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Robert Soboda

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CIRCUMVENTING THE EXCLUSIONARY ZONING PROBLEM THROUGH EXCLUSIONARY STANDING

On January 24, 1972, eight individuals composed of Rochester, New York area residents and taxpayers, and Metro-Act of Rochester, Inc., a non-profit corporation interested in the local low and moderate income housing shortage, filed suit in the United States District Court for the Western District of New York. Two other groups, Housing Council (a non-profit corporation interested in housing problems) and Rochester Home Builders Association (an association of residential construction firms) sought to join as party plaintiffs.1 The defendants were the Town of Penfield, a municipality adjacent to Rochester, and the town’s Zoning, Planning and Town Boards. Plaintiffs alleged that Penfield’s zoning ordinance, on its face2 and as applied,3 effectively excluded persons of low and moderate income from living in the town, in violation of their constitutional and statutory rights.4 The plaintiffs alleged various personal injuries as the result of the town’s allegedly exclusionary ordinance.5 Faced with the sensitive situation of nonresidents attacking the validity of a town’s zoning law, the district court dismissed the action. The court held, inter alia, that the original plaintiffs lacked standing to sue, and that Home Builders and Housing Council

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1. Plaintiffs claimed jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1343 (civil rights action).
2. The ordinance allocated 98 percent of the town’s vacant land to single family detached housing and imposed minimum size and area building requirements which allegedly made the cost of such housing prohibitive for low and moderate income families. Only 0.3 percent of the available residential land was allocated to multi-family structures, and plaintiffs alleged that low density and other requirements made low and moderate income housing economically unfeasible on this land.
3. Plaintiffs alleged, inter alia, that defendant members of the zoning board had unreasonably delayed and arbitrarily denied action on proposals for low and moderate income housing and had amended the ordinance to make approval of such projects virtually impossible.
5. The low and moderate income plaintiffs alleged that Penfield’s exclusionary zoning practices forced them to live in less attractive surroundings. The taxpayer plaintiffs alleged they paid higher taxes because Penfield’s ordinance forced Rochester to provide more low and moderate income housing.
lacked standing to intervene. The Court of Appeals for the Second Circuit affirmed. On certiorari, the United States Supreme Court held, affirmed: Where individuals or associations who are not residents of a municipality seek to attack that municipality’s zoning law on the basis that it excludes persons of low and moderate income, such parties must allege facts which clearly demonstrate a real, specific injury that is capable of relief by judicial intervention, to satisfy both the article III and prudential aspects of the standing doctrine. Warth v. Seldin, 95 S. Ct. 2197 (1975).

The problem which the petitioners brought before the Court is exclusionary or “snob” zoning. This has been defined to include “those controls which appear to interfere seriously with the availability of low- and moderate-cost housing where it is needed.” The problems created by such zoning laws have reached substantial proportions in recent years, due to the population increase and the fact that most of the land available for residential use is in the suburbs. The judicial response to challenges of allegedly exclusionary ordinances has been largely unfavorable, and many courts have evidenced a genuine dislike of zoning litigation.

One expression of this judicial attitude can be seen in the rigid standing requirements usually present in zoning litigation. Generally, a party bringing suit must have some legal or equitable interest in the zoned land, and must allege specific personal injury. If a party has no interest in the land, he must show some specific harm.

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6. The court also held that the complaint failed to state a claim upon which relief could be granted, and that the suit should not proceed as a class action.
7. Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974).
11. 22 SYRACUSE L. REV. 598, supra note 10, at 611. The Supreme Court has not heard a zoning case since 1928; see Note, Exclusionary Zoning and Equal Protection, 84 HARV. L. REV. 1645, 1648, n. 27 (1971).
13. Id. at 355. Contra, Southern Burlington Cty. NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (while issue not raised, the court noted nonresidents who wished to secure low cost housing would have standing to challenge a municipality’s zoning ordinance). But see Annot. 48 A.L.R. 3d. 1210, 1227 (1973). See also 22 SYRACUSE L. REV. 598, supra note 10, at 601.
which differs from that suffered by his neighbors. Standing, in its prudential aspects, is a valuable discretionary tool for the courts. When a presumptively valid zoning law is challenged it permits the court, in effect, to sustain the law without going to the merits.

In Warth v. Seldin, the majority chose to apply these strict standards, rather than the more liberal requirements adopted in other forms of constitutional litigation. Foremost among these requisites is the demonstration of some judicially cognizable interest in the zoned land, coupled with an actual or threatened concrete injury. In cases cited by petitioners in which exclusionary ordinances were invalidated, these or other mitigating factors were present. 14


15. Mr. Justice Powell explains that the standing inquiry involves both constitutional limitations on federal court jurisdiction, and prudential limitations on its exercise. The constitutional limitation involves the "case or controversy" requirement of article III. The question is whether plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invoking the jurisdiction of the federal courts. 95 S. Ct. at 2205.

Apart from constitutional requirements, Justice Powell states that the Court has recognized other limitations on the class of persons who may invoke the power of the courts. For example, when the asserted harm is a "generalized grievance," exercise of jurisdiction is normally not warranted. Also, even where a plaintiff has alleged sufficient injury to meet constitutional requirements, the Court has held that plaintiff must assert his own legal rights, and not those of third parties. Justice Powell described these limitations as "matters of judicial self-governance" which enable the Court to avoid being called on to decide abstract questions of great public significance when other governmental institutions may be more competent to address the questions, and judicial intervention is unnecessary to protect individual rights. Id. at 2205-06.

16. See, e.g., how standing requirements are relaxed in civil rights cases such as Barrow v. Jackson, 346 U.S. 249 (1953) and NAACP v. Alabama, 357 U.S. 449 (1958). See also Comment, Standing to Sue: A Commentary on Injury in Fact, 22 Case W. Res. L. Rev. 256 (1971). For a brief general background of standing, see the noted case, 95 S. Ct. at 2205-07.

17. In deference to the legislative origin of zoning ordinances, the United States Supreme Court in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) stated that where their validity is "fairly debatable, the legislative judgment must be allowed to control." This statement was translated by the courts into a presumption of validity and continues to influence zoning cases to this day.


19. United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Crow v. Brown, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970).


20. All of the cases cited in note 19 supra, involved at least one plaintiff with a recognized
The facts of Warth reveal that all of the petitioners were nonresidents and had no legal or equitable interest in land in Penfield.\textsuperscript{21} Given these circumstances, and a background of the traditionally strict standing requirements in such cases, the Court's holding is perhaps not surprising.

The taxpayer petitioners alleged that their taxes were higher than necessary because Penfield's zoning law required nearby Rochester to provide more low and moderate income housing. The Court held that the connection between this injury and its alleged cause was too tenuous to warrant standing, and that the taxpayers' claim amounted to the assertion of the rights of third parties, who could sue in their own right.\textsuperscript{22} The Court had, however, already dismissed the claims of these third parties—the low and moderate income petitioners and Metro-Act. The majority held that these parties had failed to allege any concrete personal injury which judicial intervention could relieve.\textsuperscript{23}

Metro-Act had also claimed standing because 9 percent of its members lived in Penfield and were deprived of a racially and ethnically integrated community as a result of the exclusion of low and moderate income persons. The Court indicated that while Congress could by statute confer standing in the absence of a judicially cognizable injury, no such statute was applicable here.\textsuperscript{24} The Court further said that, assuming arguendo an injury sufficient to satisfy article III requirements, Metro-Act was attempting to raise the rights of third parties, and prudential considerations counselled against according Metro-Act standing.\textsuperscript{25}

With regard to Home Builders, the organization composed of residential construction firms, the Court said it could have standing

\textsuperscript{21} The Court indicates this fact at several points in the opinion. See 95 S. Ct. at 2208, 2211.

\textsuperscript{22} 95 S. Ct. at 2210.

\textsuperscript{23} The Court's reasoning is, apparently, that a decision for petitioners would do nothing to reduce high purchase and rental prices already in force in Penfield. The majority did not consider, possibly, that lower priced housing would almost certainly be available if low and moderate income housing were permitted to be built through the Court's intervention.

\textsuperscript{24} The Court distinguished Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), where plaintiffs claiming, \textit{inter alia}, lost social benefits as a result of racial discrimination were held to have standing. The distinguishing factor was that the plaintiffs had sued under the Civil Rights Act of 1968, 42 U.S.C. § 3604, which the Court said had conferred upon them standing to sue.

\textsuperscript{25} Id. at 2213.
only if it had alleged facts sufficient to make out a case or controversy if the suit had been brought by its members themselves. As there had been no allegation that any member had been denied a building permit or variance or had been in any way thwarted or delayed regarding any current project, it had failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.26

Similar analysis was employed in denying the original plaintiffs' motion to join Housing Council as a party plaintiff. However, one of Housing Council's member groups, Penfield Better Homes Corporation, had been denied a zoning variance in 1969. While indicating that it was possible that Penfield Better Homes or Housing Council would have had standing to seek review in 1969, the Court said that there was no evidence that the project remained a viable, concrete dispute when the complaint was filed in 1972, and therefore denied the motion.27

If the Court's reasoning seems strained or circular at times, it may be due to the majority's efforts to wedge each of the petitioners into some category which would keep him out of the courtroom. The majority's opinion may have been motivated by the acknowledged reluctance of the judiciary to interfere in zoning cases. It may have been motivated by fear that a flood of constitutional challenges would be instituted by persons of lower income who might be unable to secure satisfactory housing in any given community. Whatever the policy basis for the majority's decision in *Warth*, it seems that the holding should properly be considered as limited to the facts of the case: that is, where non-residents of a lower income group seek to challenge the zoning law of a municipality in which they hold no real estate interest, and where organizations challenge the law when no viable dispute exists between their members and the municipality.

Since *Warth* exemplifies the strict standing requirements commonly applied to similar fact situations, it should not be considered a step backward in general standing requirements. A recent federal case28 has traced the development of standing thresholds,29 and

26. *Id.* at 2214.
27. *Id.* at 2214-15.
29. The *Schultz* case traces standing requirements from the strict "legal interest" test of *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137 (1939) to the two-pronged "injury in fact" and "zone of protected interests" test of *Association of Data Processing Serv. Organizations,*
notes that *United States v. SCRAP* exemplifies the most recent and most liberal. According to this interpretation of *SCRAP*, once a party has shown that he is among those actually injured by the challenged law, standing will not be denied because many others suffer the same wrong, nor because of an attenuated line of causation between the challenged law and the alleged injury, nor because of a relatively small personal stake in the outcome. It is certainly arguable that a different result could have been reached in *Warth* if these standards had been applied.

By the same token, *Warth* should not be read as a judicial endorsement of exclusionary zoning. It merely shows that the majority was not ready to deal with the question of nonresident challenges to zoning laws, and chose the vehicle of a strict interpretation of standing requirements to avoid it. Where these requirements have been met, other courts have struck down exclusionary ordinances. The 5-4 division in the *Warth* case may also be indicative of changing judicial attitudes toward strict procedural rules which prevent courts from reaching questions of importance and interest.

The traditional *laissez-faire* attitude of the majority of courts confronted with exclusionary zoning cases, has led to a great deal of commentary. Authors have advocated the extension of standing to nonresidents, and have drawn attention to the larger regional issues which may be present in such cases. The legislative branch has also taken notice of the problem. The attention of the courts in these cases might well be directed back to language in *Euclid*. There the court stated that their sanction of zoning did not “exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality could not be permitted to stand in the way.”

ROBERT SOBODA


31. Id. at 687-88.
32. Id. at 688.
33. Id. at 689 and n.14.
34. See cases cited in note 19 supra.
35. See 24 VAND. L. REV. 341, supra note 12.
36. Id. at 347-49.
38. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); see note 17 supra.
39. Id. at 390.