substandard. That the conventional housing industry cannot meet this need is evidenced by the fact that, in West Virginia, sixty percent of all new residential units sold between 1970 and 1975 were mobile homes. With the strong preference for single family housing frustrated by the increasing costs and acute shortage of conventional dwellings, mobile homes have become a viable alternative for many residents of West Virginia.

Yet, despite increasing federal and state recognition of the urgent need for low and middle income housing and the enactment of both federal and state housing acts, very little housing has been

2 Id. at 7.
3 Id. at 6.
5 Id.
6 Note, Snob Zoning: Developments in Massachusetts & New Jersey, 7 Harv. J. LEGIS. 246, 246 nn.1 & 2, 247 n.3 (1970) (a comprehensive list of federal and state legislation). The legislature of West Virginia responded to the seriousness of the housing situation by enacting the West Virginia Housing Development Fund in an extraordinary session of the legislature in 1968. W. VA. CODE §§ 31-18-1 to 25 (1975
actually built under these programs. Studies have placed a large part of the blame for this situation upon exclusionary zoning practices and building code regulations.\(^7\) While mobile homes, along with modular and prefabricated housing, can be the solution to the current housing needs, zoning practices may very well be the stumbling block.\(^8\)

Most communities looked upon the early "house trailers" and their tenants with distaste, finding both to be undesirable. They were viewed as the source of three major problems: potential blight to surrounding areas and depression of property values; the social undesirability of their occupants (variously deemed to be "footless and nomadic," "tourists and transients," or "migratory paupers"); and an unwelcome burden on municipal services. These house trailers were small, constructed without any standards, and often lacked water and sanitary facilities. They were generally placed in crowded parks or camps, which seldom met even minimal health and safety standards. Thus, mobile homes have been strictly regulated or totally excluded because of these early conditions.\(^9\) They have variously been held to constitute a health hazard to the community, to affect detrimentally the general welfare of the community, and to place a severe strain on municipal services such as schools, sewage and water systems, as well as police and fire protection. They have been cited for failure to pay a fair share of municipal taxes and for overcrowding and congesting streets and highways. Finally, aesthetic considerations play a major role in the decisions of communities to exclude mobile homes.\(^10\)

The mobile home of today bears little resemblance to its primitive ancestor—it is much larger, completely furnished, and has all of the conveniences of conventional housing. It is space-saving and efficient, requires little maintenance, and can be permanently placed on a foundation. Yet, despite the many improvements in

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mobile homes there has not been a corresponding change in the attitudes of the local community. Most jurisdictions continue to restrict the placement of mobile homes on private land, relegating them to mobile home parks in semiresidential or commercial districts, or prohibiting them completely.\textsuperscript{11}

Although housing is not a fundamental right either enumerated or implicit in the Constitution,\textsuperscript{12} the United States Supreme Court has proclaimed that it is a basic "necessity of life."\textsuperscript{13} The growing judicial and legislative concern for the pressing need for quality, affordable housing, and the inability of the conventional housing industry to meet that need, mandate a retreat from the burdensome restrictions placed on mobile home use. As an increasing number of jurisdictions have done, West Virginia must re-examine the dated policies which continue to justify present zoning practices.

Relevant to any zoning dispute is the power to zone. This note will first examine the power granted to municipalities to regulate land use, especially considering questions which are raised by the statutes granting that power. Next, the policies considered by municipalities in restricting or prohibiting mobile homes, as provided by case law, will be evaluated for their continuing validity. Finally, the policies of those jurisdictions which have invalidated exclusionary zoning ordinances will be considered in relation to West Virginia's current zoning practices.

\textit{The Municipality's Power to Regulate}

Municipalities have the power to regulate land uses, either as an exercise of their general police power or under a specific delegation of zoning power. Both methods are a delegation of the state's powers to the local municipal governing bodies.\textsuperscript{14} Under early city charters, West Virginia's municipalities were given broad police powers to "prescribe and enforce ordinances and rules for the purpose of protecting health, property, lives, decency, morality, cleanliness and good order of the city," and to prohibit nuisances.\textsuperscript{15}

\textsuperscript{11} Id.
\textsuperscript{12} Lindsey v. Normet, 405 U.S. 56, 74 (1972).
\textsuperscript{14} 2 A. Rathkopf, supra note 10, §§ 19.03, 19.04.
\textsuperscript{15} Charleston City Charter of 1921, ch. 4 W. Va. Acts 101 (amending 1915 charter). See also, Huntington City Charter of 1921, ch. 11 W. Va. Acts 291 (amend-
Mobile homes were first regulated by communities under ordinances enacted pursuant to grants of general police power, based upon the possibility of potential health and safety hazards to the general community. Since mobile homes have generally been found not to constitute nuisances per se, it has been held that municipalities acting under their grant of police power may not exclude this use completely, but are limited to regulation by permit or to prohibiting their location outside of mobile home parks. With the advent of zoning, however, total prohibition of land uses has been held to be a valid exercise of the delegated power to zone.

The state’s power to zone land is customarily granted to local government subdivisions by enabling statutes. West Virginia’s enabling statute provides for the creation of city and county planning commissions to promote the orderly development of each governing unit and its environs. The state legislative objectives of zoning are “to encourage local government to improve the present health, safety, convenience and welfare of their citizens,” to carefully develop future highway systems and new communities, to provide for the needs of agriculture, industry and business, to insure “that residential areas provide healthy surroundings for family life,” and to insure that the “growth of the community is commensurate with and promotive of the efficient and economical use...
of public funds." To further these objectives, regulatory powers and authority are granted to the local governing bodies.\textsuperscript{20}

The planning commission is designed to serve in an advisory capacity to the local governing body and is authorized to formulate and recommend a comprehensive zoning plan for land uses within its jurisdiction.\textsuperscript{21} After holding a public hearing on the plan,\textsuperscript{22} it is then submitted to the local governing body for adoption.\textsuperscript{23} Following its adoption or enactment, the voters affected by the plan may petition for a referendum. Residents of the area affected by the plan may then endorse or reject the plan subsequent to its enactment by the governing body.\textsuperscript{24}

Although the current statute limits zoning jurisdiction to the corporate limits of the municipality,\textsuperscript{25} prior enabling acts authorized municipalities to maintain jurisdiction over any lands outside of the municipality "which, in the opinion of the commission, bears relation to the planning of the municipality," but limited to that deemed reasonably necessary to protect both the community and its environs.\textsuperscript{26} Under the current statute, municipalities that have exercised such extraterritorial jurisdiction continue to retain such powers.\textsuperscript{27} A new municipality's power is thereby limited to its corporate boundaries, while older communities may zone beyond their corporate limits.

This enabling statute raises the question of the validity of exclusionary or prohibitory zoning ordinances enacted by municipalities that have not adopted comprehensive zoning plans. May a municipality single out for total exclusion a particular land use, here, mobile homes, without providing for the regulation of all land uses in a comprehensive plan? The significant contribution of the comprehensive plan is that it precludes arbitrary discrimination as to uses by considering the community as a whole.\textsuperscript{28} Indeed, the landmark case which established the constitutionality of zoning, \textit{Euclid v. Ambler Realty Co.},\textsuperscript{29} decided the issue of zoning within a fact pattern which included a detailed comprehensive plan.

\textsuperscript{20} Id. at § 8-24-1.  
\textsuperscript{21} Id. at §§ 8-24-1 to -16.  
\textsuperscript{22} Id. at § 8-24-18.  
\textsuperscript{23} Id. at §§ 8-24-19 to -21.  
\textsuperscript{24} Id. at § 8-24-48.  
\textsuperscript{25} Id. at § 8-24-26.  
\textsuperscript{26} W. VA. CODE § 8-5-13 (1931) (repealed in 1959).  
\textsuperscript{27} W. VA. CODE § 8-24-71 (1976 Replacement Vol.).  
\textsuperscript{28} Aurora v. Burns, 319 Ill. 84, 149 N.E. 784 (1925).  
\textsuperscript{29} 272 U.S. 365 (1926).
It has been stated that land uses which are inherently socially desirable may be excluded under comprehensive zoning schemes, but cannot be excluded by special or piecemeal zoning ordinances.\textsuperscript{30} Unless West Virginia's communities declare mobile homes to be nuisances per se, which would be against the weight of authority,\textsuperscript{31} a single ordinance apparently may not be enacted to totally exclude mobile homes in the absence of a comprehensive zoning plan.

Although the Attorney General of West Virginia has indicated that a comprehensive plan is not a prerequisite for the enactment of subdivision regulations, subdivision control is a separate function of county and municipal governing bodies.\textsuperscript{32} Therefore, this discussion of the municipality's power to regulate subdivisions is not conclusive of the need for a comprehensive plan for zoning and would not appear to affect the regulation of mobile homes, unless a mobile home park is developed as a subdivision. Thus, there appears to be some doubt as to whether municipalities may lawfully adopt an ordinance totally prohibiting, directly or indirectly, the placement of mobile homes in the absence of a comprehensive zoning plan intended to promote the purposes enumerated in the statutory grant of power.

\textit{Extraterritorial Jurisdiction}

Another aspect of West Virginia's enabling statute which merits further inspection is the authority retained by certain municipalities to zone land which lies beyond their corporate limits. The current statute allows municipalities which have exercised extraterritorial zoning power as authorized by the 1931 Code to retain that jurisdiction.\textsuperscript{33}

Generally, the extraterritorial power to zone is granted to municipalities for several reasons: to direct the development of unincorporated land likely to be annexed in the future; to assist cities in protecting land uses within city limits and close to the boundary from conflicting uses outside the borders of the city; to insure an orderly pattern of regional growth and to prevent a repetition of past chaotic development; and to prevent dangerous and

\textsuperscript{33} W. Va. Code § 8-24-71 (1976 Replacement Vol.).
unaesthetic development surrounding municipal core areas. Enabling statutes such as West Virginia's seek to resolve the problems of community development, which do not necessarily end at the corporate limits of the municipality, by granting municipalities extraterritorial zoning power.

Although these enabling statutes have been attacked as a denial of due process, courts have almost unanimously sustained their constitutionality. These decisions are premised on the theory of a municipality's derivation of power from the state legislature. In exercising its governmental powers, a municipality acts only as an agent of the state, having no power to act governmentally without express authorization from the legislature. If consent of the governed is a necessary prerequisite to the municipality's jurisdiction over non-residents, arguably such consent is given by the nonresident's representative in the state legislature. In a recent voting rights case, however, the United States Supreme Court rejected this theory of municipal derivation of state power:

While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision making at the local level by representatives elected by the people. . . . In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference . . . between the exercise of state power

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33 In Schlientz v. North Platte, 172 Neb. 477, 110 N.W.2d 58 (1961), the plaintiff contended that persons living within the zoning territory but outside the municipality's corporate limits suffered disenfranchisement in being subjected to the jurisdiction of elected officials whom they had no voice in electing. Therefore, the statute granting extraterritorial zoning power should be declared unconstitutional. The court rejected this argument, stating that there is neither a constitutional nor inherent right to local self-government. The court added that municipal offices are created by the legislature, which can subject nonresidents to the jurisdiction of a municipality if it so chooses.
34 Anderson, Extraterritorial Powers of Cities, 10 Minn. L. Rev. 564, 581 (1926).
through legislatures and its exercise by elected officials in the cities, towns, and counties.\textsuperscript{38}

Thus the basic question involved in determining the constitutionality of the statute is not the power to zone but the disenfranchisement of the residents of the extraterritorial area. May the state provide that residents of a geographical area be governed by an adjacent municipality while prohibiting such residents from voting in municipal elections or otherwise participating in the municipal government? The past cases involving extraterritorial jurisdiction cease to be reliable precedent since they do not address the true constitutional question, which is not the power of the municipality to zone, but rather the disenfranchisement of extraterritorial residents.\textsuperscript{39}

The issue of disenfranchisement, then, must be examined in light of the United States Supreme Court's decisions in voting rights cases. \textit{Gray v. Sanders}\textsuperscript{40} and \textit{Reynolds v. Sims}\textsuperscript{41} extended the one man, one vote principle to state elections, applying the equal protection guaranteed by the fourteenth amendment. The judicial focus, stated in \textit{Reynolds}, "must be concentrated on ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote."\textsuperscript{42} There is no question that

the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.\textsuperscript{43}

The one man, one vote principle was then extended to local elections in \textit{Avery v. Midland County}.\textsuperscript{44} Where the unit of local government has general governmental powers, whether the state power was exercised through the legislature or through local elected officials, the equal protection clause requires assurances that those

\textsuperscript{38} Avery v. Midland County, 390 U.S. 474 (1968).
\textsuperscript{40} 372 U.S. 368 (1963).
\textsuperscript{41} 377 U.S. 533 (1964).
\textsuperscript{42} \textit{Id.} at 561.
\textsuperscript{43} \textit{Id.} at 561-62.
\textsuperscript{44} 390 U.S. 474 (1968).
qualified to vote have the right to an equally effective voice in the election process.

Hadley v. Junior College District\(^4\) represents a further application of the one person, one vote formula by the United States Supreme Court. In Hadley, the Court articulated the general rule seemingly applicable to all levels of government: whenever a state or local government decides to select persons by popular election to perform governmental duties, equal protection requires that each qualified voter must be given an equal opportunity to participate in that election. Thus, the application of the one man, one vote principle hinges upon two related factors: a commitment to the elective process with the elected officials performing governmental functions.\(^4\)

This line of reasoning can readily be applied to the zoning problem. The state clearly provides for the election of the local governing body, both in municipalities and counties. This governmental body performs a governmental function—among other duties, it exercises the power to zone, delegated to it by the legislature. The appointed planning commission is not relevant to the question since it merely serves in an advisory capacity to the municipal governing body. In elections involving matters of general interest to the community, voting is a fundamental right. Any classification restricting the right to vote must demonstrate a compelling state interest.\(^4\) Clearly there is no compelling state interest which justifies classifications discriminating between the residents of the municipality and the residents of the extraterritorial area. The classification must be subjected to the test established by the Court in Kramer v. Union Free School District No. 15: "[w]hether classifications allegedly limiting the franchise to those resident citizens ‘primarily interested’ deny those excluded equal protection of the law depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes."\(^4\)

While the Court concluded that the classification did not meet the Kramer standard in a recent case involving the extraterritorial exercise by a city of its police power over residents of a contiguous...


unincorporated community,49 it expressly reserved judgment on such traditional authorities of local government as the power to zone.50 In Holt Civic Club v. Tuscaloosa, the Court declared that the one man, one vote principle had never been extended to residents residing outside of the geographical boundaries of the governmental entity in question, while emphasizing that states are free to choose their own form of internal government by creating various types of political subdivisions.51 The concurring opinion emphasizes that the holding does not make all exercises of extraterritorial authority immune from attack, reiterating that the powers exercised by Tuscaloosa were limited and did not include the power to zone property.52 The dissenters argue that the geographical residency requirement is entirely arbitrary and that no compelling state interest has been demonstrated to justify withholding the franchise from Holt’s residents.53

Significantly, then, the Court, speaking in both the majority and concurring opinions, implies that it would find the extraterritorial exercise of zoning power a sufficient usurpation of traditional local power to either declare the statute unconstitutional or, alternatively, extend the voting franchise to those residents affected by the exercise of such power.

Therefore, it appears that in light of this most recent case, the United States Supreme Court could find that residents of extraterritorial areas have as great an interest in the regulation of their property as do residents of the municipality in question. Under the Kramer test, then, the classification must fall as denying equal protection by subjecting these individuals to the jurisdiction of local governing bodies whom they had no voice in electing.

Policy Considerations

There are no reported decisions in West Virginia which reveal the policy justifications for restricting or excluding mobile homes within the state. However, it appears reasonable to assume that

49 Holt Civic Club v. Tuscaloosa, 99 S. Ct. 383 (1978). Holt is a small, unincorporated community located within the three-mile police jurisdiction of Tuscaloosa. Its residents are subject to the city’s police and sanitary regulations, the criminal jurisdiction of the city’s courts, and to the city’s powers to license businesses, trades and professions.
50 99 S. Ct. at 391-92, n. 8.
51 99 S. Ct. at 389-91.
52 99 S. Ct. at 393-94.
since West Virginia, like other jurisdictions, has local zoning ordinances which exclude or otherwise restrict mobile home use, the basic policies employed by other jurisdictions which afford similar treatment to mobile homes would be equally applicable here.

Recently, a growing number of courts have begun to reexamine policies developed in the past to exclude or otherwise restrict mobile homes and have concluded, because of changing conditions, that these restrictions no longer bear a reasonable relation to the general welfare or are no longer necessary to protect the municipality. The judicial trend towards the acceptance of mobile homes involves two considerations: first, that restrictions on different types of housing should be viewed more critically than restrictions on non-housing; and secondly, that the critical shortage of low and moderate income housing can be met by the increased use of mobile homes.

In large measure, mobile homes have been excluded from residential areas because they are not considered to be permanent dwellings due to their potential for mobility. This policy was based on the mobility of the early "house trailer," which was easily pulled behind an automobile. Today, mobility is important only in transporting the mobile home from the manufacturer to the dealer, and then to the often permanent homesite. Nevertheless, courts continue to see no distinction between the house trailer and the mobile home, both being designed and built as movable dwellings. Even where the mobile home was found to be of a size comparable to that of a conventional dwelling and set upon a permanent foundation, it has nonetheless been deemed to be movable and subject to regulation.

Generally, the courts have split in deciding whether a mobile home ceases to be mobile when its wheels are removed and it is firmly attached to a permanent foundation. Many jurisdictions have realistically held that this modification transforms the home into a permanent structure, allowing it to be placed in a location which otherwise excludes mobile homes. As one court lamented,

51 See generally, 2 A. Rathkoff, supra note 10, at 13.
53 2 A. Rathkoff, supra note 10, § 19.01.
54 Hodes & Roberson, supra note 1, at 8.
57 Rezler v. Riverside, 28 Ill. 2d 142, 190 N.E.2d 706 (1963); Rundell v. May,
"[the mobile home's] sole curse seems to be that it was moved to its present location and not built there." It then deemed the home in question to be a "prefabricated single family unit" permitted by the zoning ordinance. This same distinction was used by another jurisdiction to permit modular houses, while excluding mobile homes because they were transported "complete" to the homesite and required no further installation. What appears to be the most extreme jurisdiction on this issue endorses the position "once a trailer, always a trailer" or "a trailer is a trailer is a trailer."

The major difficulty appears to be that the courts focus on whether the structure had ever been mobile and on its apparently nonpermanent attachment to the land. This focus overlooks the fact that conventional housing can be, and has been, placed on flatbeds and moved to a different location. Mobile homes have been recognized as dwellings, homes, and buildings for a variety of other purposes—defense of one's home against intruders, statutes relating to arson, insurance losses, homestead exemptions, and building code regulations. The different treatment for these purposes is explained by the focus of the court: "What is dominant . . . is the purpose for which it was built and used, and to which it was primarily adapted. That purpose, to be used as a shelter and habitation . . . a dwelling house . . . dominates the case."

The original house trailer was often deemed a health hazard because it lacked running water and sanitary facilities and was built in the absence of any construction standards. Today's mobile home construction, however, is governed by federal regulations. Congress enacted the National Mobile Home Construction and Safety Standards Act of 1974, in response to the concern over construction standards, requiring the Department of Housing and


41 Washington v. Work, 75 Wash.2d 204, 205, 449 P.2d 806, 807 (Wash. 1969).
44 Id. at 502.
45 HODES & ROBERSON, supra note 1, at 104.
46 Aetna Life Ins. Co. v. Aird, 108 F.2d 136, 138 (5th Cir. 1939); see also, Bartke & Gage, supra note 63, at 498-99; HODES & ROBERSON, supra note 1, at 104-05.
Urban Development to establish Federal mobile home construction and safety standards. The standards, promulgated pursuant to the Act, apply to all homes manufactured after June 15, 1976. At the same time, courts have recognized that the question of whether a mobile home or mobile home park constitutes a public health hazard is properly within the jurisdiction and power of the boards of health rather than the local zoning authority. Any health hazards which may be presented can easily be handled by the board of health and do not necessitate a broad exercise of zoning power.

Communities often disfavored mobile home parks, believing them to be the cause of increased burdens on municipal services while failing to contribute sufficient tax revenues to offset these expenses. Adding to the problem is the fact that many states tax mobile homes as personal property rather than real estate, and since personal property rates are generally lower, mobile home owners frequently pay less property tax than do residents of other types of dwellings. As was suggested by one state court, however, if the personal property tax rate is "inequitable, the appropriate course of action is a legislative change rather than the administrative prohibition of [mobile homes] in an area where [mobile home] parks are clearly a permitted use." This court also rejected the municipality's contention that since the proposed mobile home park would place a severe strain on the local school system, the general welfare would be promoted by rejecting the use. The court reiterated that the solution was to correct the imbalance in taxation, rather than to prohibit a valid use.

At the same time courts are insisting that mobile home dwellers are permanent residents of the community who work, vote and pay taxes and who are entitled to benefit from the municipality's

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70 E.g., W. Va. Code § 11-5-3 (1974 Replacement Vol.). The statute defines personal property as "all fixtures attached to the land, if not included in the valuation of such land." Thus, a mobile home occupied by its owner but situated on leased land is taxed as personal property with the real property tax on the land assessed to the landowner. See Note, Housing-Mobile Homes-Some Legal Questions, 75 W. Va. L. Rev. 382, 382-91 (1973).
services like any other homeowner.  

A number of recent decisions have held that "problems inherent in an increase of population are not sufficient to justify zoning restrictions which serve to exclude." The inadequacies of existing sewage disposal facilities, roads, police and fire protection, and school systems, which were policies used in the past to justify restrictions, have today been held to be insufficient to justify restrictions tending to prevent population growth.

If mobile homes have helped to alleviate the problem of housing shortages, they have, in turn, created the problem of where to put the mobile home. Although many people are willing to live in mobile homes, it is apparent that many others are unwilling to live near mobile homes or mobile home parks. Yet, mobile home parks are necessary for those who can afford to live in mobile homes, but who cannot afford the price of land on which to place one.

Relegating mobile homes to parks may have been a method devised to protect residential neighbors from the harm they believed mobile homes to cause—the lowering of surrounding property values. These municipalities were convinced that the failure of the mobile home to conform to the neighboring housing standards would result in decreased property values in the neighborhood. This difference in appearance became a significant factor in the poor treatment mobile homes received, treatment which continues today. To remove this threat to property owners, mobile homes and parks were confined to commercially or industrially zoned districts, rather than residential districts.

This confinement was considered justifiable under accepted zoning principles of dividing the land mass into use districts according to the area's suitability for a particular use, with uniformity of that use within the district. According to this philosophy, the mobile home park was not a residential use but a business, with the owner of the land receiving financial benefits from leasing space to the mobile home owner. The fallacy of this logic is in looking not to the primary function of residential living, but the

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73 Burroughs v. Board of County Comm'rs, 540 P.2d 233 (N.M. 1975).
74 2 A. Rathkoff, supra note 10, §17.04.
incidental profitability to the landowner.\textsuperscript{78} If the focus is properly placed on the primary residential use, ordinances which restrict mobile home parks to commercial areas become invalid for two reasons. First, the ordinance is unreasonable and arbitrary because it no longer bears a real and substantial relation to the health, safety, or general welfare of the public. Second, under Euclidean zoning principles,\textsuperscript{79} the residential use becomes incompatible with the other uses properly contained in commercial and industrial districts.\textsuperscript{80}

The original purposes of Euclidean zoning, conserving property values and encouraging the most appropriate use of land, were to insure that all structures within the district were erected for the same general purposes and with the same general characteristics. It contemplated residential districts which excluded commercial uses, and commercial districts which excluded residential uses.\textsuperscript{81} Under these principles, at the very least, mobile homes and parks should be placed in some type of residential district, rather than the commercial or industrial zones for which they are unsuited.

Regardless of the concerns expressed for the general welfare to justify zoning ordinances restricting or excluding mobile homes, the essence of these policies appears to be aesthetic considerations. The decision to permit or exclude mobile homes too often turns upon how closely they resemble standard conventional housing.\textsuperscript{82}


\textsuperscript{79} Euclidean zoning takes its name from the village of Euclid, which litigated the landmark case Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The theory is based on the premise that some uses of land are incompatible with others and that more efficient employment of land resources would be achieved if incompatible uses are clearly separated. The theory envisions that each community can be separated into districts, each restricted to a particular use, such as: industrial, commercial or residential occupation. However sound in theory Euclidean zoning appears to be, it has proven to be less practical in its application. It is seldom that an existing community can be tidily arranged into separate and mutually exclusive use districts. State and local legislators, however, for the most part continue to use the Euclidean zoning theory in designing comprehensive zoning plans. 1 R. Anderson, Am. Law of Zoning § 6.02 (2d ed. 1976).

\textsuperscript{80} Hodes & Robertson, supra note 1, at 225-28.


\textsuperscript{82} Kyritis v. Fenny, 66 Misc.2d 332, 320 N.Y.S.2d 702 (1971); Charleston, W. Va., Rev. Zoning Ordinance § 8.09.01 (1969) (repealed by Ordinance No. 1279, Nov. 6, 1972). Section 8.09.01 permitted mobile homes on a solid foundation provided that the “exterior design does not have a deleterious effect on the surrounding
Zoning for purely aesthetic purposes has rarely received judicial sanction. It appears difficult to accommodate varying individual tastes when formulating a precise standard, while a vague standard will too often be susceptible to discriminatory use and enforcement. Additionally, the courts generally defer to the governing body's best judgment as to what zoning restrictions are necessary to promote the health, safety and general welfare of the community. This deference presupposes that such actions are taken conscientiously, sincerely and honestly for the general welfare. Thus, if local officials may zone for appearance because a use is unsightly or does not contribute to the general appearance of the community or enhance the value of local real estate, under the guise of the general welfare, they can just as easily exclude any use which they find unsightly. This would constitute control of uses by individual preference and prejudice.

Perhaps for these reasons, the generally accepted rule is that the exercise of zoning power is not justified by purely aesthetic considerations. In an early West Virginia case the court refused to sustain a municipal ordinance based solely on aesthetic grounds. The court considered the weight of authority and then existing population conditions to preclude the regulation of property on mere aesthetics which had no reasonable reference to the safety, health, morals and general welfare of the public. The issue of how much weight to give aesthetic considerations was later examined by the West Virginia court, which frankly acknowledged that aesthetics presented a difficult question. The court found the earlier adopted principle precluding pure aesthetics to be diluted by subsequent decisions in West Virginia and other jurisdictions stating that aesthetics are properly considered as a factor in zoning restrictions, but alone are insufficient justification. The court then

neighboring town” and to the “greatest extent possible have the appearance of a single family residence of normal construction.” Nicholas County has recently enacted an amendment to their zoning ordinance which allows modular homes as residential dwellings on permanent foundations, but disallows mobile homes on individual lots because they are capable of being moved. Nicholas County, W. Va., Zoning Ordinance (October, 1978).

8 Fruth v. Board of Affairs, 75 W. Va. 456, 84 S.E. 105 (1915).
adopted the view that "within essential limitations aesthetics have a proper place in the community affairs of modern society."

Although several jurisdictions have adopted pure aesthetic zoning, the question has been left open by the United States Supreme Court. Its early landmark decision in Euclid v. Ambler Realty Co. did not address the question since the asserted state interest was the protection of health and safety, not the aesthetic value of the use. In a more recent case, the Court found the concept of public welfare to be so broad and inclusive as to embrace purely aesthetic values. However, the case concerned a compensated taking under the eminent domain power of the federal government, not an exercise of zoning power. It may be fairly concluded that while a state may lawfully consider aesthetics as a factor in zoning, there is some doubt whether the United States Supreme Court would sanction aesthetics alone to justify exclusionary or restrictive zoning.

Many courts have found they can circumvent this difficulty by disguising the pure aesthetic purpose of a zoning ordinance behind dubious health or safety justifications or by expansion of the general welfare definition to permit aesthetic zoning to protect property values. While a few jurisdictions have upheld pure aesthetic zoning, the ordinance must still satisfy due process and equal protection requirements. It must serve a public, not private, interest; it must be rationally formulated and fairly administered; and it must be calculated to achieve the desired purposes.

At the very least, pure aesthetic zoning allows the community to openly express its aesthetic preferences without resorting to purported general welfare justifications. Aesthetic zoning also allows the individual to directly attack the aesthetic question, rather than attempting to refute a nonexistent justification. The difficulty lies in determining what is reasonable and rational as opposed to what is unreasonable and arbitrary. The individual who sees a mobile home as his only alternative to inadequate housing is often

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88 Id. at 45, 119 S.E.2d at 847, citing Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368 (1937).
90 272 U.S. 365 (1926).
94 Id.
precluded from placing the home on his own property, or in a mobile home park, because the community in general desires only housing which resembles the standard single family dwelling.

Evidence that mobile homes are indeed regulated on the basis of pure aesthetics is apparent from the differing treatment afforded to modular housing. One jurisdiction distinguished modular housing on the following grounds:

While a mobile home is now available in expandable and double-wide units which create a more "homelike" appearance, the concept of a mobile home is entirely different than that of a modular home. A mobile home is a single entity which when placed on a building site is completed and needs no further installation of a heating system or materials. A modular home is transported to the construction site in several pieces. Moreover, a modular home is indistinguishable in appearance from conventionally built homes while a mobile home cannot be easily mistaken for a conventional dwelling.5

The court further concluded that the current housing crisis makes it unreasonable to exclude modular homes from residential zones due to the need for more readily available housing at lower costs. Under this justification, analogous reasoning should also apply to the mobile home. Clearly, such reasoning is not applied in the case of mobile homes because of their inability to merge into the identity of conventional neighborhoods.

The answer to the continuing dilemma between mobile homes and aesthetics is perhaps best articulated in the following statement:

[I]t is arbitrary to permit the prohibition of mobile home parks completely in a municipality where they can be placed in appropriate districts and in which there is a need or demand for them. To hold otherwise would be to allow any method of housing to be outlawed by local whim. I cannot understand how . . . a mobile home park can have a detrimental effect on the value of all property in the township or on its overall attractiveness any more than industrial and commercial districts or even small lot housing developments.

Moreover, the aesthetic warrant for the prohibition . . . is not a reasonable basis for the exercise of zoning power in the situation. . . . [I]t certainly is not enough to sanction exclusion of a particular use on the sole ground that its appearance

offends the subjective sensibilities of the local governing body. . . . Letting a use be controlled by individual preferences and prejudices, devoid of standards entirely, is the antithesis of proper judicial review of zoning ordinances.98

Exclusionary Zoning

Since the landmark decision of the United States Supreme Court in 
Euclid v. Ambler Realty Co.97 in 1926, there has been little question concerning the constitutionality of zoning per se.98 Euclid provided the standard test used to determine the constitutionality of a particular zoning ordinance or statute: the provision must be rational and reasonable, having a real and substantial relation to the public health, safety, morals or general welfare. Constitutionality is also dependent upon authorization by the state’s enabling statute.99

The general principles applicable to judicial review of the validity of zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof lies with the party challenging the ordinance to prove that it is clearly unreasonable or arbitrary, and that it bears no reasonable and substantial relation to the public interests enumerated above. An additional presumption to be overcome rests on the rule that the courts will not substitute their judgment for that of the legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.100 This places two serious burdens of proof upon the party challenging the zoning ordinance. Until recently, the mechanical application of these principles appeared to make it virtually impossible for a municipal ordinance to be successfully attacked. Yet recent court decisions have shown that more courts are now willing to be persuaded by clear and convincing evidence and some courts are pre-

97 272 U.S. 365 (1926).
100 Id. at 18.

pared to resolve the conflict in favor of the plaintiff even where the validity of the ordinance appears to be fairly debatable.\footnote{Annot., 48 A.L.R.3d 1210 (1973); 1 ANDERSON, AM. LAW OF ZONING § 2.14-2.19 (1968).}

"Exclusionary zoning may assume a wide variety of forms. Ultimately, the existence of such practices must be measured by exclusionary intent and actual or potential exclusionary effect."\footnote{Southern Burlington Cty. NAACP v. Mt. Laurel, 67 N.J. 151, 197, 336 A.2d 713, 737 (1975) (concurring opinion), cert. denied, 423 U.S. 803 (1975).} The most common method is the ordinance which is exclusionary per se, that is, it patently prohibits the placing of mobile homes on any property within the corporate limits of the municipality. A number of municipalities in West Virginia have this type of ordinance.\footnote{E.g., Eleanor, W. Va., Municipal Code § 78-2 (1978); Parkersburg, W. Va., Zoning Ordinance § 1363.03 (Feb. 27, 1973); Charleston, W. Va., Rev. Zoning Ordinance No. 1279 (Nov. 6, 1972).} Other ordinances commonly allow mobile homes only in mobile home parks which must conform to minimum lot size or subdivision regulation requirements.\footnote{Jefferson County, W. Va., Subdivision Ordinance (June 8, 1972) (amendment May 7, 1973). The 1973 amendment pertains to the placement of mobile homes. The county currently does not have a comprehensive zoning plan (a proposed comprehensive ordinance was defeated by referendum); therefore, mobile homes may be placed by permit on any land within the county. However, where more than one mobile home is placed on the same tract of land it is then regulated as a subdivision. It must conform to the following subdivision regulations: paved roads, gutters and curbs, central sewage and water, all utilities placed underground, subdivision review, and a plan and plat recorded at the courthouse. Nitro, W. Va., Zoning Ordinance (Oct. 6, 1970). This ordinance requires mobile home parks to be established and operated under the standards of Kanawha County and the state. Specific zoning requirements are: two-acre site with 2,400 square feet net area per mobile home, off-street parking, setbacks, and six-foot enclosure of fire-resistant materials or natural growth. Beckley, W. Va., Zoning Ordinance (1971), in which the city limits parks to six-acre tracts, allowing 3,600 square feet for each home. Nicholas County, W. Va., Zoning Ordinance (March 13, 1965), in which Nicholas County limits mobile homes to parks on the areas of ten acres or more, designed to accommodate 50 or more homes with 3,000 square feet per home. The zoning ordinance covers only a portion of the county, see infra note 111.)} Burdened by these stringent requirements, the park becomes economically unfeasible and the developer abandons the project. The use is then effectively excluded because the cost to develop the parks is prohibitive.

A similar result occurs where the zoning ordinance does permit mobile homes or mobile home parks in a particular zoning district, but the size of the district in which the use is allowed is so small in relation to the remaining municipal land mass as vir-
Exclusion of a use can also be achieved by providing for the use within the municipality, but failing to attach that use to any particular area, thereby creating a "floating zone." Alternatively, exclusion would apparently result where a fair amount of land is zoned for a use, but it must compete with a large number of other approved uses which effectively use up the available area.

Apart from total exclusion, a zoning ordinance allowing the use of mobile home parks may be held invalid where the zoning ordinance fails to provide the municipality with specific guidelines for park development. Allowing permission to be granted or denied on the mere whim of the zoning board increases the likelihood that the municipality will act arbitrarily in approving or denying applications to establish a park. Similar results are likely to occur where mobile homes are permitted on individual lots by permit only with no specific requirements to guide local officials in approving the permits.

In the judicial review of exclusionary ordinances a significant factor has become the outward population expansion from urban areas and the corresponding pressures placed on the suburbs to provide low and moderate cost housing to meet this expansion. In the past, most courts have tended towards an increasingly broad interpretation of the general welfare and, in particular, to look upon aesthetic objectives and considerations as properly falling within the meaning and scope of the general welfare. It is clear that many zoning restrictions which tend to have an exclusionary effect bear only minimal relation to the health, safety, or morals of a community, and that they tend to promote the general welfare only from an aesthetic standpoint.

Recently, progressive courts have redefined the concept of the general welfare to encompass the welfare of the region, rather than limiting it, as local officials would prefer, to the territorial limits of the municipality. These courts are not advocating extraterritorial zoning but instead zoning which contemplates the needs and desires of the region. In addition, in weighing the interest of the

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105 Nickola v. Grand Blanc, 394 Mich. 589, 232 N.W.2d 604 (1975) (the district included approximately one-tenth of one percent of the municipality's total acreage).
general welfare, aesthetic considerations are balanced against current pressing housing needs and the movement out of urban areas into the suburbs. Finally, these courts disfavor zoning which bears little relation to the "public" as opposed to the "private" welfare, in particular, those ordinances enacted primarily to avoid the increased governmental costs and burdens accompanying the influx of lower income persons.\textsuperscript{100}

All of the factors previously discussed, and those which follow, must be taken into consideration in examining the current zoning practices by West Virginia's municipalities and counties. Many municipalities presently exclude mobile homes totally, or restrict their placement within the municipal boundaries in some manner.\textsuperscript{110} While most of the counties do not have comprehensive zoning plans which encompass mobile home uses, many have made attempts to do so.\textsuperscript{111} If municipalities may exclude mobile homes on the justification that unincorporated areas of the counties will accommodate them, and subsequently, counties are permitted to exclude them, the result will be total prohibition of a use which is beneficial to the state. The same policies which led other courts to move against exclusionary zoning in the examples which follow must of necessity be adopted by the West Virginia judiciary in striking down exclusionary ordinances within the state.

The Michigan Supreme Court appears to be the most adamant in striking down zoning ordinances which either directly or indirectly exclude mobile homes. This court has invalidated ordinances which totally prohibit the operation of mobile home parks within the municipality.\textsuperscript{112} Where the lack of extensive development of a township provides adequate space for growth, prohibition of mobile home parks bears no real or substantial relation to

\textsuperscript{100} Id.

\textsuperscript{110} See notes 103, 104 supra.

\textsuperscript{111} Nicholas County, W. Va., Zoning Ordinance (March 13, 1975). The Nicholas County Planning Commission had recommended a comprehensive zoning plan to the County Commission in March of 1965. At public hearings the residents of the county so strenuously objected to the zoning that the comprehensive ordinance was not-enacted for the entire county, but was limited to the area surrounding Summersville Lake. Jefferson County attempted to enact a comprehensive ordinance which limited mobile homes on private land to farm tenant dwellings or temporary shelter during construction of a permanent residence. Mobile homes parks would have been limited as planned unit developments, only after submission of a community impact statement. The plan was adopted by the county commission, but rejected by referendum prior to 1972.

the present public health, safety, morals or general welfare. The court has further emphasized that upholding the validity of zoning ordinances which totally exclude would be tantamount to declaring mobile homes a nuisance per se. In addition, exclusionary zoning based on the expectation of future industrial expansion has been rejected by the court as giving unlimited power to the zoning board, to be measured only by the limit of the board's expectations and beliefs.13

The Michigan court has also addressed the validity of zoning ordinances which limit the size of mobile home parks.14 Prior judicial recognition of the mobile home park as a legitimate land use, combined with the housing shortage, has given the use a "favored status." Where the favored use is appropriate for a given site, such as the mobile home park in question, the presumed validity of the restrictive ordinance fades and the burden shifts to the municipality to justify its exclusion. The court has found protection of the mobile home park to be a favored use of increased importance in view of the massive nationwide housing shortage which necessitates a re-defining of the term "general welfare" as applied to justify residential zoning. That term is not a mere catchword to permit the translation of narrow desires into ordinances which discriminate against or operate to exclude certain residential uses deemed beneficial. Citizens of the general community have a right to decently placed, suitable housing within their means and such right must be a consideration in assessing the reasonableness of local zoning prescribing residential requirements or prohibitions. Such zoning may never stand where its primary purpose is shown to operate for the exclusion of a certain element of residential dwellers.15

That court also looked with disfavor on ordinances which indirectly exclude mobile homes, invalidating districts too insignificant in size to permit mobile home park development16 and zoning classifications not attached to any specific land.17 Clearly, Michi-

13 Id. at 442, 70 N.W.2d at 774.
15 Id. at 217, 192 N.W.2d at 327-28.
16 Nickola v. Grand Blanc, 394 Mich. 574, 232 N.W.2d 604 (1975) (less than one-tenth of one percent of township's land zoned to permit mobile home parks plus the refusal to permit expansion of two existing parks found tantamount to exclusion).
gan has adopted the policy that a township cannot enact zoning ordinances designed to prevent the influx of natural population expansion to avoid future burdens, economic or otherwise, upon the administration of public services and facilities, where it is apparent that the general welfare of the community is not promoted. The pressing need for housing is deemed to be of greater importance than the desire of the community to avoid increased burdens on municipal services.

The Pennsylvania Supreme Court has established a judicial precedent of invalidating exclusionary zoning ordinances. Minimum lot size requirements so large as to be exclusionary in effect, serving private rather than public interests, have been rejected as zoning ordinances primarily designed to prevent the entrance of newcomers "to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring." Exclusionary ordinances involving apartment developments have been struck down by the Pennsylvania court as prohibitive of those in search of suitable housing:

Apartment living is a fact of life that communities like Nether Providence must learn to accept. If [the township] is located so that it is a place where apartment living is in demand, it must provide for apartments in its plan for future growth; it cannot be allowed to close its doors to others seeking a "comfortable place to live."

The same court appears reluctant to invalidate indirect exclusionary zoning of mobile homes, finding an excessive minimum lot size requirement for mobile home parks did not unreasonably fail to provide for the use. The dissenting judge in the case noted that while mobile homes should be required to meet reasonable regulations applicable to all other dwellings, "if any of those regulations can be determined to be designed to unreasonably restrict a usage intended for an otherwise legitimate use, such as providing a residence for people, it should be stricken as a violation of the constitutional right to use property."

Clearly, the neighboring property owners have seen the mobile home park as a threat to their privacy.

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122 Id. at 608-09, 290 A.2d at 726-27 (citation omitted).
and to real estate values, while disregarding the needs of their fellow citizens. Finally, the dissent declared "[z]oning ordinances must not be used to accomplish indirectly that which cannot be accomplished directly, i.e., total prohibition of an otherwise legitimate use."123

The New Jersey Supreme Court has redefined "general welfare" to specifically include an affirmative obligation to provide the opportunity for "an appropriate variety and choice of housing, for all categories of people."124 Although the court has not changed the existing Euclid test of constitutionality, by establishing a much stricter and demanding definition of the general welfare it has made it more difficult for zoning ordinances to pass the constitutional test. Thus, a zoning ordinance which acts to foreclose the availability of low and moderate income housing will be stricken as an exclusionary ordinance.125 Additionally, New Jersey decisions have stressed the developing community's obligation to afford the opportunity for decent and adequate low and moderate income housing in relation to present and prospective regional needs.126

A later New Jersey decision upheld an ordinance permitting mobile home parks to be established only under certain conditions, in particular limiting residents to persons fifty-two years of age or older.127 Such an ordinance clearly promotes the general welfare of the community by providing much needed affordable housing for the elderly. However, the court stressed it would look to the true

123 Id. at 611, 290 A.2d at 728.
124 Southern Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. denied, 423 U.S. 803 (1975). The court invalidated pervasive exclusionary zoning restrictions which included multifamily housing so designed as to benefit only the relatively affluent, overly large minimum lot size, frontage and floor space requirements, and excessive zoning for industrial and related uses (almost 30% or 4100 acres, while present industrial development occupied only 100 acres).
127 Taxpayers Ass'n v. Weymouth Twp., 71 N.J. 249, 364 A.2d 1016 (1976). The court emphasized that its "failure to probe more deeply into the possible exclusionary effect of similar ordinances should not be understood to be the product of blindness to their potentially exclusionary character, but only the consequences of the plaintiffs' decision not to try the case on that legal theory." Id. at 295-96, 336 A.2d at 1041. See also, Note, Zoning-Restrictions on Mobile Homes: The Beginning of the End?, 55 N.C.L. Rev. 1289 (1977).
character of the zoning device. If it substantially contributes to an overall pattern of improper exclusion, the fact that it is beneficial to a particular group will not justify the zoning provision.

Thus, the door is left open for New Jersey to strike down zoning ordinances totally excluding mobile homes. Its recent case history invalidating exclusionary zoning ordinances in other contexts and its persuasive arguments emphasizing the contribution to the general welfare provided by the mobile home can be used to invalidate remaining regulatory barriers to the socially beneficial use of mobile homes.

Equal protection may become an important legal argument against exclusionary zoning, which segregates people on the basis of economic status thereby denying them access to suitable housing. Low income families usually are members of minority groups, so that in purpose and effect exclusionary zoning is often analogous to exclusion on racial grounds. Where restrictions which unreasonably increase housing costs for low and moderate income families are invalidated, housing is then made available to those families which are also minorities.

Lower federal courts have utilized the equal protection rationale to strike ordinances having an exclusionary effect on low income groups. The United States Supreme Court directly confronted the issue of exclusionary zoning, but declined to reach any decision, finding that the plaintiffs lacked standing to sue. However, the Court did state that if a zoning ordinance and its pattern of enforcement have had the purpose and effect of excluding persons of low and moderate income, including members of minority


126 Southern Alameda Spanish Speaking Organization v. Union City, 424 F.2d 291 (9th Cir. 1970).

127 Kennedy Park Homes Ass'n v. Lackawanna 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Dailey v. Lawton, 425 F.2d 1037 (10th Cir. 1970). Dailey involved a proposed low-income housing project in a predominately white neighborhood. The city refused to issue a building permit or rezone the lot after receiving a petition against the project from 250 white residents of the neighborhood. The court found it was enough for the plaintiff to show the local officials were effectuating the discriminatory designs of private individuals. The city also urged denial of the permit on the grounds of overcrowding local schools and overburdening local fire fighting capabilities, which the court found unpersuasive since the neighborhood was an area already zoned for high-density housing. See also, Southern Burlington County NAACP v. Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert denied, 423 U.S. 803 (1975).

groups, such intentional exclusionary practices would be invalidated, if proven in a proper case.\textsuperscript{132}

Conclusion

By examining the major decisions from jurisdictions which have reached the issue of exclusionary zoning as it pertains to mobile homes and other uses, the policies considered by these courts are fully disclosed. The same policies and considerations these progressive courts seek to promote should also be the policies adopted by the West Virginia judiciary. The exclusionary devices explored in this Note, for the most part exist in West Virginia. As these decisions reveal, the time has come to reexamine the needs of both the community and the state and to redefine the concept of the general welfare. West Virginia communities can no longer afford to ignore the pressing needs of the general "public" welfare, especially when as much as twenty-seven percent of the existing housing stock is substandard and the need for new housing is increasing at a rate the conventional housing industry cannot meet. It is readily apparent that a statement made in 1905 has more relevance than ever to today's current dilemma: Aesthetic considerations are "a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."\textsuperscript{133} Zoning officials must recognize "beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation."\textsuperscript{134}

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\textsuperscript{132} Id. at 502.

