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best interests and insults the equity of our legal structure. The integrity of the judiciary and the welfare of the child mandate its elimination.

ANDREA ANN TIMKO

Zoning—Restrictions on Mobile Homes: The Beginning of the End?

Fifty years after zoning ordinances first underwent judicial examination\(^1\) the New Jersey Supreme Court, one of the nation's leading state forums for zoning adjudication,\(^2\) in *Taxpayers Association v. Weymouth Township*\(^3\) upheld the validity of a municipal ordinance that limited the use of mobile home units within trailer parks to elderly persons. The *Weymouth* decision comes just one year after the New Jersey court's landmark decision in *Southern Burlington County NAACP v. Township of Mount Laurel*\(^4\) striking down exclusionary zoning regulations. Considered in light of *Mount Laurel*, the *Weymouth* result may appear to limit the extent to which the court is willing to find an impermissible exclusionary intent or effect in local land use regulations—even when those regulations expressly restrict residential land use on the basis of types of occupancy.\(^5\) The decision could thus be misread as being another in a series of recent decisions\(^6\) that in effect give judicial ap-

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5. *See* note 10 and accompanying text infra.
6. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977), noted in 55 N.C.L. REV. 733 (1977) (upholding municipality's refusal to rezone a 15 acre parcel from single family to multi-family classification, thus preventing construction of a housing complex for low and moderate income tenants); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a zoning ordinance restricting the use of one-family residences to persons related by blood, adoption or marriage, or to not more than two unrelated persons); James v. Valtierra, 402 U.S. 137 (1971), noted in 50 N.C.L. REV. 369 (1972) (upholding a California constitutional provision requiring approval by local referendum before low-rent housing projects may be established in a community); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), noted in 54 N.C.L. REV. 266 (1976) (upholding a comprehensive zoning plan designed to control the municipality's growth,
proval to exclusionary zoning ordinances. The Weymouth opinion, however, strongly reaffirms the New Jersey court's view that local zoning ordinances must promote the general welfare of an entire region rather than merely the welfare of the municipality promulgating the regulations. Ultimately, Weymouth is significant in detailing the criteria with which the exclusionary impetus or impact of such ordinances might be discerned, criteria that may lead to the invalidation in New Jersey and elsewhere of zoning restrictions that restrict or prohibit the residential use of mobile homes.

Weymouth Township's general zoning ordinances, which had previously permitted trailer camps in one district of the municipality, were amended in 1971 to prohibit generally the use of trailer homes within the township. The amended ordinances did, however, permit the establishment of a limited number of trailer parks upon compliance with specified requirements, the most significant of which restricted occupancy to "elderly persons" or "elderly families," defined as individuals or heads of households fifty-two years of age or older. The Taxpayers Association of Weymouth Township and several of its members filed suit alleging, inter alia, that the ordinances were enacted improperly, constituted illegal "spot zoning" and unconstitutionally infringed upon the rights of children. The Superior Court, Law Division, dismissed the complaint with prejudice. On appeal, the Superior Court, Appellate Division, reversed and invalidated the ordinances, ruling that the municipality's zoning power did not authorize ordinances restricting land use by the age of occupants and that the ordinances

in effect limiting the number of newcomers who may reside in the community); cf. Warth v. Seldin, 422 U.S. 490 (1975) (rejecting a challenge against allegedly exclusionary zoning ordinances for petitioners' lack of standing).


8. 71 N.J. at 258, 364 A.2d at 1021.

9. Id. at 259, 364 A.2d at 1021.

10. As quoted by the New Jersey Superior Court, Appellate Division, the crucial portion of the ordinance provides: "Trailer parks are generally prohibited in the Township. A special exception to fulfill the needs of senior citizens, as defined by this ordinance, has been made by the township. Occupancy by any persons other than elderly [persons] or elderly families is hereby prohibited." Taxpayers Ass'n v. Weymouth Township, 125 N.J. Super. 376, 379, 311 A.2d 187, 188 (Super. Ct. App. Div. 1973) (quoting Weymouth, N.J., Ordinance 172-1971 (June 25, 1971)).

11. Id. "Elderly families" is further defined as those in which the youngest spouse is 45 years of age or older, and in which all children are at least 18 years of age. Id.

12. 71 N.J. at 260, 364 A.2d at 1022.

13. Id.

were unreasonable, arbitrary and discriminatory in violation of the equal protection clause of the fourteenth amendment.\textsuperscript{15} The New Jersey Supreme Court reversed, holding that the ordinances did not exceed the municipality's zoning power;\textsuperscript{16} did not violate either the due process or equal protection provisions of the state or federal constitutions;\textsuperscript{17} and did not, on the basis of the facts before it, constitute impermissible exclusionary zoning.\textsuperscript{18}

Although zoning ordinances designed to provide housing for the elderly have been promulgated by many communities, court tests of their validity have not provided uniform results.\textsuperscript{19} The \textit{Weymouth} decision is significant not only in increasing the number of those courts that have upheld such ordinances, but also in doing so after reviewing the facts of the case in an unusually thorough manner. This close scrutiny is in part required by the New Jersey constitution's equal protection provisions;\textsuperscript{20} and in part by the requirements of the \textit{Mount Laurel} decision—itself based on state constitutional grounds.\textsuperscript{21} In contrast, the standard of review applied to zoning ordinances by most forums continues to be the test formulated in \textit{Village of Euclid v. Ambler Realty

\begin{itemize}
\item \textsuperscript{15} Id. at 382, 311 A.2d at 189-90; see note 52 and accompanying text infra.
\item \textsuperscript{16} 71 N.J. at 275, 364 A.2d at 1030.
\item \textsuperscript{17} Id. at 287-88, 364 A.2d at 1037; see notes 52 & 71 and accompanying text infra.
\item \textsuperscript{18} See id. at 295-96, 364 A.2d at 1041. The court upheld the lower court's dismissal of the unlawful conspiracy and illegal spot zoning challenges originally raised against the ordinances. \textit{Id.} at 261, 364 A.2d at 1022.
\item \textsuperscript{20} The equal protection provisions of the New Jersey Constitution provide in part: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those . . . of acquiring, possessing, and protecting property . . . ." N.J. CONST. art. 1, § 1; "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right . . . because of religious principles, race, color, ancestry or national origin." \textit{Id.} § 5. The New Jersey Supreme Court has stated that, because of these provisions, "[W]here an important personal right is affected by governmental action, this court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." Taxpayer's Ass'n v. Weymouth Township, 71 N.J. at 286, 364 A.2d at 1036. For an example of this demanding review, see Borough of Collingswood v. Ringgold, 66 N.J. 350, 313 A.2d 262 (1975), upholding the validity of an ordinance prohibiting canvassing or soliciting without first registering with the chief of police and procuring a permit. In rejecting appellants' equal protection challenge to the ordinance the court observed that "application of a test based either on mere rationality or strict scrutiny is not called for; rather we adopt a 'means-focused' standard. This narrows our inquiry to the 'crucial question [of] whether there is an appropriate governmental interest suitably furthered by the differential treatment.'" \textit{Id.} at 370, 331 A.2d at 274.
\item \textsuperscript{21} 67 N.J. at 174, 336 A.2d at 725.
\end{itemize}
Co.—a test that accords land use regulations a substantial presumption of validity when challenged on either federal or state constitutional grounds. New Jersey applied this deferential standard in many of its earlier zoning cases; it was utilized in particular by the New Jersey Supreme Court to uphold the validity of local zoning ordinances that in effect banned house trailers from the municipality. The court's approval of such bans, first set forth in *Vickers v. Township Committee,* was predicated upon a "broad interpretation" of the general welfare. If any zoning ordinance was "reasonably calculated" to promote the general welfare, as it was thus expansively defined, the ordinance was, according to the *Vickers* court, a proper exercise of the municipality's zoning power as derived from the state. The *Vickers* court

22. The United States Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), established that in any judicial test of a zoning ordinance "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. This compaisant standard continues to be applied without variation in federal courts, as was observed by the Supreme Court in *Arlington Heights* when it referred approvingly to "the generous *Euclid* test, recently reaffirmed in *Belle Terre.*" 97 S. Ct. at 562. With respect to state law the *Euclid* Court had declared: "The question is the same under both [the United States and Ohio] Constitutions . . . : Is the ordinance invalid in that it violates the constitutional protection 'to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?'" 272 U.S. at 386. As a result the *Euclid* test, though formulated by a federal court, is applied by most states in zoning cases, whether a challenge is based on state or federal constitutional grounds. See 1 R. Anderson, *supra* note 19, § 3.14, at 106-07. As noted earlier, however, the equal protection provisions of the New Jersey Constitution have, with respect to zoning and other cases, required a standard of review somewhat more rigorous than that established in *Euclid.* See note 20 supra.


25. *Id.* at 247, 181 A.2d at 137. Under this interpretation the "general welfare" is defined in such generalized terms as the "public convenience" or "general prosperity," Pierro v. Baxendale, 20 N.J. 17, 28, 118 A.2d 401, 407 (1955) (quoting Schmidt v. Board of Adjustment, 9 N.J. 405, 415, 88 A.2d 607, 611 (1952)). The New Jersey Supreme Court has related this generalized and all-embracing reading of the general welfare to the equally broad and inclusive concept of the public welfare set forth in the landmark opinion of the United States Supreme Court in *Berman v. Parker,* 348 U.S. 26, 33 (1954). Under this relatively vague definition court examination of zoning ordinances is cursory since this amorphous conception of the general welfare provides a rationale for almost any zoning provision. See text accompanying notes 30 & 31 infra.

26. 37 N.J. at 247, 181 A.2d at 137.

27. At the time suit was commenced the New Jersey zoning statutes provided in part:

Any municipality may by ordinance, limit and restrict to specified districts and may regulate therein, buildings and structures according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority, subject to the provisions of this article, shall be deemed to be within the police power of the State.

. . . .
declared that the regulation of trailer camps was bound up with "the public health, safety, morals and general welfare" of any municipality; accordingly, court sanction of any regulation of trailer homes—including their outright prohibition—would follow almost as a matter of course. The broad power thus accorded to local zoning authorities was attacked in a heralded dissent to Vickers, in which it was recognized that the expansive view of the general welfare taken by the majority could embrace any conceivable zoning purpose and thus make it virtually impossible for any allegedly exclusionary ordinances to be attacked successfully.

The New Jersey Supreme Court, however, thereafter delivered its landmark opinion in Mount Laurel, signaling its determination to strike down local ordinances that clearly resulted in exclusionary zoning. The Mount Laurel court set forth an elaborate and demanding definition of the general welfare, specifically including an affirmative obligation to provide the opportunity for "an appropriate variety and choice of housing, for all categories of people." Zoning regulations that in any way restricted the availability of housing to favored groups would, under this test, fail to promote the general welfare and thus be an improper exercise of the zoning power. In addition, the Mount Laurel decision defined the general welfare in terms of regions of the state, rather than merely of the locality establishing the regulation.

Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: to promote health, morals, or the general welfare...


29. See, e.g., Williams & Norman, Exclusionary Land-Use Controls: The Case of Northeastern New Jersey, in LAND USE CONTROLS: PRESENT AND FUTURE REFORM 105, 125 (D. Listokin ed. 1974), in which Justice Hall's dissent is referred to as "by far the best of modern zoning opinions."

30. 37 N.J. at 261, 181 A.2d at 145 (Hall, J., dissenting).

31. Id. at 258-59, 181 A.2d at 143.

32. 67 N.J. at 187, 336 A.2d at 731. The basic test of the constitutionality of zoning ordinances remains the same—if the ordinances are shown to promote the general welfare, they constitute proper exercises of the zoning power and are therefore valid. However, by defining with unusual specificity the meaning and requirements inherent in the concept of the general welfare, the Mount Laurel court in effect required that zoning ordinances meet a more rigorous standard in order to be considered as promoting the general welfare.

33. Id. at 188-90, 336 A.2d at 732-33.
By setting forth a comprehensively detailed definition of the general welfare that was to be promoted by zoning ordinances, the Mount Laurel court thus effectively restricted the scope of municipal land use regulation—prohibiting zoning ordinances that restricted access to the use of land on the basis of economic or racial factors.

This demanding standard of review necessitated the Weymouth court's detailed demonstration of how the Weymouth ordinances promoted the general welfare of both the municipality and the region, and thus lay within the purview of the zoning power. Ironically, the Weymouth court found that the very specific definition of the general welfare provided a rationale for zoning ordinances permitting the limited use of house trailers. In contrast, the Vickers court had held that its view of the general welfare justified a total ban on the use of such trailers in another municipality. In changing its views as to how the use of trailer homes might alternatively impede or promote the general welfare, the New Jersey court's decisions on the zoning of trailers may seem inconsistent. But by adopting the view expressed in Mount Laurel that "provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all land use regulation," the Weymouth court appears to indicate that ordinances that expand housing opportunities, rather than limit them, will hereafter find court approval.

The court supported its conclusion that the Weymouth ordinances promoted the general welfare by reviewing in considerable detail the array of state and federal proclamations and programs illustrating governmental determination to provide for the housing needs of the elderly and thereby to promote their welfare and that of the political entity as

34. See 71 N.J. at 265, 364 A.2d at 1025, where the court declares: "In this regard, the term [general welfare] is mutable and reflects current social conditions."

35. 67 N.J. at 179, 336 A.2d at 727.

36. See 71 N.J. at 274-75, 364 A.2d at 1030. In this respect the Weymouth court aligns itself with the ruling in Maldini v. Ambro, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, appeal dismissed, 423 U.S. 993 (1975), which upheld a zoning ordinance creating a residential district providing, inter alia, for a Retirement Community District. The Maldini court, finding the ordinance properly within the New York zoning statutes, observed:

[The ordinance's] purpose—meeting the town's need for adequate housing for the aged—was within the town's police powers to regulate land use for the promotion of the community's health and general welfare.

...Certainly, when a community is impelled ... to move to correct social and historical patterns of housing deprivation, it is acting well within its delegated 'general welfare' power.

Id. at 484-86, 330 N.E.2d at 405-06, 369 N.Y.S.2d at 389-90.
The court cited these materials and various sociological authorities to create a persuasive record justifying the use of trailer homes as specifically permitted residences for the elderly, and, by necessary implication, for all other income or age groups as well. The court declared that ordinances of such benefit to the general welfare would justify either a variance of, or reasonable exception to, the municipality's general ban on trailer homes. It then noted approvingly that the ordinance would help satisfy the region's housing require-

37. 71 N.J. at 266-75, 364 A.2d at 1025-30. See such representative provisions as: 12 U.S.C. § 1701h-1 (1970) (regarding the establishment of an "advisory committee on matters relating to housing for elderly persons"); id. § 1701r (in which Congress declared: "Our older citizens face special problems in meeting their housing needs because of the prevalence of modest and limited incomes 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."); id. § 1701z-6 (Supp. V 1975) (authorizing the Secretary of Housing and Urban Development to determine what housing is "most effective or appropriate to meet the needs of groups with special housing needs including the elderly"); 42 id. § 1401 (1970) (declaring the national policy "to make adequate provision . . . for families consisting of elderly persons"); id. § 3012(a)(4) (Supp. V 1975) (establishing the function of the Administration on Aging to "develop plans . . . and carry out programs designed to meet the needs of older persons for social services, including . . . low-cost transportation and housing"); id. § 3028(a)(1) (providing for model projects to "assist in meeting the special housing needs of older persons"); N.J. STAT. ANN. § 40:55D-21 (West Cum. Supp. 1977-78) (encouraging "senior citizen community housing construction consistent with provisions permitting other residential uses of a similar density in the same zoning district"); id. § 52:27D-28.1 (stating that "senior citizens . . . need and deserve the attention, assistance, and protection of the State"). In particular see id. § 55:14L-2, which establishes the creation of housing for the elderly as part of the state's policy to promote the welfare of the state:

It is hereby found and declared . . . that the lack of properly constructed rental housing units designed specifically to meet the needs of the elderly of this state in the lower middle-income bracket at rentals which this class of elderly can afford constitutes a menace to the health, safety, welfare and morals of the public . . . .

_id_. This statute provides substantial support for the Weymouth holding that local zoning regulations designed to encourage the provision of such housing satisfy the general welfare requirement of the New Jersey zoning statutes.

38. See note 87 and accompanying text infra.

39. 71 N.J. at 278-80, 364 A.2d at 1032-33; see DeSimone v. Greater Englewood Hous. Corp. No. 1, 56 N.J. 428, 440, 267 A.2d 31, 37 (1970), in which the court upheld a variance to a local zoning ordinance permitting a housing project for lower income groups, declaring:

"Special reasons" is a flexible concept; broadly speaking, it may be defined by the purposes of zoning set forth in N.J.S.A. 40:55-32, which specifically include promotion of "health, morals or the general welfare." . . . So variances have been approved for many public and semi-public uses because they significantly further the general welfare.

For a decision providing even broader general welfare grounds justifying a variance for a housing project for the elderly, see Borough of Roselle Park v. Township of Union, 113 N.J. Super. 87, 272 A.2d 762 (Super. Ct. Law Div. 1970). See also E. BARTLEY & F. BAIR, MOBILE HOME PARKS AND COMPREHENSIVE COMMUNITY PLANNING 91 (1960), on the value of special exceptions in connection with the use of mobile homes, although none of the special exceptions discussed therein are based on occupant age.
ments for the elderly and thus would comport with the *Mount Laurel* test.\(^4\) In this important aspect the *Weymouth* opinion differs sharply from the holding reached in the analogous case of *Hinman v. Planning & Zoning Commission*.\(^4\) In that case a zoning provision establishing a housing development for the elderly was struck down by a Connecticut court which insisted that the challenged ordinance was invalid in not promoting the *local* general welfare.\(^4\) Other issues may have guided the *Hinman* court to apply that line of reasoning;\(^4\) certainly the approach of the *Weymouth* decision,\(^4\) focusing upon the relationship of a challenged ordinance to the *regional* general welfare, is more appropriate in zoning adjudication.\(^4\)

Although zoning ordinances will inevitably affect people as well as property, they are nonetheless designed as regulations upon the use of land, not upon those who use it. The Weymouth ordinances, by restricting the use of mobile homes on the basis of their occupants rather than on the characteristics of the homes themselves, seem to disregard that distinction. Opposition to ordinances such as the Weymouth provisions has usually been based on this distinction,\(^4\) and one jurist has even

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40. 71 N.J. at 275 n.9, 364 A.2d at 1030 n.9.
42. It is hard to conceive how there could be a need, in a town which is chiefly rural, having a population of less than 5000 people, for a community for aged people . . . . The welfare of aged people undoubtedly is a matter of concern to the state and federal government, but it is not ordinarily a matter of local governmental concern, and certainly not in towns the size of Southbury.
43. "[T]he obvious that the matter of enforcement of such a zoning regulation would create problems of considerable magnitude. . . . [T]he proposed zoning amendment appears to be designed to promote the financial interests of the petitioners for its adoption rather than the public welfare . . . ." *Id.* at 130, 214 A.2d at 134; see 2 N. Williams, *supra* note 2, § 50.16, for a general discussion of *Hinman* and the Connecticut court's reasons for rejecting the proposed housing project and for thus relying on such a "parochial view of the nature of the general welfare requirement underlying zoning . . . ." *Id.* § 50.16, at 303.
44. *Accord*, Maldini v. Ambro, 36 N.Y.2d 481, 330 N.E.2d 403, 369 N.Y.S.2d 385, *appeal dismissed*, 423 U.S. 993 (1975). The New York court observed, in regard to the ordinance's purpose in meeting housing needs of the aged, that "[n]ot only was this an important goal of the Town's Comprehensive Plan, but a matter of general public concern not only to the locality but to the State and Nation as well." *Id.* at 485, 330 N.E.2d at 405-06, 369 N.Y.S.2d at 389 (footnotes omitted).
45. See, e.g., Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 20, 283 A.2d 353, 358 (Super. Ct. Law Div. 1971), in which the court declared: "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*." (emphasis added).
raised this doctrine to constitutional dimensions.47 Recent commentators have noted, however, that the distinction is illusory, for it ignores the extent to which zoning ordinances, ostensibly regulating solely the physical use of land, necessarily impinge upon the social and economic well-being of those who are affected, however indirectly, by the use of that land.48 As the Weymouth court correctly observed, "[A]s a conceptual matter regulation of land use cannot be precisely dissociated from regulation of land users."49 In fact, if zoning ordinances are ever to improve the general welfare to any substantial degree, such social and economic factors must provide the express rationale for the ordinances.50 The New Jersey courts have recognized that zoning ordinances drafted to implement certain social planning goals may properly regulate land use.51 Therefore the Weymouth ordinances, designed to provide adequate and appropriate housing for certain age groups of the community, are not invalid because they operate in terms


47. Arguing that the ordinances challenged in Village of Belle Terre v. Boraas, 416 U.S. 1 (1973), violated the equal protection clause, Justice Marshall declared:

Zoning officials properly concern themselves with the uses of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.

Id. at 14-15 (Marshall, J., dissenting) (emphasis added).

48. See 1 N. WILLIAMS, supra note 2, § 13.05, at 289, where the author declares:

Many issues which come up as land use decisions have substantial social and economic implications: the obvious (but not the only) example is a decision as between different types of housing. By now this is widely realized, and so responsible public officials are likely to take such implications into account

It has long been settled in both law and widespread practice that towns may take such considerations into account, at least to some extent.

49. 71 N.J. at 277, 364 A.2d at 1031.

50. See 1 N. WILLIAMS, supra note 2, § 1.11, at 22, quoted in Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. 230, 248, 364 A.2d 1005, 1015-16 (1976). See also 1 N. WILLIAMS, supra note 2, § 13.05, at 290:

[I]t is more than a little surprising—and more than a little naive—for courts in the 1970's to attempt to lay down a rule that land use controls may be used only to regulate the physical pattern and physical interrelationships, and not for any type of social or economic concerns.

51. See Shepard v. Woodland Township Comm. & Planning Bd., 71 N.J. at 247-48, 364 A.2d at 1015-16. ("Permission to develop age homogeneous communities as a possible use in a multifaceted community is a legislative judgment which should not be disturbed by this Court unless clearly violative of constitutional principles.")
of occupants' ages, rather than directly in terms of the tracts being regulated.

Though classifications by occupant age may be properly within the general regulatory ambit of zoning, the particular classifications challenged in Weymouth nonetheless appear to raise problems under the equal protection provisions of both the state and federal constitutions.\textsuperscript{52} In general, judicial review of state regulations challenged on equal protection grounds is deferential\textsuperscript{53} and requires only a rational relationship between the classifications under attack and a legitimate state objective when the regulations neither impinge upon "fundamental interests" or classify according to "suspect criteria."\textsuperscript{54} Although housing may be one of "the most basic human needs,"\textsuperscript{55} it is nonetheless not deemed a "fundamental right" invoking strict scrutiny under the fourteenth amendment.\textsuperscript{56} Accordingly, the New Jersey court recognized that the Weymouth ordinances are not subject to exhaustive equal protection review.

\textsuperscript{52} The fourteenth amendment provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. See note 20 supra for the text of the equal protection provisions of the New Jersey Constitution.

\textsuperscript{53} See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961), in which the Court stated:

[The Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.]

\textit{Id.} at 425-26.

\textsuperscript{54} For a general discussion of current Supreme Court application of equal protection review see Gunther, \textit{Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 Harv. L. Rev. 1 (1972). In addition, see Justice Marshall's attack on the current two-tier equal protection approach of the Court in his dissent in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam). In that case Marshall espoused a formally declared policy of equal protection review that focuses "upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification." \textit{Id.} at 318 (Marshall, J., dissenting).


\textsuperscript{56} See Lindsey v. Normet, 405 U.S. 56 (1972). In \textit{Lindsey} the Court rejected the contention that the "need for decent shelter" was a fundamental interest requiring strict scrutiny of any challenged regulation affecting that interest, declaring "[a]bsent constitutional mandate, the assurance of adequate housing . . . is a legislative, not judicial, function . . . ." \textit{Id.} at 74. \textit{See also} San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), in which the Court observed that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." \textit{Id.} at 30.
simply because they bear directly upon the housing needs of the parties affected.\textsuperscript{57}

In addition, the court noted that the challenged zoning ordinances did not require strict scrutiny because they established classifications based upon the age of prospective mobile home dwellers. The court relied on the recent United States Supreme Court decision in \textit{Massachusetts Board of Retirement v. Murgia},\textsuperscript{58} holding that age was not a suspect criterion under the fourteenth amendment.\textsuperscript{59} It further observed that even under the more demanding review required by state standards the Weymouth ordinances need not be subjected to strict scrutiny.\textsuperscript{60} As the \textit{Weymouth} court noted, the ordinance does not burden the elderly as the regulation challenged in \textit{Murgia} allegedly did;\textsuperscript{61} rather the ordinance seeks to implement programs for their benefit, much like numerous other governmental initiatives.\textsuperscript{62} Governmental provisions of a positive, affirmative nature—designed to open up housing opportunities to the elderly, rather than to deny them to individuals not fulfilling the age specifications—are invariably spared rigorous court review.\textsuperscript{63} Therefore the decision of the \textit{Weymouth} court not to apply strict scrutiny to the zoning ordinances, and thus subject them to likely invalidation, seems correct. Even if age is a suspect criterion when used as the basis of governmental classifications, the resulting discrimination in this case, as in others, favors, rather than handicaps, the elderly.\textsuperscript{64}

\begin{footnotes}
\item 57. See 71 N.J. at 281, 364 A.2d at 1034.
\item 58. 427 U.S. 307 (1976).
\item 59. 71 N.J. at 281-82, 364 A.2d at 1034 (citing 427 U.S. at 313-14).
\item 60. \textit{Id.} at 286-87, 364 A.2d at 1036-37; see note 20 supra.
\item 61. 427 U.S. at 323-24 (Marshall, J., dissenting).
\begin{quote}
As bearing on the reasonableness of a classification based on age or income, we but note the many laws which provide for public assistance, social security payments, reduction in real estate taxes for elderly home owners and double exemption on the computation of Federal, State and city income taxes and other protective legislation based wholly on the age or economic need of the recipient.
\end{quote}
\item 64. Even though dissenting in \textit{Murgia}, Justice Marshall conceded that the elderly do not suffer from discrimination to the same extent as such traditionally suspect classes as Blacks, or such "quasi-suspect" classes as women or illegitimates. Indeed, "The elderly are protected not only by certain anti-discrimination legislation, but by legislation that provides them with positive benefits not enjoyed by the public at large. Moreover, the elderly are not isolated in society, and discrimination against them is not pervasive but is centered primarily in employment." 427 U.S. at 325 (Marshall, J., dissenting). With respect to the field of housing it is significant to note that government regulations banning discrimination in housing omit age as an improper basis for discrimination, as if implicitly recognizing that the elderly are rarely, if ever, disfavored in the
\end{footnotes}
It could be argued that the age-oriented Weymouth ordinances do infringe upon younger citizens’ rights to use mobile homes within the municipality. Since, however, Weymouth Township could have lawfully denied such housing to any individual, regardless of age or income, a provision that operates to remove that prohibition even partially does not further aggravate the mobile home housing needs of those still subject to the township’s general ban on mobile homes. Indeed, allowing the elderly to occupy mobile homes may make more traditional (if more costly) housing stock available to those who cannot take advantage of the Weymouth ordinances.

If the age of prospective occupants is permitted as a basis for the Weymouth ordinances’ classifications, then it follows that the adoption of a particular age, fifty-two, as the cut-off for the regulations’ operation is valid unless proven to be arbitrary. Legislative line-drawing on the basis of age is accorded a high degree of deference by the courts, even when important needs such as food and shelter are at issue. Under that generous standard of review it is evident that the fifty-two year age limit set by the Weymouth ordinances should not be considered arbitrary. In fact, the permissive use of trailers for those over age fifty-two actually relaxes the rigidity of the trailer prohibition more than would the benchmarks established to define the “elderly” in other housing market. See, e.g., 42 U.S.C. § 5309(a) (Supp. V 1975); N.J. STAT. ANN. §§ 10:5-9.1, -12.f to .k (1976).


66. The same could be said of many of the government provisions cited in note 37 supra. Special efforts to house the elderly promote the accommodation of the housing needs of all individuals, and to the extent the demand of the elderly is satisfied by such government projects the overall demand for adequate housing is reduced, making it easier for other groups to obtain housing on their own.

67. See Oregon v. Mitchell, 400 U.S. 112 (1970). In a separate opinion Justice Stewart recognized that applying strict scrutiny to age limitations renders any given demarcation subject to invalidation. Referring to an Oregon provision setting the minimum voting age at 21 years, Stewart declared: “Yet to test the power to establish an age qualification by the ‘compelling interest’ standard is really to deny a State any choice at all, because no State could demonstrate a ‘compelling interest’ in drawing the line with respect to age at one point rather than another.” Id. at 294-95. (Stewart, J., concurring in part and dissenting in part). As was observed by another court, discussing Justice Stewart’s opinion, “The power to establish an age requirement necessarily involves the power to choose a reasonable one . . . .” Wurtzel v. Falcey, 69 N.J. 401, 404-05, 354 A.2d 617, 619 (1976) (per curiam).

68. Cf. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (while there is a “dramatically real factual difference” between cases involving business and industry and those involving the “most basic economic needs of impoverished human beings,” that is no basis for applying a different constitutional standard). See also notes 53-56 and accompanying text supra.
statutes designed for their benefit. The persuasive record set forth by the Weymouth court, supported by a learned social and economic analysis, provides a rational basis for the fifty-two year threshold established by the zoning ordinances; accordingly, the court was correct in determining that the use of age classifications in general, and the cut-off age limit of fifty-two years in particular, do not violate the principles of equal protection.

Notwithstanding the Weymouth court's detailed review of the issues discussed above, the court's most sedulous scrutiny was reserved for an issue that was not even raised by plaintiff—the exclusionary effect of the ordinances. The New Jersey Supreme Court strongly

69. See, e.g., 12 U.S.C. § 1701q(d)(4) (Supp. V 1975); id. § 1701s(c)(B) (1970); N.J. STAT. ANN. § 55:14L-3a (West Cum. Supp. 1977-78), all of which provide housing programs or loans for the elderly, defined therein as being persons 62 years or older.


71. The New Jersey court also rejected a due process attack on the Weymouth ordinances, declaring that it constituted little more than a restatement of the equal protection challenge. 71 N.J. at 287-88, 364 A.2d at 1037. Under the doctrine set forth in Nebbia v. New York, 291 U.S. 502 (1934), the guarantee of due process requires only that a law not be "unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Id. at 525. The New Jersey court's careful study of the ordinance's relation to the general welfare would seem to satisfy the latter requirement, and the court's well-reasoned rejection of the equal protection attack on the age classifications refutes any contention that the 52 year cutoff provision is unreasonable or arbitrary.

For an analogous case also rejecting a due process attack on an ordinance granting the elderly preferences with respect to housing, see Parrino v. Lindsay, 29 N.Y.2d 30, 35, 272 N.E.2d 67, 70, 323 N.Y.S.2d 689, 692 (1971). Parrino upheld a New York City provision exempts the elderly from rent increases authorized under the city's rent control provisions. Rejecting the contention that such an exemption amounted to deprivation of landlords' due process right to property (represented by the rent increases), the court noted that if the original rent ceiling was valid (like the original ban on trailers in Weymouth), a partial relaxation of its prohibitive effect, designed to benefit the elderly, did not further deprive the unexempted groups of any due process rights (whether it be increased rent for landlords in Parrino, or access to mobile homes for the non-elderly in Weymouth). Id. at 34-35, 272 N.E.2d at 69, 323 N.Y.S.2d at 691-92.

72. 71 N.J. at 288-96, 364 A.2d at 1037-41.
condemned exclusionary zoning practices in *Mount Laurel*, specifically noting that land use regulations creating a retirement community for the elderly were part of the exclusionary package of zoning ordinances there. Although the Weymouth ordinances are not as restrictive as those condemned in *Mount Laurel*, they do display a potentially exclusionary impact as pernicious as that discerned in the *Mount Laurel* provisions. The New Jersey court engaged in an instructive review of the factors that might have sufficed to establish the Weymouth ordinances as unlawfully exclusionary had this issue been properly brought before it.

The court noted that housing for the elderly tends to provide net tax benefits for municipalities, especially when income or age groups with high demands for municipal services are thereby excluded.

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73. 67 N.J. at 169, 336 A.2d at 722. The *Mount Laurel* court further observed: The extensive development requirements detailed in the ordinance make it apparent that the scheme was not designed for, and would be beyond the means of, low and moderate income retirees. The highly restricted nature of the zone is found in the requirement that [with limited exceptions] all permanent residents must be at least 52 years of age. . . . *Id.* The court disapproved of such land use regulations because “[a]ll this affirmative action for the benefit of certain segments of the population is in sharp contrast to the lack of action, and indeed hostility, with respect to affording any opportunity for decent housing for the township’s own poor living in substandard accommodations . . . .” *Id.*

74. The Weymouth ordinances were drafted for the purpose of “providing . . . dwellings which the elderly who need housing can afford” and thus seem designed to accommodate those low-income elderly excluded by the *Mount Laurel* ordinances. Taxpayer’s Ass’n *v.* Weymouth Township, 125 N.J. Super. 376, 381, 311 A.2d 187, 189-90 (Super. Ct. App. Div. 1973). In addition, the *Mount Laurel* ordinances, unlike the Weymouth provisions, placed an absolute limit on the number of children over 18 who could reside with each “elderly” family in the retirement community established by the ordinance. Southern Burlington County NAACP *v.* Township of Laurel, 67 N.J. 151, 169, 336 A.2d 713, 722 (1975). Although the Weymouth provisions indirectly limit the number of children by limiting the size of the mobile homes in which they would dwell, the supreme court in *Weymouth* observed that this restriction alone does not make the zoning ordinances exclusionary. 71 N.J. at 295 n.20, 364 A.2d at 1041 n.20. The New Jersey courts, however, had previously served notice that zoning ordinances restricting housing to adults and excluding children would be struck down. Molino *v.* Mayor of Glassboro, 116 N.J. Super. 195, 281 A.2d 401 (Super. Ct. Law Div. 1971).

75. 71 N.J. at 289-92, 364 A.2d at 1038-39. Communities for the elderly provide favorable tax consequences because their demand for municipal services—in particular for schooling—is far less than that of the population as a whole. Because the elderly rarely have many children of school age residing with them, a community in which many of the residents are of advanced age does not need to expend a considerable amount of its revenue on education. As a result, the entire community’s tax burden can be maintained at relatively low levels. Municipal tax benefits of this nature are the usual impetus behind exclusionary zoning ordinances and constitute an important reason for their invalidity. For example, the *Mount Laurel* court declared “[t]here cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on property . . . .” 67 N.J. at 170, 336 A.2d at 723; see, e.g., Hinman *v.* Planning & Zoning Comm., 26 Conn. Supp. 125, 214 A.2d 131 (C.P. 1975). *See also*
Such tax motivations were present in the *Weymouth* situation, and the court observed that the prevalence of such improper zoning purposes had motivated the New Jersey legislature to promulgate new zoning laws ensuring that municipally-sponsored housing projects for the elderly would be part of a balanced housing stock meeting the housing needs of *all* individuals—essentially the mandate of the New Jersey court in *Mount Laurel.* As a result of these judicial and legislative declarations, the *Weymouth* court established the basic test for assaying the exclusionary impact of such ordinances: "If it substantially contributes to an overall pattern of improper exclusion, the fact that the ordinance may also benefit the elderly is neither an excuse nor a justification to sustain a challenge to a zoning provision." Since there was no evidence presented on this point, the *Weymouth* ordinances were not examined under this principle, but its significance as a limit on the ramifications of the *Weymouth* result is not to be underestimated. It is apparent that, after *Weymouth*, ordinances restricting land use on the basis of age will be permitted only to the extent that they conform to a comprehensive plan that meets the regional housing needs of all groups within the region.

Because of plaintiffs' failure to challenge the ordinances as unlawfully exclusionary, the ultimate importance of this case may at first appear to be limited. In one sense the entire result is moot, since the

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77. 67 N.J. at 187, 336 A.2d at 731-32.

78. 71 N.J. at 294, 364 A.2d at 1040 (footnote omitted).

79. As the court itself warns, "The Court's 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 consequence of plaintiff's decision not to try the case on that legal theory." Id. at 295-96, 364 A.2d at 1041.

80. See id. at 293, 364 A.2d at 1040. It should be noted that the *Weymouth* court did recognize and approve the inclusionary effect of the ordinances, *id.*, since the qualified use of mobile homes permitted by the regulation substantially reduces the exclusionary impact of one of the zoning devices, the prohibition of mobile homes, that the *Mount Laurel* court found "inherently exclusionary." 67 N.J. at 197, 202, 336 A.2d at 737, 740 (Pashman, J., concurring). However, as the test for exclusionary effect enunciated by the *Weymouth* court implies, the indirect inclusionary effect of ordinances such as the *Weymouth* provisions will not otherwise prevent their invalidation should they indirectly operate to exclude other groups from a municipality.
court declared that if the state's new zoning provisions were applicable in *Weymouth* the challenged ordinances would not have been in compliance. Viewed from another perspective, the *Weymouth* case seems to be merely a repetition of the decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which also set forth avenues of attack to be employed against allegedly exclusionary ordinances—but which nonetheless upheld the particular regulations there under challenge by requiring that discriminatory intent be proved to show a violation of the equal protection clause. The *Weymouth* decision, however, offers a far greater degree of guidance than does *Arlington Heights* to future challengers of potentially exclusionary zoning, since the New Jersey court's elaboration of the characteristics and purposes indicative of improper exclusionary ordinances offers a clearer and more detailed benchmark by which such ordinances may be successfully discerned and defeated. In this respect the court's discussion of the *Weymouth* fact situation and its relationship to New Jersey's new land use law completes the New Jersey Supreme Court's decision in *Mount Laurel*. In approving zoning ordinances restricting land use on the basis of occupant age, the *Weymouth* court adds an incisive ruling to those delivered by other jurisdictions affirming the validity of such regulations. But by restricting the applicability of this

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81. 71 N.J. at 296, 364 A.2d at 1041. The court declared that the new state provisions require "that where a zoning ordinance establishes a district in which senior citizen communities are a permitted use, the ordinance must also allow housing of similar density for some other residential use in the same district." *Id.* The *Weymouth* zoning ordinances make no such provision for other residential uses, and in fact density requirements for other types of housing in the municipality are considerably higher. *Id.* at 296, 364 A.2d at 1041-42; cf. N.J. STAT. ANN. 40:55D-2(l), -65(g) (West Cum. Supp. 1977-78) (encouraging senior citizen community housing, but requiring other residential uses of a similar density in the same zoning district).

82. Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.

. . . . Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further ruling that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance. 97 S. Ct. at 563, 566.


84. Although the *Mount Laurel* court had found that the provisions promoting a retired adult community contributed to the exclusionary effect of the municipality's land use regulations, the court specifically withheld passing "on the validity of any land use regulation which restricts residence on the basis of occupant age." 67 N.J. at 169 n.7, 336 A.2d at 722 n.7.
holding—by warning of the potentially exclusionary effect of such ordinances—the *Weymouth* holding is made consonant with the *Mount Laurel* guidelines and supplements the principles set forth in that decision.

Perhaps more importantly, the *Weymouth* opinion illustrates the increasing impact of federal and state housing and land use policy on the heretofore far-ranging power of local zoning authorities. The array of federal and state enactments cited by the New Jersey court indicating governmental concern with the proper use of land on the one hand, and the provision of proper accommodations for the elderly on the other, illustrate the growing role legislative initiative may come to play in the struggle against exclusionary zoning and for adequate housing. In particular, the *Weymouth* court's impressively substantiated argument that the elderly's use of mobile homes promotes the general welfare provides a strong basis for contending that all groups, regardless of age or income, should be permitted to reside in mobile homes. Since the primary purpose of zoning ordinances is to create a better environment for all elements of the community, those reasons (e.g., cost and convenience) that justify mobile homes for the elderly would seem to justify their use by those individuals who do not meet the age specifications of the *Weymouth* ordinances. The *Weymouth* court's argument, strongly emphasizing the contribution to the general welfare provided by trailer housing, if pressed further, could be used to dismantle remaining regulatory barriers to the socially beneficial use of mobile homes. In this respect the *Weymouth* decision may become


86. The *Mount Laurel* court's observation that "[j]ouls do not build housing nor do municipalities" reflects the limited role which the courts or local governments are obliged to play in regard to these issues. 67 N.J. at 192, 336 A.2d at 734. As another observer has remarked with respect to states asserting state or regional control over land use planning and regulation, "The message here to municipalities should be clear enough. Either modify prevailing local zoning philosophy and practices or lose authority over local land use." Elias, *Significant Developments and Trends in Zoning Litigation*, in *LAND USE CONTROLS: PRESENT PROBLEMS AND FUTURE REFORM* 157, 159 (D. Listokin ed. 1974).

87. This in essence was one of the objections raised by the lower court to the *Weymouth* ordinances. Noting that the ordinances were adopted out of a concern with the economic status of the elderly, the court declared: "But the same considerations which allegedly motivated the adoption of the ordinances in this case are equally applicable to young married couples or other individuals under the age of 52 years whose incomes are low." 125 N.J. Super. at 382, 311 A.2d at 190.

88. See *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971), invalidating local zoning ordinances that in effect excluded mobile homes from the municipality. The court found that
significant, not merely as a coda to *Mount Laurel*, but in prefiguring the reversal of *Vickers* and thus ending the New Jersey Supreme Court's "blanket tolerance of prohibitions upon mobile homes." If New Jersey, one of the relatively few jurisdictions allowing such bans, should thus abandon its position, it is possible that other states that also uphold local bans on mobile homes may follow its lead. Should this be the case, then *Weymouth* may soon come to be viewed as a dramatic step forward in the wider battle against exclusionary zoning.

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[c]ertain uses of land have come to be recognized as bearing a real, substantial, and beneficial relationship to the public health, safety, and welfare so as to be afforded a preferred or favored status. To restrict such uses appears to conflict with the concept of presumed validity of an ordinance prohibiting such an otherwise legitimate use.

*Id.* at 210, 192 N.W.2d at 324. The court then observed that "[l]egislative enactments geared toward a betterment of the general welfare will, in the appropriate factual setting, give rise to a legally protected land use, thereby negating the operation of the presumption of validity which normally surrounds local legislative restrictions." *Id.* at 215, 192 N.W.2d at 326. Once such a protected land use has been defined, regulations restricting its accessibility bear a high risk of invalidation:

Since mobile home parks have, by virtue of state statute coupled with judicial precedent, been afforded a protected status, there is no longer a presumption of validity of an ordinance which operates toward their exclusion. Such protection of this particular land use is 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.

*Id.* at 217, 192 N.W.2d at 328. A similar conflict between policies founded in statutes that regulate and license certain land-use activities and those policies, also founded in statutes, that encourage such uses as being in the public interest, is discussed in general and with particular application to New Jersey in Feiler, *Metropolitization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 Mich. L. Rev. 655, 694-95 (1971).

91. North Carolina is among those jurisdictions. *See City of Raleigh v. Morand*, 247 N.C. 363, 100 S.E.2d 870 (1957), *appeal dismissed*, 357 U.S. 343 (1958) (an ordinance prohibiting trailer camps from being established in residentially-zoned areas in the city and within one mile of its corporate limits was a valid exercise of the police power).